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A TREATISE

ON THE

LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND POWERS OF RAILROAD CORPORATIONS, AND OF THE RIGHTS AND LIABILITIES INCIDENT TO THE LOCATION, CONSTRUCTION AND OPERATION OF RAILROADS; TOGETHER WITH THEIR DUTIES, RIGHTS AND LIABILITIES AS CARRIERS

INCLUDING BOTH

STREET AND INTERURBAN RAILWAYS

By BYRON K. ELLIOTT

AND

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Authors of ROADS AND STREETS, GENERAL PRACTICE, EVIDENCE

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§ 1380 (1056). Duty to construct—Authority and care required in construction.—Many of the specific subjects which we have already considered, or will hereafter consider, are intimately connected with the general subject of this chapter. Some of them, indeed, are parts of the same great subject; but, because of their importance and their completeness in themselves, it has been deemed advisable to treat them separately. Thus, the subject of the construction of crossings and that of the construction of fences will be hereafter considered in separate chapters. So, the duty of railroad companies to construct their roads,[1] the time within which they must be constructed,[2] in order to obtain a conditional subscription, or public aid, or to

[1] See ante, §§ 733, 736, 737. It has been held that words of mere permission in a charter do not per se make it obligatory upon the company to construct a road. York &c. R. Co. v. Reg., 1 El. & B. 858; Rex v. Birmingham &c. Nav., 2 W. Black 708. Mandamus may be to compel a railroad company to construct or keep in repair its track or roadbed in a proper case. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320. It will not lie to compel the company to extend or complete its road to a further place where its charter simply authorizes and does not require it to do so. Bentler v. Cincinnati &c. R. Co., 180 Ky. 497, 203 S. W. 199, L. R. A. 1918E, 315, 319; York v. North Midland R. Co., 1 El. & Bl. 858, 118 Eng. Reprint 657, 7 Eng. Ry. &c. Cas. 459, 1 C. L. R. 119, 22 L. J. Exch. N. S. 225.

[2] As to when the road or its construction is to be deemed to have been commenced, see State v. Wheadon, 39 Ind. 520; State v. Bergen &c. R. Co., 33 N. J. L. 108, 20 Atl. 762; Ontario &c. R. Co. v. Canadian Pac. R. Co., 14 Ont. 432.

prevent a forfeiture, and the like, are matters that have already been considered. The duty to construct their roads may not only extend to the construction of roadbeds and tracks, but may also include the establishment of stations or depots. This is frequently required by statute, and, as we have already seen, there are some authorities which hold that this is a common-law duty which may be enforced by mandamus, even in the absence of any statute upon the subject.[3] The company must, however, have authority to construct its road as located, must keep clearly within the bounds of the authority granted by the legislature,[4]

[3] See ante, § 739. See also as to validity of statute or order of railroad commission requiring station or depot at certain places. Vicksburg &c. R. Co. v. Railroad Com., 132 La. 193, 61 So. 199, Ann. Cas. 1914C, 1168 (holding order of commission invalid under the circumstances of the case); Southern Ry. Co. v. State, 95 Miss. 657, 48 So. 236, Ann. Cas. 1912A, 226 (holding valid a statute requiring railroads to have a depot in every incorporated village through which they pass). The authorities on the general subject are cited in the note to the first case as reported in Ann. Cas. 1914C, 1163, as well as in the section above referred to.

[4] Georgetown &c. R. Co. v. Eagles, 9 Colo. 544, 13 Pac. 696, 30 Am. & Eng. R. Cas. 228; Lafayette &c. Co. v. New Albany &c. R. Co., 13 Ind. 90; Eaton v. European &c. R. Co., 59 Maine 520, 8 Am. Rep. 430; Hazen v. Boston &c. R. Co., 2 Gray (Mass.) 574; Concord v. Concord &c. Co., 65 N. H. 30, 18 Atl. 87; Worster v. Forty-Second St. R. Co., 50 N. Y. 203; Metropolitan &c. Co., In re, 111 N. Y. 588, 19 N. E. 645; Little Miami &c. R. Co. v. Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Schuylkill &c. Co. v. McDonough, 33 Pa. St. 73; Biscoe v. Great Eastern R. Co., 16 L. R. Eq. 636; Jones v. Festiniog R. Co., 3 L. R. Q. B. 733. But general authority to construct the road usually includes the power to construct necessary side tracks, switch terminals and the like. Lake Shore &c. R. Co. v. Baltimore &c. R. Co., 149 Ill. 272, 37 N. E. 91; Protzman v. Indianapolis &c. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84. See also as to gauge and kind of rail, Millvale v. Evergreen R. Co., 131 Pa. St. 1, 18 A. 993, 7 L. R. A. 369. In State v. District Court, 34 Mont. 535, 88 Pac. 44, it was held that a railroad company had the right to select the route which seemed most advantageous, though crossing a river several times, and to secure land necessary for its use in constructing the road thereon in such manner as to afford security for life and property; that under a statute empowering railroads to lay out their roads not exceeding in width 100 feet on each side of the center line unless a greater width be required for excavations or embankments and to construct and maintain them with a double or single track and with such

and must use due care in the construction.[5] If it constructs a road without authority or in an unauthorized place and manner it may thus subject itself to liability as for a nuisance.[6]

§ 1381 (1056a). Location of round houses, shops, cattle yards, etc.—The doctrine is well-supported that a railroad company in selecting places for its round houses, shops, cattle yards and the like and in maintaining and operating the same is entitled to no superior rights of immunity for injuries to property resulting from the operation of these facilities in such a manner

appendages and adjuncts as may be necessary for their convenient use, it was not limited from securing land for railroad purposes generally, such as for necessary side tracks, turn-outs, machine shops, and depots; and that the only limits on the amount of land to be acquired are that the right of way shall not exceed 200 feet in width except where more is needed for excavations and embankments, and that the land for excavations, embankments, side tracks, and other purposes shall not exceed in extent the amount necessary for such purposes.

[5] Kansas Pac. R. Co. v. Lundin, 3 Colo. 94; Colorado &c. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Gilbert v. Savannah &c. R. Co., 69 Ga. 396; Ohio &c. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279, 5 Am. St. 532; Chicago &c. R. Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239; Chicago &c. R. Co. v. Henneberry, 42 Ill. App. 126; Van Orsdol v. Burlington &c. R. Co., 56 Iowa 470, 9 N. W. 379; Heath v. Texas &c. R. Co., 37 La. Ann. 728; Libby v. Maine &c. R. Co., 85 Maine 34, 26 Atl. 943, 20 L. R. A. 812; Brewer v. Boston &c. R. Co., 113 Mass. 52; Spencer v. Hartford &c. R. Co., 10 R. I. 14. See also Minneapolis &c. Elec. Tract. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609.

[6] Commonwealth v. Old Colony &c. R. Co., 14 Gray (Mass.) 93; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 47; McCandless' Appeal, 70 Pa. St. 210. See also Mahon v. New York &c. Railroad Co., 24 N. Y. 658; Stewart's Appeal, 56 Pa. St. 413. To same effect see also Graham v. Chicago &c. Ry. Co., 39 Ind. App. 294, 77 N. E. 57, 1055. In Southern R. Co. v. State, 130 Tenn. 261, 169 S. W. 1173, L. R. A. 1915B, 766n, it is held that a railroad company is not liable to indictment as for maintaining a nuisance where a municipality has raised the grade of a street passing under one of its trestles so as to diminish the space and obstruct the free use of the street where the space was sufficient before, and in the course of the opinion it is said: "No one is civilly answerable for a nuisance, even though that nuisance be immediately promoted by his own property, if this result is occasioned by the acts of others, over whom he has no control, so affecting his property as to make it an agency contributing to the nuisance."

as to create a nuisance.[7] And it may be said further that statutory authority to construct such works does not authorize railroad companies to place them wherever they may desire without any reference to the property rights of others. The principle is distinctly recognized both in England and this country that a statutory sanction can not be pleaded in justification of acts which by the general rules of law constitute a nuisance to private property unless they are expressly authorized by the statute, under which the justification is made or by the plainest and most necessary implication from the powers expressly conferred.[8] In addressing himself to this issue Justice Field in the leading case on this question uses these words: "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road, did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the

[7] Louisville &c. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188; Louisville &c. Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881; Beseman v. Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164. See also to the same effect Cogswell v. New York &c. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739; Stuhl v. Great Northern R. Co., 136 Minn. 158, 161 N. W. 501; Rogers v. Philadelphia &c. Co., 182 Pa. St. 473, 38 Atl. 389, 61 Am. St. 716. Indeed it is said that there is more reason for liability in such cases. Matthias v. Minneapolis &c. R. Co., 125 Minn. 224, 146 N. W. 353; Townsend v. Norfolk &c. R. Co., 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. 842.

[8] Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739; Cogswell v. New York &c. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Louisville &c. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188; Louisville &c. Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881; Townsend v. Norfolk R. &c. Co., 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. 842; Truman v. London &c. R. Co., L. R. 25 Ch. Div. 423.

authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teachings of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. . . . It admits, indeed, of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance. The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."[9] In regard

[9] Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739. See also in support of the doctrine of this

to the matter of damages for the species of injuries it has been held that where terminal facilities were carefully operated, the measure of damages was the injury to the fee or permanent value of the property by the permanent operation of such terminal facilities.[10]

§ 1382 (1056b). Connection of tracks with those of other railroads.—It is well-settled that the legislature, under the police power, may require railroad companies, whose roads cross or meet each other, to construct such switches, sidetracks and connections as will enable them to transport cars to and from each other's lines.[11] A proper regulation of this

section, Chicago &c. R. Co. v. Methodist Church, 102 Fed. 85, 50 L. R. A. 488; Stuhl v. Great Northern R. Co., 136 Minn. 158, 161 N. W. 501, L. R. A. 1917D. 317; Peyser v. Metropolitan Elev. R. Co., 13 Daly (N. Y.) 122; Cogswell v. New York &c. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Lahr v. Metropolitan Elev. R. Co., 104 N. Y. 268, 10 N. E. 528; Drucker v. Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437; Kane v. New York Elev. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Duyckinck v. New York Elev. R. Co., 125 N. Y. 710, 26 N. E. 755; Bohm v. Metropolitan Elev. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; Stevens v. New York Elev. R. Co., 29 N. Y. St. 361, 8 N. Y. S. 313; Smith v. New York Elev R. Co., 44 N. Y. St. 875, 18 N. Y. S. 132. But see Walther v. Chicago &c. R. Co., 215 Ill. 456, 74 N. E. 461, where it is held that the erection by a railroad company of switch tracks, and a freight depot in a residence neighborhood directly across the street from complainant's residence and flat building, and the construction of an elevated drive way from the street to the tracks and depot, but in such a manner as not to cause traffic to interfere with the use of complainant's property any more than any other constant use of the street would do, can not be enjoined as a nuisance, there being no showing that the depot was not necessary, or that it could have been as conveniently built elsewhere. See also London &c. R. Co. v. Truman (1885) L. R. 11 App. Cas. 45. See generally post, § 1397. There is even much doubt as to whether the legislature can constitutionally grant absolution. See note to Missouri &c. R. Co. v. Mott, 70 L. R. A. 579, and note to Louisville &c. R. Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881, in 1 L. R. A. (N. S.) 49.

[10] Louisville &c. Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881.

[11] Atlantic &c. R. Co. v. State, 42 Fla. 358, 29 So. 319, 89 Am. St. 233; Portland &c. R. Co. v. Grand Trunk R. Co., 46 Maine 69; note to Atlantic Coast Line R. Co. v. North Carolina Corp. Com., 206 U. S. 1,

character under the police power does not amount to the taking of the property of a railroad company for which compensation must be provided.[12] These statutes usually contemplate a mechanical or physical connection with roads of similar gauge so as to permit the running of cars from one road to the other.[13] It has been held that a business connection is not intended by the provision found in such a statute and that the statute does not require any interchange of traffic at the point of junction.[14] Neither does a bare power to connect or unite authorize the purchase or even the lease of the roads joined or any union of their franchises.[15] In Texas where this matter is regulated by the railroad commissioners, it has been held that this body is authorized to require two roads crossing each other to connect their tracks, although they do not cross at grade.[16] These statutes usually provide for the appointment of commissioners to determine the place and manner of making the connection

27 Sup. Ct. 585, 51 L. ed. 933, in 11 Ann. Cas. 398; Michigan R. Com. v. Michigan Cent. R. Co., 168 Mich. 230, 132 N. W. 1068; and authorities cited in next following note.

[12] Atlantic &c. R. Co. v. State, 42 Fla. 358, 29 So. 319, 89 Am. St. 233. A state may make a regulation requiring physical connection for the accommodation of the public without violating any constitutional provision, where the requirement is reasonable in view of the public interests and accommodation and does not unduly affect the rights of or interests of the railroad company. Wisconsin &c. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194; Pennsylvania Co. v. United States, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616, P. U. R. 1915B, 261; Seaboard &c. R. Co. v. Railroad Com., 240 U. S. 324, 36 Sup. Ct. 260, 60 L. ed. 669; notes in L. R. A. 1916E, 759, and L. R. A. 1917E, 1083.

[13] Altoona &c. R. Co. v. Beech Creek R. Co., 177 Pa. 443, 35 Atl. 734.

[14] Kentucky &c. Bridge Co. v. Louisville &c. R. Co., 37 Fed. 567, 2 L. R. A. 289. See also Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291. But see Georgia &c. R. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315. Some statutes or orders of railroad commissions, however, do require such interchange of traffic. See ante, §§ 803, 805. As to whether and when such statutes or orders constitute a taking of property entitling to compensation, see note to Pacific Tel. &c. Co. v. Eshelman, 166 Cal. 640, 137 Pac. 1119, in 50 L. R. A. (N. S.) 652n, and ante, § 12.

[15] Louisville &c. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849.

[16] International &c. R. Co. v. Railroad Comrs. (Tex.), 89 S. W. 961.

where the railroad companies can not agree,[17] and it has been held that one railroad can not enter upon the right of way of another for the purpose of connecting therewith without previous agreement or condemnation proceedings.[18] In some jurisdictions the right to make connection can be enforced by eminent domain proceedings,[19] and in many states the matter is now left largely to railroad or public utility commissioners. It is generally agreed that the grant of a right to a railroad company to extend and unite with any other railroad authorizes the extension to any other road within the prescribed limits,[20] though the lines do not cross, but are contiguous or so near each other that public interest requires facilities for the interchange of freight and passenger cars.[21] Provisions in these statutes as to the point of intersection are reasonably construed by the courts. Thus, where a railroad company was empowered to connect with another railroad "at" a certain city "at the point which may be found most practicable" it was held that a connection made at a point one thousand yards outside the city limits, at the most practicable point satisfied the statute. The word "at" does not necessarily and always mean "in."[22] Under the New York statute governing this matter it has been held that the mere fact that the place at and on which a new road located a switch or turn-out, for intersecting with an old road, prior to the application therefor, is devoted by the old road to a specific use in the discharge of its public duties as a railroad company, is not a bar to the new company's right to the intersection, so long as the new road does not invade or take such lands, so that the use to which they have been appropriated will thereby be rendered ineffectual.[23] In Georgia it

[17] Jennings v. Delaware &c. R. Co., 103 App. Div. 164, 93 N. Y. S. 374; Richmond &c. R. Co. v. Raleigh, 104 N. Car. 654. See also Smith v. Chicago &c. R. Co., 86 Iowa 202, 53 N. W. 128.

[18] Richmond &c. R. Co. v. Durham &c. R. Co., 104 N. Car. 658, 10 S. E. 659.

[19] East St. Louis &c. R. Co. v. Belleville R., 159 Ill. 544, 42 N. E. 974.

[20] Belleville &c. R. Co. v. Gregory, 15 Ill. 20.

[21] New York &c. R. Co. v. Erie R. Co., 31 App. Div. 378, 52 N. Y. S. 318.

[22] Purifoy v. Richmond &c. R. Co., 108 N. Car. 100, 12 S. E. 741.

[23] Jennings v. Delaware &c R.

has been held that a statute authorizing a railroad company to construct its line from a given initial point to another city with power to connect with other railroads, gave the railroad company the power to connect with railroads with which it might come in contact only, but gave it no power to make connections with other railroads at the initial point, and a further provision for the enforcement of the right to connect in the event of refusal by condemnation, was held to give the power to condemn the property of the refusing road, but not power to condemn the property of other persons. Under this statute the railroad had no power to run its lines across a city to connect with another line unless otherwise authorized to do so.[24] An agreement of a railroad company not to make a connection authorized by statute—if valid—is regarded as a mere personal contract binding on the company and its legal successors, but not conclusive as against the public.[25] In New York it has been held that electric railways are entitled to track connections with intersecting commercial steam railroad companies where the statute gives such right to "every railroad corporation," especially where the incorporation of both classes of roads is provided for in the same statute containing such provision.[26]

§ 1383 (1056c). Mandamus to compel the restoration of and maintenance of abandoned railroads.—It is well-settled that a writ of mandamus to compel a railroad company to do a particular act in the construction and operation of its road will be issued only where there is a legal duty on its part to do that

Co., 103 App. Div. 164, 93 N. Y. S. 374.

[24] Augusta v. Port Royal &c. R. Co., 74 Ga. 658. But see Long Branch Comrs. v. West End R. Co., 29 N. J. Eq. 566.

[25] Menasha v. Milwaukee &c. R. Co., 52 Wis. 414, 9 N. W. 396. Where a connection is made under a valid contract, it has been held that its continuance may be enforced, in a proper case, in equity unless it has been terminated by the parties, in which event equity will not interfere. Androscoggin R. Co. v. Androscoggin R. Co., 52 Maine 417. See generally Hoyt v. Chicago &c. R. Co., 93 Ill. 601. A contract giving another railroad to make a crossing is held valid and binding as against subsequent mortgagees in Chicago &c. R. Co. v. Old Colony Trust Co., 216 Fed. 577.

[26] Stillwater &c. St. R. Co. v. Boston &c. R. Co., 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489.

act and a clear breach of that duty.[27] And it is equally well-settled that a railroad company merely authorized to construct its road to a given terminus, but under no charter obligation to do so, cannot be compelled to build to such point when it would not be remunerative to do so.[28] The rule is the same where a line of railroad owned by an insolvent corporation has been abandoned because it could not be operated except at a great loss. Here the courts uniformly refuse to issue the writ since it would be useless or futile and of no public benefit.[29] "No principle of law is better settled than that the writ should not be granted in any case where it is clear that it would prove unavailing; as where the act sought to be enforced is from its very nature physically impossible or where from extrinsic causes it has become so, or where performance, though not absolutely impossible, is from any cause not within the power of the defendant."[30] The fact that the railroad does not pay the expense of running trains is very persuasive evidence that the service to the public does not require it to be kept in operation.[31] These rules apply, of course, only under the limitations noted and do not prevent the issuance of the writ in cases where the railroad company has wilfully and wrongfully attempted to put it out of its power to perform the required act.[32] And, as else-

[27] Northern Pac. R. Co. v. Territory, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092.

[28] Northern Pac. R. Co. v. Territory, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092; York &c. R. Co. v. Reg., 1 El. and Bl. 858; Great Western R. Co. v. Reg., 1 El. and Bl. 874; Bentler v. Cincinnati &c. R. Co., 180 Ky. 497, 203 S. W. 119, L. R. A. 1918E. 315, 319; Commonwealth v. Fitchburg R. Co., 12 Gray (Mass.) 180; State v. Southern Minn. R. Co., 18 Minn. 40.

[29] State v. Dodge City &c. R. Co., 53 Kans. 329, 36 Pac. 755, 24 L. R. A. 564; Jack v. Williams, 113 Fed. 823; State v. Jack, 145 Fed. 281; Ohio &c. R. Co. v. People, 120 Ill. 200, 11 N. E. 347.

[30] Ohio &c. R. Co. v. People, 120 Ill. 200, 11 N. E. 347. See also State v. Old Colony Trust Co., 215 Fed. 307, L. R. A. 1915A, 549n; Sherwood v. Atlantic &c. R. Co., 94 Va. 291, 26 S. E. 943.

[31] Ohio &c. R. Co. v. People, 120 Ill. 200, 11 N. E. 347; State v. Jack, 145 Fed. 281.

[32] Ohio &c. R. Co. v. People, 120 Ill. 200, 11 N. E. 347. See also Colorada &c. R. Co. v. State R. Com., 54 Colo. 64, 129 Pac. 506; Southern R. Co. v. Hatchett, 174 Ky. 463, 192 S. W. 694, L. R. A. 1917D, 1105; Southern R. Co. v. Franklin

where shown, mandamus will lie in a proper case to compel construction, restoration or maintenance of a railroad or some part of its works or equipment.[33]

§ 1384 (1057). Liability for injuries caused by construction—Consequental damages.—It is a general rule that the rightful and proper exercise of a lawful power or authority "can not afford a basis for an action."[34] It follows, therefore, that in the absence of any statutory or constitutional provision to the contrary, a railroad company is not liable for consequential damages, arising from the construction of its road, so long as it keeps within the bounds of its authority and is not negligent in the manner of doing the work or exercising such authority.[35]

&c. R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 301.

[33] See ante, §§ 789, 824, and post, § 1571. Also State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320; Southern Ry. Co. v. State, 95 Miss. 657, 48 So. 236, Ann. Cas. 1912A, 225; State v. Sugarland R. Co. (Tex. Civ. App.), 163 S. W. 1047; King v. Severn &c. R. Co., 2 Barn. & Ald. 646, 21 Rev. Rep. 433.

[34] Slatten v. Des Moines Valley R. Co., 29 Iowa 154, 4 Am. Rep. 205; Dodge v. County Comrs., 3 Metc. (Mass.) 380; Hatch v. Vermont Cent. R. Co., 25 Vt. 49; Radcliff v Mayor, 4 N. Y. 195, 53 Am. Dec. 357, and note citing and reviewing numerous authorities. See also Transportation Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93, 112; Bennett v. Long Island R. Co., 181 N. Y. 431, 74 N. E. 418; Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315.

[35] Hodge v. Lehigh Valley R. Co., 39 Fed. 449; Burroughs v. Housatonic R. Co., 15 Conn. 124, 38 Am. Dec. 64, and note; Stone v. Fairbury &c. R. Co., 68 Ill. 394, 18 Am. Rep. 556; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274; Hougan v. Milwaukee R. Co., 35 Iowa 558, 14 Am. Rep. 502; Boothby v. Androscoggin R. Co., 51 Maine 318; Brown v. Providence &c. R. Co., 5 Gray (Mass.) 35; Lynn &c. R. Co. v. Boston &c. R. Co., 114 Mass. 88; McCormick v. Kansas City &c. R. Co., 57 Mo. 433; Aldrich v. Cheshire R. Co., 21 N. H. 359, 53 Am. Dec. 212; Sunbury &c. R. C v. Hummell, 27 Pa. St. 99; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84. See also Shepherd v. Baltimore &c. R. Co., 130 U. S. 426, 9 Sup. Ct. 598, 32 L. ed. 970; Fitch v. New York &c. R. Co., 59 Conn. 414, 20 Atl. 345, 10 L. R. A. 188; Aldrich v. Metropolitan &c. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237 and authorities cited in note and abstract of briefs; Wabash &c. Canal v. Spears, 16 Ind. 441, 79 Am. Dec. 444; State v. Louisville &c. R. Co., 86 Ind. 114; Frost v.

The theory is that all damages incident to the authorized construction of the road in a careful and lawful manner are taken into consideration in determining the amount of compensation when the property is condemned or the right of way obtained.[36]

Washington County R. Co., 96 Maine 76, 51 Atl. 806, 59 L. R. A. 68, and note; Beseman v. Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Struthers v. Dunkirk &c. R. Co., 87 Pa. St. 282. But in some jurisdictions it is held that this immunity does not extend to private or quasi public corporations, such as a railroad company, although it does to strictly public corporations, and that the legislature can not give a railroad company any other rights in this respect as against a land-owner than an individual would have. See Cogswell v. New York &c. Railroad Co., 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; Booth v. Rome &c. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. 552, followed in French v. Vix, 143 N. Y. 90, 37 N. E. 612. But see Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739; Northern Pac. R. Co. v. United States, 104 Fed. 691; 59 L. R. A. 80 and note; Alton &c. R. Co. v. Deitz, 50 Ill. 210, 99 Am. Dec. 509; Evansville &c. R. Co. v. Dick, 9 Ind. 433, followed in Egbert v. Lake Shore &c. R. Co., 6 Ind. App. 350, 33 N. E. 659; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Delaware &c. Canal Co. v. Lee, 22 N. J. L. 243; Bellinger v. New York &c. R. Co., 23 N. Y. 42; Conklin v. New York &c. R. Co., 102 N. Y. 107, 6 N. E. 663; Staton v. Norfolk &c. R. Co., 111 N. Car. 278, 16 S. E. 181, 17 L. R. A. 838 and note. It is held in a recent case that under a constitution providing that private property shall not be taken, destroyed or damaged for public use without just compensation a property owner may recover for special pecuniary damage to such property by the construction and operation of a railroad stock yard, although it is located where it will do as little damage as possible and the same time serve its public purpose and is conducted without negligence. Stuhl v. Great Northern R. Co., 136 Minn. 158, 161 N. W. 501, L. R. A. 1917D, 317. See also Richards v. Washington Terminal Co., 233 U. S. 546, 34 Sup. Ct. Rep. 654, 58 L. ed. 1088, L. R. A. 1915A, 887.

[36] Porterfield v. Bond, 38 Fed. 391; New Orleans &c. R. Co. v. Brown, 64 Miss. 479, 1 So. 637; Clark v. Hannibal &c. R. Co., 36 Mo. 202; Dearborn v. Boston &c. R. Co., 24 N. H. 179; Johnson v. Atlantic &c. R. Co., 35 N. H. 569, 69 Am. Dec. 560; Van Schoick v. Delaware &c. Co., 20 N. J. L. 249; Blackwell v. Lynchburg &c. R. Co., 111 N. Car. 151, 16 S. E. 12, 17 L. R. A. 729n, 32 Am. St. 786; Pittsburgh &c. R. Co. v. Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97; Watts v. Norfolk &c. R. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. 894; ante, §§ 1168, 1281. See also Gilbert v. Savannah &c. R. Co., 69 Ga. 396; Kotz v. Illinois Cent. R. Co., 188 Ill. 578, 59 N. E. 240; Gart-

But where its authority is negligently, unlawfully or improperly exercised the company may be held liable in damages to one who is injured thereby. Thus, it is liable for negligently or unlawfully throwing debris, dirt and rocks upon adjoining land,[37] or for trespassing thereon and digging up the soil,[38] or appropriating and converting material without authority.[39] So, railroad companies have been held liable for negligently constructing embankments in such a manner as to cause water to overflow the land of others,[40] for negligently depriving adjacent

ner v. Chicago &c. R. Co., 71 Nebr. 444, 98 N. W. 1052; Fremont &c. R. Co. v. Gayton, 67 Nebr. 263, 93 N. W. 163.

[37] Georgetown &c. R. Co. v. Eagles, 9 Colo. 544, 13 Pac. 696, 30 Am. & Eng. R. Cas. 228; Nicholson v. New York &c. R. Co., 22 Conn. 74, 56 Am. Dec. 390; Chicago &c. R. Co. v. Robbins, 159 Ill. 598, 43 N. E. 332; Hendershott v. Ottumwa, 46 Iowa 658, 26 Am. Rep. 182; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 and note; Norfolk &c. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517; Norfolk &c. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517.

[38] Cairo &c. R. Co. v. Woosley, 85 Ill. 370; Doud v. Mason City &c. Co., 76 Iowa 438, 41 N. W. 65; Waltemeyer v. Wisconsin &c. R. Co., 71 Iowa 626, 33 N. W. 140; Chicago &c. R. Co. v. Willits, 45 Kans. 110, 25 Pac. 576; Ryan v. Mississippi Valley R. Co., 62 Miss. 162. See also Pittsburgh &c. R. Co. v. Atkinson, 51 Ind. App. 315, 97 N. E. 353; Cleveland &c. R. Co. v. Simpson, 182 Ind. 693, 104 N. E. 301, 108 N. E. 9 (injury to mine).

[39] Railroad Co. v. Hutchins, 37 Ohio St. 282, 4 Am. & Eng. R. Cas. 219; Parsons v. Howe, 41 Maine 218; Moore v. Albany, 98 N. Y. 396; Vermont Cent. R. Co. v. Baxter, 22 Vt. 365. See also Louisville &c. R. Co. v. Higginbotham, 153 Ala. 334, 44 So. 872; Hendler v. Lehigh Valley R. Co., 209 Pa. St. 256, 58 Atl. 486, 103 Am. St. 1005.

[40] Lawrence v. Great Northern &c. Co., 16 Ad. & El. (Q. B.) 643, 20 L. J. Q. B. 293. Kansas City &c. R. Co. v. Lackey, 72 Miss. 881, 16 So. 909, 48 Am. St. 589; Hunt v. Iowa Cent. R. Co., 86 Iowa 15, 52 N. W. 668, 41 Am. St. 473; Henry v. Ohio &c. R. Co., 40 W. Va. 234, 21 S. E. 863. See also Staton v. Norfolk &c. R. Co., 111 N. Car. 278, 16 S. E. 181, 17 L. R. A. 838; Savannah &c. R. Co. v. Buford, 106 Ala. 303, 17 So. 395; Alabama &c. R. Co. v. Prouty, 149 Ala. 71, 43 So. 352; Ohio &c. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529, 36 Am. St. 359; White v. Chicago &c. R. Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Kelly v. Pittsburgh &c. R. Co., 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. 134, note in 59 L. R. A. 862, 863, et seq.; Baltimore &c. R. Co. v. Quillen, 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. 158; Chicago &c. R. Co. v. Ely, 77 Nebr. 809, 110 N. W. 539; Eaton v. Boston &c. R. Co., 51 N. H. 504, 12 Am. Rep. 147; Galveston &c. Co. v. Bibb, 3 Tex. Civ. App. 330. But the right to properly erect embankments may be implied

land of its lateral support,[41] or obstructing navigation,[42] for neg-

from the power and duty to provide suitable and safe roadways. Kansas City &c. R. Co. v. Smith, 72 Miss. 677, 17 So. 78, 27 L. R. A. 762, 48 Am. St. 579; Hodge v. Lehigh Valley R. Co., 39 Fed. 449. See also Clevelang &c. R. Co. v. Huddleston, 21 Ind. App. 621, 52 N. E. 1008, 69 Am. St. 385. But compare Schier v. Cane Belt R. Co., 45 Tex. Civ. App. 295, 100 S. W. 360 (company held liable even in absence of negligence). And the liability in most states does not extend to injuries caused by properly fighting off surface water. Missouri Pac. R. Co. v. Renfro, 52 Kans. 237, 34 Pac. 802, 39 Am. St. 344; Hannaher v. St. Paul &c. R. Co., 5 Dak. 1, 37 N. W. 717; Cairo &c. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139 and note; Jean v. Pennsylvania Co., 9 Ind. App. 56, 36 N. E. 159; Atchison &c. R. Co. v. Hammer, 22 Kans. 763, 31 Am. Rep. 216; Jordan v. St. Paul &c. R. Co., 42 Minn. 172, 43 N. W. 849, 6 L. R. A. 573 and note; Bunderson v. Burlington &c. R. Co., 43 Nebr. 545, 61 N. W. 721; Edwards v. Charlotte &c. R. Co., 39 S. Car. 472, 18 S. E. 58, 22 L. R. A. 246, 39 Am. St. 746. As to what is surface water, see Cairo &c. R. Co. v. Brevoort, 62 Fed. 129, 25 L. R. A. 527 and note and authorities there cited. See also Harvey v. Mason &c. R. Co., 129 Iowa 465, 105 N. W. 958; Parks v. Southern R. Co., 143 N. Car. 289, 55 S. E. 701, 12 L. R. A. (N. S.) 680. But as many of these cases show there may be liability here too if the surface water is collected in a body and diverted and cast on the land of another. The entire subject is specifically considered in subsequent actions in this chapter.

[41] Quincy v. Jones, 76 Ill. 231; 20 Am. Rep 243; Rau v. Minnesota Valley R. Co., 13 Minn. 442; Charless v. Rankin, 22 Mo. 566, 66 Am. Dec. 642 and note; Larson v. Metropolitan &c. Co., 110 Mo. 234, 10 S. W. 416, 16 L. R. A. 330, 33 Am. St. 439 and note; Nading v. Denison, &c. Ry. Co. (Tex. Civ. App.), 62 S. W. 97; Richardson v. Vermont &c. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Parke v. Seattle, 5 Wash. 1, 20 L. R. A. 68, 34 Am. St. 839. We do not here consider whether there is a liability in the absence of negligence nor whether this constitutes a taking. There is conflict among some of the authorities upon that point, as well as to how far the right to lateral support extends. See elaborate note to Larson v. Metropolitan &c. Co., 33 Am. St. 439, 446, et seq.; Elliott Roads and Streets, (3rd Ed.) §§ 229, 591; Langhorne v. Turman, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211; Louisville &c. R. Co. v. Culbertson, 158 Ky. 561, 165 S. W. 681; Nichols v. Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. 743; Parke v. Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. 839, and authorities cited in both the prevailing and dissenting opinion. Compare Hortsman v. Covington &c. R. Co., 18 B. Mon. (Ky.) 218, with Eaton v. Boston &c. R. Co., 51 N. H. 504, 12 Am. Rep. 147. See, also, ante, § 1233 and post, § 1387.

[42] Tuckahoe Canal Co. v. Tuckahoe &c. R. Co., 11 Leigh (Va.) 42,

ligently leaving work in a public street in a dangerous condition so that one who is properly using the street is injured thereby,[43] and for various other negligent acts in the construction of the road resulting in injury to others.[44] A more specific consideration of these matters will be found in the following sections.

§ 1385. Liability for injuries caused by blasting.—The question as to the liability of railroad companies for injuries or damages caused by blasting has given rise to some difference of opinion. There can be no doubt that the company is liable for injuries proximately caused by its negligence in blasting,[45] and

36 Am. Dec. 374. See also Philadelphia & Wil. & Balt. R. Co. v. Philadelphia &c. Steam Tow Boat Co., 23 How. (U. S.) 209, 16 L. ed. 433. And see elaborate notes in 59 L. R. A. 33-94. But compare Pedrick v. Raleigh &c. R. Co., 143 N. Car. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554.

[43] Gudger v. Western &c. R. Co., 87 N. Car. 325, 19 Am. & Eng. R. Cas. 144; Hogan v. Kentucky Union R. Co. (Ky.), 21 S. W. 242.

[44] See Louisville &c. R. Co. v. Higginbotham, 153 Ala. 334, 44 So. 872 (liable for pumping water so negligently as to fill up landowner's spring); DeBaker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. 237; Roushlange v. Chicago &c. R. Co., 115 Ind. 106, 17 N. E. 198; Hunt v. Iowa Cent. R. Co., 86 Iowa 15, 52 N. W. 668, 41 Am. St. 473; Payne v. Morgan's &c. Co., 38 La. Ann. 164, 58 Am. Rep. 174; Peabody v. Boston &c. R. Co., 181 Mass. 76, 62 N. E. 1047; Kansas City &c. R. Co. v. Lackey, 72 Miss. 881, 16 So. 909, 48 Am. St. 589; Missouri &c. R. v. Mott, 98 Tex. 91, 81 S. W. 285 (stock pens constituting a nuisance); Gulf &c. R. Co. v. Blue, 46 Tex. Civ App. 239, 102 S. W. 128 (same); Terrell v. Chesapeake &c. R. Co., 110 Va. 340, 66 S. E. 55, 32 L. R. A. (N. S.) 371, and other cases there cited in note; Watts v Norfolk &c. R. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. 894. As to measure of damages depending on whether nuisance is temporary or permanent, see Cleveland &c. R. Co. v. King, 23 Ind. App. 573, 55 N. E. 875; Cleveland &c. R. Co. v. Dugan, 18 Ind. App. 435, 48 N. E. 238; Baltimore &c. R. Co. v. Quillen, 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. 158; Southern R. Co. v. Poetker, 46 Ind. App. 295, 91 N. E. 610; Railroad Co. v. Higdon, 111 Tenn. 121, 76 S. W. 895. See also Knapp &c. Co. v. New York &c. R. Co., 76 Conn. 311, 56 Atl. 512, 100 Am. St. 994; and compare McElroy v Kansas City &c. R. Co., 172 Mo. 546, 72 S. W. 913; Carl v. Sheboygan &c. R. Co., 46 Wis. 625, 1 N. W. 295; Harvey v. Mason &c. R. Co., 129 Iowa 465, 105 N. W. 958.

[45] Beauchamp v. Saginaw &c. Co., 50 Mich. 163, 15 N. W. 65, 45

some courts seem to hold that it may be liable, even in the absence of negligence.[46] Thus, in one case it was held that a hotelkeeper could recover for loss of business, or rents and profits, caused by his guests and tenants leaving the hotel in fear of falling rock and debris resulting from the blasting, although there was nothing to show that it was negligently done.[47] But where there is no physical invasion and no negligence, as, for instance, in cases in which the injury is caused by mere vibration necessarily resulting from the blasting, it seems that the company is not liable.[48] So, upon the theory

Am. Rep. 30; Hinkle v. Richmond &c. R. Co. 109 N. Car. 472, 13 S. E. 884, 26 Am. St. 581; Blackwell v. Lynchburg &c. R. Co., 111 N. Car. 151, 16 S. E. 12, 17 L. R. A. 729 and note, 32 Am. St. 786; Settle v. Southern R. Co., 150 N. Car. 643, 64 S. E. 759; Tissue v. Baltimore &c. R. Co., 112 Pa. St. 91, 3 Atl. 667, 56 Am. Rep. 310; Sabin v. Vermont Cent. R. Co., 25 Vt. 363; Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. 936. See also Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. 221, Page v. Dempsey, 184 N. Y. 245, 77 N. E. 9.

[46] Carman v. Steubenville &c. R. Co., 4 Ohio St. 399; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Scott v. Bay, 3 Md. 431; Colton v. Onderdonk, 69 Cal. 155, 16 Pac. 395, 58 Am. Rep. 556; Munro v. Pacific &c. R. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. 248. It is so held in a number of cases where there is an actual physical invasion of the property of another by casting the debris upon it. Langhorne v. Turman, 141 Ky. 809, 133 S. W. 1008, 32 L. R. A. (N. S.) 211, and note reviewing many other cases.

[47] Georgetown &c. R. Co. v. Doyle, 9 Colo. 549, 30 Am. & Eng. R. Cas. 231; Georgetown &c. R. Co. v. Eagles, 9 Colo. 544, 13 Pac. 699, 30 Am. & Eng. R. Cas. 228. See also Hunter v. Farren, 127 Mass. 481, 34 Am. Rep. 423. But compare McCalla v. Louisville &c. R. Co., 163 Ala. 107, 50 So. 971.

[48] Booth v. Rome &c. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. 552, 9 Lewis Am. R. & Corp. R. 92; Louisville &c. R. Co. v. Bonhayo, 94 Ky. 67, 21 S. W. 526. See also Fenwick v. East London &c. R. Co., L. R. 20 Eq. 544; Bessemer &c. Co. v. Doak, 151 Ala. 670, 44 So. 631, 12 L. R. A. (N. S.) 389, and note; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Benner v. Atlantic &c. Co., 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. 649; Cary Bros. &c. v. Morrison, 129 Fed. 177, 65 L. R. A. 659. In the first case above cited, it was held that the company was not liable in the absence of negligence, although the court which decided it has gone as far at least as any other court towards holding that a railroad company is no more protected from liability in such a case

that all damages likely to arise from necessary and proper blasting should be considered and allowed in the condemnation proceedings, and may be presumed to have been so considered and allowed, it is generally held that the company is not liable for casting rocks and debris upon adjoining land in the proper and careful exercise of its authority to use all necessary and appropriate means to construct its road, although it may be liable for not removing the debris within a reasonable time,[49] and the rule is the same where the land for the right of way is sold outright to the railroad company.[50] It would seem, however, that this rule exempting the company from further liability where the injury was taken into consideration or may be presumed to have been taken into consideration in allowing damages in the condemnation proceedings, can not apply where the injury caused by blasting is to persons and property not affected by the original condemnation proceedings.

than an individual and that the rule which protects a public corporation does not apply to a railroad company. But see Fitzsimons &c. Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; Hickey v. McCabe, 30 R. I. 346, 75 Atl. 404, 27 L. R. A. (N. S.) 425; Gossett v. Southern R. Co., 115 Tenn. 276, 89 S. W. 737, 1 L. R. A. (N. S.) 97, 112 Am. St. 846; also as to blasting constituting a private nuisance by an individual. Longten v. Persell, 30 Mont. 306, 76 Pac. 699, 65 L. R. A. 655, 104 Am. St. 723.

[49] Whitehouse v. Androscoggin R. Co., 52 Maine 208; Proprietors of Locks v. Nashua &c. R. Co., 10 Cush. (Mass.) 385; Brown v. Providence &c. R. Co., 5 Gray (Mass.), 35; Dodge v. County Commissioners, 3 Metc. (Mass.) 380; Blackwell v. Lynchburg &c. R. Co., 111 N. Car. 151, 16 S. E. 12, 17 L. R. A. 729 and note, 32 Am. St. 786; Hord v. Holston River R. Co., 122 Tenn. 399, 123 S. W., 637, 135 Am. St. 878, 19 A. & E. Am. Cas. 331; Sabin v. Vermont Cent. R. Co., 25 Vt. 363; Watts v. Norfolk &c. R. Co., 39 W. Va. 196, 19 S. E. 570, 23 L. R. A. 674, 45 Am. St. 894.

[50] St. Louis &c. R. Co. v. Hanks, 80 Ark. 417, 97 S. W. 666; Hord v. Holston River R. Co., 122 Tenn. 399, 123 S. W. 637, 19 A. & E. Ann. Cas. 331, 135 Am. St. 878. See also St. Louis &c. Ry. Co. v. Walbrink, 47 Ark. 330, 1 S. W. 545. But there are some courts that seem to take a different view. Langhorne v. Turman, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211, and cases cited in note.

§ 1386 (1057a). Raising grade so as to necessitate changes in adjoining warehouses and business buildings.—It has been held that a railroad company, having the right under a deed of a right of way to change its grade, and doing so in response to the demands of several property owners and as a public necessity, to more effectually handle freight and to conform to the grade of the connecting main line, is not liable to an abutting owner who thereby has to raise his buildings to conform to the new grade.[51] And in a case already referred to in another section it was held that a railroad company was not liable where a municipality had raised the grade of a street so as to diminish the space between the railroad trestle and the street in such a manner as to obstruct the free use of the latter.[52] Other cases relating to change of grade and track elevation generally are cited below.[53]

§ 1387 (1057b). Excavation for right of way injuring lateral support.—A railroad company, like any other proprietor, may be liable to an adjoining property owner for injuries caused by the disturbance of the lateral support to his land in making excavation on the right of way for a road-bed. This right of lateral support from the adjacent soil is an absolute right of property and under the law the owner has a legal remedy for any injury to his soil resulting from the removal of the natural

[51] Liedel v. Northern Pac. R. Co., 89 Minn. 284, 94 N. W. 877.

[52] Southern R. Co. v. State, 130 Tenn. 261, 169 S. W. 1173, L. R. A. 1915 B, 766.

[53] Muhlker v. New York &c. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872 (reversing 173 N. Y. 549, 66 N. E. 558); Birrell v. New York &c. R. Co., 198 U. S. 390, 25 Sup. Ct. 667, 49 L. ed. 1096; Siegel v. New York &c. R. Co., 200 U. S. 615, 26 Sup. Ct. 756, 50 L. ed. 619-626; McKeon v. New York &c. R. Co., 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730; Atlantic &c. R. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148; State v. Indianapolis &c. R. Co., 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831; Indianapolis v. Indianapolis &c. Co., 177 Ind. 396, 95 N. E. 246; Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705; Ranson v. Sault Ste. Marie, 143 Mich. 661, 107 N. W. 439; Dolan v. New York &c. R. Co., 175 N. Y. 367, 67 N. E. 612; Houston &c. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850 and note with which compare however, De Lusca v. North Little Rock, 142 Fed. 597; and see post §§ 1441, 1581.

support to which it is entitled. The right to a recovery, according to the weight of authority, does not necessarily depend upon negligence but upon the violation of the right of property.[54] And it has been held that the right to remove the lateral support of the remaining land of the grantor in the construction of the road does not pass by a grant in fee simple of a strip of land for a right of way containing no limitations and nothing to show that damages for injury to such remaining property were included or released.[55] The actionable wrong, however, in the case of a railroad excavation, is not simply the excavation, but the act of allowing the abutting owner's land to fall.[56] The damages recoverable in such a case, it has been held, are restricted to the special injury sustained by the land-owner and he cannot recover damages for injury to the lateral support of

[54] Schultz v. Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. 630; Mosier v. Oregon &c. Co., 39 Ore. 256, 64 Pac. 453, 87 Am. St. 652; Pettit v. Jamestown &c. R. Co., 222 Pa. 490, 71 Atl. 1048, 21 L. R. A. (N. S.) 318, and cases there reviewed in note. See also to same effect Nichols v. Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. 743; Bradley v. New York &c. R. Co., 21 Conn. 294, 312; Roushlange v. Chicago &c. R. Co., 115 Ind. 106, 17 N. E. 198; Kansas City &c. R. Co. v. Schwake, 70 Kans. 141, 78 Pac. 431; Foley v. Wyeth, 2 Allen (Mass.), 131, 79 Am. Dec. 771; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312; McGuire v. Grant, 23 N. J. L. 362, 67 Am. Dec. 49; Costigan v. Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810; Mosier v. Oregon R. &c. Co., 39 Ore. 256, 64 Pac. 453, 87 Am. St. 652; Nading v. Denison &c. R. Co. (Tex. Civ. App.), 62 S. W. 97. But there are cases holding that there is no liability in the absence of negligence where a railroad company is acting under statutory authority. Hortsman v. Covington &c. R. Co., 18 B. Mon. (Ky.) 218. But see Chesapeake &c. R. Co. v. May, 157 Ky. 78, 163 S. W. 1112); Boothby v. Androscoggin R. Co., 51 Me. 318; Alabama &c. R. Co. v. Stingily, 111 Miss. 237, 76 So. 376; Chapman v. St. Louis &c. R. Co. 240 Mo. 592, 144 S. W. 469.

[55] Pettit v. Jamestown &c. R. Co., 222 Pa. 490, 71 Atl. 1048, 21 L. R. A. (N. S.) 318. See also Chesapeake &c. R. Co. v. May, 157 Ky. 708, 163 S. W. 1112; Louisville &c. R. Co. v. Culbertson, 158 Ky. 561, 165 S. W. 681. But see North & West Branch R. Co. v. Swank, 105 Pa. 555, where the agreement was for a right of way and amounted to a release of damages.

[56] Kansas City &c. R. Co. v. Schwake, 70 Kans. 141, 78 Pac. 431. See also Backhouse v. Bonomi, 1 Best & Smith R. 970; Schultz v. Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. 630.

his property until it has suffered injury, that is, until the earth is so much disturbed that it slides or falls.[57] The prevailing rule seems to be that land acquired by a railroad company, either by grant or by condemnation, is usually subject to the burden of lateral support, the destruction of which amounts to a taking or damaging of property within constitutional provisions, and the damages awarded in a condemnation proceeding do not cover the right to lateral support as to the part of the tract not taken, unless it appears that such right was taken and compensation therefor included.[58]

§ 1388 (1057c). Bridges over navigable waters.—A state has the power to authorize the construction of bridges over navigable rivers situated within its limits in the absence of any action of congress upon the subject.[59] The authority of the

[57] Kansas City &c. R. Co. v. Schwake, 70 Kans. 141, 78 Pac. 431. For a review of the cases upon both sides of the general question, see note to Larson v. Metropolitan &c. R. Co., 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. 439, 446, and both principal and dissenting opinions in Parke v. Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. 839; also notes in 21 L. R. A. (N. S.) 318); and L. R. A. 1918D, 714.

[58] Fleming v. Monongahela R. Co., 82 W. Va. 1, 95 S. E. 819, L. R. A. 1918D, 711, and other cases there cited in note; also cases cited in preceding notes to this section and in notes in L. R. A. 1917E, 576; 5 L. R. A. (N. S.) 1086. But, on the other hand, it is also held that a railroad company acquires by condemnation, as by grant of a right of way, the right of subjacent and lateral support for its tracks and the weight of trains that may be run over them. Manning v. New Jersey Short Line R. Co., 80 N. J. L. 349, 78 Atl. 200, 32 L. R. A. (N. S.) 155. See also Dilts v. Plumville R. Co., 222 Pa. St. 516, 71 Atl. 1072; and compare Village of Haverstraw v. Eckerson, 192 N. Y. 54, 84 N. E. 578.

[59] Gilman v. Philadelphia, 3 Wall (U. S.) 713, 18 L. ed. 96; Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463; Wilson v. Black Bird Creek Marsh Co., 2 Pet. (U. S.) 245, 7 L. ed. 412; Kansas City &c. R. Co. v. Wiygul, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578. But see as to bridges over rivers constituting boundaries of states, Covington &c. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158; Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. ed. 808. The state cannot, it is held, authorize the use of a navigable stream so as to

United States in this matter is dormant and inoperative until aroused by some action of congress; but when congress undertakes to act, its regulations are supreme.[60] On this question of conflicting jurisdiction between congress and the state, the Supreme Court of the United States has said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, street, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation."[61] Congress has, however, acted to some extent on the subject, and in a number of recent cases certain bridges have been held unauthorized because an act of Congress had not been complied with and permission had not been obtained from the proper officer or department of the United States government as required.[62] So, in one of the cases, it is held that removal of existing railway bridges over a navigable stream, forming necessary parts of an interstate commerce railway, cannot be ordered by a state court, even in the expectation that

seriously interfere with navigation. State v. Southern Sand &c. Co. 113 Ark. 149, 167 S. W. 854.

[60] Pennsylvania v. Wheeling &c. Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249; United States v. Union Bridge Co., 143 Fed. 377.

[61] Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96. That the act of congress leaving it to the Secretary of War to determine whether a certain fact exists necessary to make it lawful is valid, see Miller v. New York, 109 U. S. 385, 3 Sup. Co. 228, 27 L. ed. 971; Lake Shore &c. R. Co. v. Ohio, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. ed. 747.

[62] Among the latest of such cases are Kansas City &c. R. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857; State v. Price, 158 Wis. 312, 148 N. W. 873.

such order will lead to the elevation of the bridges, which the state could not order without authority of the secretary of war.[63] But railroads authorized by either of these powers to erect bridges over navigable waters, should construct the bridges so as not to interfere unnecessarily with the free navigation of the waters they cross.[64] An obstruction to a reasonable extent not preventing navigation, is generally allowed in the erection and repair of bridges.[65] It has been held that the owners of a bridge are not liable for accidental obstructions not caused by the construction of the bridge, although the bridge may have contributed thereto.[66] And where a bridge is erected as authorized both by the state and by congress, or by either when one alone is sufficient, it is not a public nuisance and can not be successfully complained of by one who owns or leases a warehouse above it and merely suffers inconvenience or possible loss of business in common with the rest of the public.[67]

[63] Kansas City &c. R. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75; 34 Sup. Ct. 564, 58 L. ed. 857.

[64] Illinois River Packet Co. v. Peoria Bridge Assn., 38 Ill. 467; Bailey v. Philadelphia &c. Co., 4 Har. (Del.) 389, 44 Am. Dec. 593; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255; The Nonpareil, 149 Fed. 521. See also Harrison v. Hughes, 125 Fed. 860; Clement v. Metropolitan &c. R. Co., 123 Fed. 271; Idaho North R. Co. v. Post Falls Lumber Co., 20 Idaho 695, 119 Pac. 1098, 38 L. R. A. (N. S.) 114; notes in 38 L. R. A. (N. S.) 763, and 51 L. R. A. (N. S.) 1172; State v. Southern Sand &c. Co., 113 Ark. 149, 167 S. W. 854. And it has been held, in an action for overflow of lands caused by a railroad bridge and embankment, that a congressional grant of franchise and right of way does not give immunity from liability for the result of negligence. Pahlka v. Chicago &c. R. Co., 62 Okla. 223, 161 Pac. 544.

[65] State v. Portland &c. R. Co., 57 Maine 402; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Clarke v. Birmingham &c. Bridge Co., 41 Pa. St. 158; Central Trust Co. v. Wabash &c. R. Co., 32 Fed. 566; Green &c. Nav. Co. v. Chesapeake &c. R. Co., 88 Ky. 1, 10 S. W. 6, 2 L. R. A. 540 and note.

[66] St. Joseph Co. v. Pidge, 5 Ind. 13. And the plaintiff is usually required to show some special injury. Swain & Son v. Chicago &c. R. Co., 252 Ill. 622, 97 N. E., 247, 38 L. R. A. (N. S.) 763, and other cases there reviewed.

[67] Miller v. New York, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. ed. 971. And the right so granted by congress includes the right to make repairs and renew the superstructure where necessary. United

§ 1389 (1057d). Obstruction of stream by bridges, trestles and culverts—Extraordinary storms.[68]—The rule is well settled that a railroad company constructing a bridge or other structure over a stream in so negligent a manner as to divert the stream from its natural course and cause it to set back and overflow the land of an adjoining owner is liable in damages for the injuries thus sustained, unless the flood or freshet was so extraordinary and unprecedented as to amount to an act of God.[69] The rail-

States v. Parkersburg &c. R. Co., 143 Fed. 224; Kansas City &c. R. Co. v. Wiygul, 82 Miss. 223, 33 So. 965, 61 L. R. A. 578. In a recent case it is held by the Supreme Court of the United States that the appropriation by eminent domain of land for approaches and terminal facilities necessary for the use of a bridge erected, under the authority of the act of congress of January 26, 1901, over a navigable stream, is not forbidden by that act because the plans submitted to the secretary of war, and approved by him, although fully subserving the purpose of showing the extent to which navigation would be affected, do not include such terminal and connecting facilities, and can not, under such act, be altered without his consent; and that the owner of property so taken is denied no federal right because the erection of the bridge was not begun within the time limit set by congress, where the bridge has been constructed without complaint by the federal authorities, especially as congress, by the act of January 18, 1904, extended the time for its completion. Stone v. Southern &c. Bridge Co., 206 U. S. 267, 27 Sup. Ct. 615, 51 L. ed. 1057.

[68] Sections 1389 to 1397 are cited in East Side Levee &c. Dist. v. East St. Louis R., 279 Ill. 319, 116 N. E. 720, 724, as correctly stating the weight of authority on the questions considered.

[69] St. Louis &c. R. Co. v. Winkelman, 47 Ill. App. 276; Kankakee &c. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Sherlock v. Louisville &c. R. Co., 115 Ind. 22, 17 N. E. 171; Houghtaling v. Chicago &c. R. Co., 117 Iowa 540, 91 N. W. 811; Union Trust Co. v. Cuppy, 26 Kans. 754; Atchison &c. R. Co. v. Herman, 74 Kans. 77, 85 Pac. 817; Piedmont &c. R. Co. v. McKenzie, 75 Md. 458, 24 Atl. 157; Mellen v. Western &c. R., 4 Gray (Mass.), 301; Abbett v. Kansas City, 83 Mo. 271, 53 Am. Rep. 581; Edwards v. Missouri &c. R. Co., 97 Mo. App. 103, 71 S. W. 366; Standley v. Atchison &c. R. Co., 121 Mo. App. 537, 97 S. W. 244, Omaha &c. R. Co. v. Brown, 16 Nebr. 161, 20 N. W. 202; Anderson v. Chicago &c. R. Co., 102 Nebr. 497, 167 N. W. 559 (railroad company liable where it constructs bridge over a stream without a sufficient culvert or outlet to carry off flood water reasonably to have been anticipated); Chicago &c. R. Co. v. Buel, 76 Nebr. 420, 107 N. W. 590; Conhocton &c. Co. v. Buffalo &c. R. Co., 3 Hun (N. Y.), 523;

road company is not bound to provide for an unprecedented flood which could not have been foreseen, but must anticipate and make provisions for such floods as may occur in the ordinary course of nature. It must foresee and provide for unusual storms such as occasionally occur whether they are called ordinary or extraordinary. But the railroad company is not guilty of negligence in failing to provide for a flood which is not only extraordinary, but unprecedented and could not reasonably have been foreseen.[70] It has been held that it is not enough that the structure was erected according to plans of skillful and competent engineers employed by the company, since it is not the danger which a competent and skillful engineer does in fact anticipate but that which, in the reasonable exercise of his skill, he ought to have anticipated, which the company is bound to provide for.[71] Furthermore if the negligence of the railroad company in the manner of constructing its bridge concurred with the unprecedented flood in producing the overflow the railroad company will be responsible providing the injury would not have happened but for its negligent acts.[72]

Pittsburgh &c. R. Co. v. Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97; Berninger v. Sunbury &c. R. Co., 203 Pa. 516, 53 Atl. 361; Jones v. Seaboard Air Line R. Co., 67 S. Car. 181, 45 S. E. 188; Lampley v. Atlantic Coast Line R. Co., 71 S. Car. 156, 50 S. E. 773; Houston &c. R. Co. v. Parker, 50 Tex. 330; Denison v. Barry, 98 Tex. 248, 83 S. W. 5; International &c. R. Co. v. Walker (Tex. Civ. App.), 97 S. W. 1081; Taylor v. Baltimore &c. R. Co., 33 W. Va. 39, 10 S. E. 29.

[70] Houghtaling v. Chicago &c. R. Co., 117 Iowa 540, 91 N. W. 811; Libby v. Railroad Co., 85 Maine 34, 26 Atl. 943, 20 L. R. A. 812; Baltimore &c. R. Co. v. Sulphur Springs School Dist., 95 Pa. St. 65, 42 Am. Rep. 529; Price v. Oregon &c. R. Co., 47 Ore. 350, 83 Pac. 843; San Antonio &c. R. Co. v. Kiersey, 98 Tex. 590, 86 S. W. 744; Railroad Co. v. Davidson, 25 Tex. Civ. App. 134, 60 S. W. 278. See also American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252 and note.

[71] Houghtaling v. Chicago &c. R. Co., 117 Iowa 540, 91 N. W. 811; Reichert v. Northern Pac. Ry. Co., 39 N. Dak. 114, 167 N. W. 127. But see Rice v. Evansville, 108 Ind. 7, 9 N. E. 139; Rozell v. Anderson, 91 Ind. 591; Cleveland &c. R. Co. v. Wisehart, 161 Ind. 208, 67 N. E. 993; Board v. Chipps, 131 Ind. 56, 61, 63 29 N. E. 1066.

[72] Evansville &c. R. Co. v. Scott (Ind. App.), 114 N. E. 649; Watts v. Evansville &c. R. Co. (Ind. App.), 120 N. E. 611; Vyse v. Chicago &c. R. Co., 126 Iowa 90, 101 N. W. 736;

But this statement should not be taken too broadly; for the act of the company, in order to render it liable, must be a proximate cause of the injury or damage complained of, and not merely a remote cause or condition.[73] The mere fact that the adjoining landowner gave the railroad company the right to cross his land, which implied his consent to the construction of a bridge over a stream, does not exempt the railroad company from liability for injuries caused by its negligence in the construction of the bridge.[74] But it has been held that the land-owner

Pahlka v. Chicago &c. R. Co., 62 Okla. 223, 161 Pac. 544 (the act of God, to prevent liability, must be the sole proximate cause); Jones v. Seaboard Air Line R. Co., 67 S. Car. 181, 45 S. E. 188. See as to question as to whether there is a joint liability where several contribute to the injury by independent obstructions. William Tackaberry Co. v. Sioux City Service Co., 154 Iowa 358, 132 N. W. 945, 134 N. W. 1064, 40 L. R. A. (N. S.) 102, and cases there reviewed.

[73] Central Trust Co. v. Wabash &c. R. Co., 57 Fed. 441; Chicago &c. R. Co. v. Buel, 76 Nebr. 420, 107 N. W. 590; Sherwood v. St. Louis &c. R. Co. (Mo. App.), 187 S. W. 260; Cooney v. Pryor (Mo. App.), 203 S. W. 630; Coleman v. Kansas City R. Co., 36 Mo. App. 476; Bristol Hydraulic Co. v. Boyer, 67 Ind. 236, 242, 243; Fagan v. Central Vt. R. Co., 81 Vt. 141, 69 Atl. 732; Denny v. New York &c. R. Co., 13 Gray (Mass.) 481; McCoy v. Danley, 20 Pa. St. 85; Pittsburgh, etc., R. Co. v. Gilleland, 56 Pa. St. 445; American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25. It is difficult, indeed, to see just how a railroad company, not being an insurer and not being under any obligation to anticipate unprecedented or extraordinary storms that could not reasonably be expected or foreseen, can logically be held negligent and liable where no injury or damage would have been caused except for such storm which the company was not negligent in failing to foresee and provide for, and most of the authorities above cited tend strongly in this direction. If it would have happened anyway from the natural conditions, and the same damages thus caused, the company is not liable. Sherwood v. St. Louis &c. R. Co. (Mo. App.), 187 S. W. 260; Scott v. Northern Tex. Trac. Co. (Tex. Civ. App.), 190 S. W. 209. See also Richard v. Baldwin Lumber Co. 142 La. 829, 77 So. 645.

[74] Jones v. Seaboard Air Line R. Co., 67 S. Car. 181, 45 S. E. 188. But compare Kirkland &c. Co. v. Sea-Board Air Line Ry., 109 S. Car. 331, 96 S. E. 122. And see Eastern Oregon Land Co. v. Deschutes R. Co., 246 Fed. 400 (relative duties of landowner and railroad company as to protection from flood waters under right of way contract). So, it has been held that damages are recoverable by a landowner against a railway company for

cannot recover for injuries to which his own negligence has contributed, as for example, where he has constructed dikes along the banks of the stream fencing its flow into a narrow channel and thereby adding to the formation of an ice gorge against the bridge which caused the flooding of his lands.[75] It has been held that the plaintiff in an action for damages for injuries caused by the obstruction of the flow of the stream by a bridge, has the burden of proof to show that the railroad company did not construct the bridge with proper care and skill, having regard to the land-owners above and below the bridge,[76] and that there is a presumption at the outset, that there was no negligence in the design and construction of the bridge and this presumption must be overcome.[77] In a recent case in Iowa

negligently maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner. Chicago, Rock Island &c. Ry. Co. v. Andreesen, 62 Nebr. 456, 87 N. W. 167; Chicago &c. R. Co. v. Ely, 77 Nebr. 809, 110 N. W. 539.

[75] Peoria &c. R. Co. v. Barton, 38 Ill. App. 469. See also Chesapeake &c. R. Co. v. Adkins, 167 Ky. 329, 180 S. W. 517. But compare Harvey v. Mason City &c. R. Co., 129 Iowa 465, 105 N. W. 958.

[76] Chicago &c. R. Co. v. Schaffer, 26 Ill. App. 280.

[77] Berninger v. Sunbury &c. R. Co., 203 Pa. 516, 53 Atl. 361. See also Chesapeake &c. R. Co. v. Adkins, 167 Ky. 329, 180 S. W. 517; Morrissey v. Chicago &c. R. Co., 38 Nebr. 406, 56 N. W. 946, 57 N. W. 522. In Cleveland &c. R. Co. v. Wisehart, 161 Ind. 208, 67 N. E. 993, it is said: "The statute hereinbefore set out expressly authorized the railroad company to construct its road upon or across the stream or water course in controversy, subject to the conditions therein provided, and merely doing what the law authorized certainly affords appellee no cause of action. Appellant undoubtedly had the right to construct the trestle bridge and the embankment, as shown, on its own premises or right of way. These were necessary, as we may assume, to the successful operation of its road. Therefore, to render tortious the act of appellant in allowing or causing the dirt used in the construction of the said embankment to spread or fill up the ditch or water way as alleged, there should have been some averments or allegations to show that the act of filling up the ditch on its own lands, and thereby obstructing the

several important questions were decided relative to this topic.[78] The railroad company had obtained the right by condemnation or purchase, to construct its land across the plaintiff's farm and through a shallow pond thereon in 1902. The track was laid on an embankment about six feet high and in constructing the roadbed the defendant attempted to provide for the escape of drainage from the pond in the direction of its natural flow by putting in a tile culvert, which proved insufficient to carry off the water in times of flood and set it back, causing injury to the plaintiff's land and crops. The plaintiff brought the action to recover damages in September, 1903. The court held that an actionable injury was shown; that the fact that after the construction of the culvert the plaintiff dug certain drainage ditches on his land, draining the water in the direction of the culvert, did not affect his right to recover, unless there was evidence showing that the flow of water to be discharged through the culvert was thereby augmented; and

flow of the water, was either wilfully or negligently done, to the injury of appellee. Bellinger v. New York &c. R. Co., 23 N. Y. 42; Wallace v. Columbia &c. R. Co., 34 S. Car. 62, 12 S. E. 815; Koch v. Delaware &c. R. Co., 54 N. J. L. 401, 24 Atl. 442; Pittsburgh &c. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274; Pennsylvania &c. R. Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Powers v. St. Louis &c. R. Co., 71 Mo. App. 540; The rule is well-settled that if a person does a lawful act on his own premises he is not liable for damages resulting therefrom, unless the act was so done as to constitute actionable negligence. Wallace v. Columbia &c. Co., supra, is a case, at least to an extent, very similar to the one at bar. The railroad company therein was charged with having obstructed and stopped the natural flow of a stream of water by reason of constructing a dam on its right of way, and thereby causing the water to back upon and flood the lands of the plaintiff to his damage. It was held by the court that in an action against a railroad company for damage done to plaintiff's land, through which a right of way had been given, caused by the obstruction by defendant of flowing streams, the complaint fails to state facts sufficient to constitute a cause of action where it does not allege any facts tending to show that the railroad company, in constructing its roadbed, wantonly or negligently or unskillfully obstructed these streams at their crossing."

[78] Harvey v. Mason City &c. R. Co., 129 Iowa 465, 105 N. W. 958.

that whether the plaintiff was guilty of contributory negligence in regard to such matter, under the evidence, was a question for the jury.[79] The court also laid down in substance the proposition stated in the syllabus that "where the injury to land caused by the damming of surface waters is one which will continue indefinitely, without change from any cause but human labor, the damages are original, and but one recovery can be had for the decrease in the fair market value of the property on account of the injury; but where the injury is temporary, or of a continuing or intermittent character, the damages are ordinarily regarded as continuous, and one recovery against the wrongdoer is not a bar to separate actions for damages thereafter accruing from the same wrong."[80] And it was held that

[79] The court, indeed, seemed to doubt whether the doctrine of contributory negligence had any proper application in or to such cases, and apparently left it an open question, citing Randolf v. Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. 268, and Correll v. Cedar Rapids, 110 Iowa 333, 81 N. W. 724.

[80] After citing authorities to the effect that the proper test is as above stated, the court said: "Applying the test suggested by the foregoing discussion, we are disposed to hold that damages arising from the occasional flooding of land by reason of an insufficient culvert upon the land of an adjacent proprietor are not original, although if the claim for damages be made and the action be tried on the theory that they are original, the parties will be bound thereby. In this conclusion we are supported by the great preponderance of the authorities. Railroad Co. v. Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. 350. Athens v. Rucker, 80 Ga. 291, 4 S. E. 885; Reid v. Atlanta, 73 Ga. 523; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427; Wells v. Railroad Co., 151 Mass. 46, 23 N. E. 724, 21 Am. St. 423; Hargreaves v. Kimberly, 26 W. Va. 787, 57 Am. Rep. 121; Esty v. Baker, 48 Maine 495; Canal Co. v. Hitchings, 65 Maine 140; Thayer v. Brooks, 17 Ohio St. 489; 49 Am. Dec. 474; Plate v. Railroad, 37 N. Y. 473; Railroad Co. v. Wachter, 123 Ill. 440, 15 N. E. 279, 5 Am. St. 532; Smith v. Railroad, 23 W. Va. 453; Burnett v. Nicholson, 86 N. Car. 99; Railroad Co. v. Thillman, 143 Ill. 127, 32 N. E. 529, 36 Am. St. 359; Dorman v. Ames, 12 Minn. 451 (Gil. 347); Carriger v. Railroad Co., 7 Lea (Tenn.), 388; Jungblum v. Railroad Co., 70 Minn. 153, 72 N. W. 971; Railroad Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239. The case of Fowle v. Railroad Co., 107 Mass. 352, which has been quite frequently cited as sustaining the opposite theory is, upon that point, expressly disapproved by the same court in the later case of Aldworth v. Lynn, 153 Mass. 53, 26 N. E. 229.

even if there was no evidence affording a proper measure of actual damages the plaintiff was nevertheless entitled to go to the jury for nominal damages,[81] if the facts were as claimed, and that the recovery of nominal damages "would operate as an adjudication of the insufficiency of the culvert and be binding upon the parties, in any subsequent action brought for the continuance of the nuisance."

§ 1390 (1057e). Artificial channel where natural channel is closed.—A railroad company, if it closes a natural channel, must not violate its duty to land-owners in so doing. On this subject it has been said that a railroad company, which for its own convenience elects to close a natural water course and provide an artificial channel is charged with the duty to make such channel of sufficient capacity to properly carry not only the water then carried by such natural channel but also to anticipate and provide for any lawful increase of the water flow.[82]

§ 1391 (1057f). Embankments and structures interfering with the flow of surface waters.—"Surface water," it has been said, "is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues

10 L. R. A. 210, 25 Am. St. 608." The court also distinguished and criticised the case of Powers v. Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792. As shown in another place, there is considerable conflict upon the general subject, and the holding in this case is not entirely beyond question. See Chicago &c. R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166.

[81] Citing Woodman v. Tufts, 9 N. H. 88; Plumleigh v. Dawson, 1 Gilman (Ill.), 552, 41 Am. Dec. 199; Foster v. Elliott, 33 Iowa 216; Watson v. Van Meter, 43 Iowa 76; Hathorne v. Stinson, 12 Maine 183, 28 Am. Dec. 167; Hooten v. Barnard, 137 Mass. 30; Jackman v. Arlington, 137 Mass. 277; Wells v. New Haven &c. Co., 151 Mass. 46, 23 N. E. 724, 21 Am. St. 423; Dorman v. Ames, 12 Minn. 451 (Gil. 347); Dixon v. Clow, 24 Wend. (N. Y.) 188; Plate v. Railroad Co., 37 N. Y. 472; Tootle v. Clifton, 22 Ohio St. 247; 10 Am. Rep. 732; Casebeer v. Mowry, 55 Pa. St. 423, 93 Am. Dec. 766. Upon the question as to the measure of actual damages under proper evidence, the court also cited and reviewed a number of cases.

[82] Atchison &c. R. Co. v. Jones, 110 Ill. App. 626.

to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of the streams and ceases to be surface water."[83] Many of the courts hold that the term does not cover overflow water of a river, which forms a continuous body with the water flowing in the ordinary channel, or water which has departed from the channel presently to return. The identity of the river or stream does not depend on the volume of the water which may happen to flow down its course at any particular season.[84] But there is not entire unanimity among the courts on this question. There are decisions which hold that the flood water of a stream is surface water.[85] In a case where the Mississippi river

[83] Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Walker v. New Mexico &c. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. ed. 837; Rice v. City of Evansville, 108 Ind. 7, 9 N. E. 139; and cases cited in following notes.

[84] O'Connell v. East Tennessee &c. R. Co., 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 397, 27 Am. St. 246; Sullens v. Chicago &c. R. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. 501; Moore v. Chicago &c. R. Co., 75 Iowa 263, 39 N. W. 390; Byrne v. Minneapolis &c. R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. 668; Fordham v. Northern Pac. R. Co., 30 Mont. 421, 76 Pac. 1040, 66 L. R. A. 556; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. 843; Jones v. Seaboard Air Line R Co., 67 S. Car. 181, 45 S. E. 188; Uhl v. Ohio River R. Co., 56 W. Va. 494, 49 S. E. 378, 68 L. R. A. 138; Barden v. Portage, 79 Wis. 126, 48 N. W. 210.

[85] Cairo &c. R. Co. v. Brevoort, 62 Fed. 129, 25 L. R. A. 527 and note; Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163 (at least in case of a small stream); Chicago &c. R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166; Cairo &c. R. Co. v. Stevens, 73 Ind. 278, 38 Am. St. 139; New York &c. R. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. 541; Morris v. Council Bluffs, 67 Iowa 343, 25 N. W. 274, 56 Am. Rep. 343. See also McCormick v. Kansas City &c. R. Co., 70 Mo. 359, 35 Am. Rep. 431, where it is held that a channel or other depression in the ground forms a bank of a river through which water escapes only at the time of high water in the river, is not a natural water course. Overflow water from a running stream is surface water where it does not return to its banks, nor find its way to another stream or water course. Anderson v. Chicago &c. R. Co., 102 Nebr. 497, 167 N. W. 559. Later Indiana cases hold that while the flood water of a natural water course becomes surface water when it leaves its ordinary channel and spreads over adjacent

overflowed its banks and levees into another water course to such an extent that the waters of the latter overflowed its flood channel and were caused to back up over plaintiff's land by defendant railroad company's trestle, which was so constructed as to permit the unobstructed flow of flood waters naturally flowing in such water course, it was held that the water so escaping from the river was surface water.[86] In this country there are two well-defined theories relating to the right and liabilities of different proprietors including railroad companies, as to this water. The common law regards surface waters as a common enemy which every proprietor may fight or get rid of as best he may. He may, broadly speaking, appropriate them to his own use when they come on his premises, or he may obstruct or divert their flow without necessarily incurring any liability to his neighbor, whether above or below him.[87] This rule seems to be accepted in Connecticut,[88] Delaware,[89] Indiana,[90]

lands in different directions or settles in pools and the like, it may have a highwater channel which cannot be obstructed without liability as for the obstruction of the ordinary channel and that the water of a natural water course does not become surface water merely because it may overflow its ordinary channel, spread over adjacent low ground, and flow for some distance without a defined channel, before returning to and flowing in its ordinary channel. Cleveland &c. Ry. Co. v. Woodbury Glass Co. (Ind. App.), 120 N. E. 427; Watts v. Evansville &c. R. Co. (Ind. App.), 120 N. E. 611; Dunn v. Chicago &c. R. Co., 63 Ind. App. 553, 114 N. E. 888; Vandalia R. Co. v. Yeager, 60 Ind App. 118, 110 N. E. 230; Evansville &c. R. Co. v. Scott (Ind. App.), 114 N. E. 649; New York &c. R. Co. v. Hamlet Hay Co. 149 Ind. 344, 47 N. E. 1064, 49 N. E. 269.

[86] Johnson v. Gray's Point &c. R. Co., 111 Mo. App. 378, 85 S. W. 941.

[87] See Cleveland &c. R. Co. v. Huddleston, 21 Ind. App. 621, 52 N. E. 1008.

[88] Grant v. Allen, 41 Conn. 156; Chadeayne v. Robinson, 55 Conn. 345, 11 Atl. 592, 3 Am. St. 55.

[89] Chorman v. Queen Anne's R. Co., 3 Penn. (Del.) 407, 54 Atl. 687.

[90] Cairo &c. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Jean v. Pennsylvania Co., 9 Ind. App. 56, 36 N. E. 159; Pittsburgh &c. R. Co. v. Atkinson, 51 Ind. App. 315, 97 N. E. 353; Barrett v. Cleveland &c. R. Co., 48 Ind. App. 668, 96 N. E., 490; Hill v. Cincinnati &c. R. Co., 109 Ind. 511, 10 N. E. 410; Cleveland &c. R. Co. v. Smith, 177 Ind. 524, 97 N. E. 164.

Kansas,[91] Maine,[92] Massachusetts,[93] Minnesota,[94] Mississippi,[95] Missouri,[96] Nebraska,[97] New Jersey,[98] New York,[99] Oregon,[1] Rhode Island,[2] South Carolina,[3] Virginia,[4] West Virginia,[5] Wisconsin.[6] Under the other theory, that of the civil law, the lower of the adjacent proprietors owes a servitude to the upper to receive all natural drainage; and the lower owner cannot reject, nor can the upper owner withhold the supply. Interference with the natural flow of surface water under this theory, is regarded as a nuisance. This theory seems to be ac-

[91] Atchison &c. R. Co. v. Hammer, 22 Kans. 763, 31 Am. Rep. 216; Chicago &c. R. Co. v. Steck, 51 Kans. 737, 33 Pac. 601.

[92] Greeley v. Maine Cent. R. Co., 53 Maine 200.

[93] Cassidy v. Old Colony R. Co., 141 Mass. 178, 5 N. E. 142.

[94] Rowe v. St. Paul &c. R. Co., 41 Minn. 384, 43 N. W. 76, 16 Am. St. 706 and note; Brown v. Winona &c. R. Co., 53 Minn. 259, 55 N. W. 123, 39 Am. St. 603.

[95] Yazoo &c. R. Co. v. Davis, 73 Miss. 678, 19 So. 487, 32 L. R. A. 262, 55 Am. St. 562; Sinai v. Louisville &c. R. Co., 71 Miss. 547, 14 So. 87.

[96] Cox v. Hannibal &c. R. Co., 174 Mo. 588, 74 S. W. 854. In Goll v. Chicago &c. R. Co., 271 Mo. 655, 197 S. W. 244, it is held that the common law as to surface water prevails in Missouri and a railroad company may shut off the overflow of a river from the company's right of way provided it does not interfere with the channel and a culvert is not required under the Missouri statute in such a case.

[97] Lincoln &c. R. Co. v. Sutherland, 44 Nebr. 526, 62 N. W. 859; Morrissey v. Chicago &c. R. Co., 38 Nebr. 406, 56 N. W. 946.

[98] Davison v. Hutchison, 44 N. J. Eq. 474, 15 Atl. 257.

[99] Moyer v. New York Cent. R. Co., 88 N. Y. 351.

[1] Morton v. Oregon &c. R. [illegible], 48 Ore. 444, 87 Pac. 151.

[2] Sweet v. Conley, 20 R. I. 381, 39 Atl. 326.

[3] Edwards v. Charlotte &c. R. Co., 39 S. Car. 472, 18 S. E. 58, 22 L. R. A. 246, 39 Am. St. 746. See also Cannon v. Atlantic &c. R. Co., 97 S. Car. 223, 81 S. E. 476.

[4] Norfolk &c. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517.

[5] Neal v. Ohio River R. Co., 47 W. Va. 316, 34 S. E. 914. Such also seems to be the rule in Arizona. Tuscon v. Dunseath, 15 Ariz. 355, 139 Pac. 177. And Washington. Thorpe v. Spokane, 78 Wash. 488, 139 Pac. 221; Healy v. Everett &c. Tract. Co., 78 Wash. 628, 139 Pac. 609.

[6] Schmeckpepper v. Chicago &c. R. Co., 116 Wis. 592, 93 N. W. 533; Johnson v. Chicago &c. R. Co., 80 Wis. 641, 50 N. W. 771, 14 L. R. A. 495, 27 Am. St. 76. See also Manteufel v. Wetzel, 133 Wis., 619, 114 N. W. 91.

cepted by the courts of Alabama,[7] California,[8] Georgia,[9] Illinois,[10] Iowa,[11] Louisiana,[12] Maryland,[13] Nevada,[14] North Carolina,[15] Ohio,[16] Pennsylvania,[17] and Tennessee.[18] In New Hampshire neither of these theories is unqualifiedly accepted. There it is the rule that a lower land-owner has the right to obstruct the flow of surface water upon his premises in the reasonable use and improvement of his land, but he is liable for any injury resulting from an unreasonable obstruction or diversion.[19] Thus in a case where the overflow of a swamp on adjacent lands could not reasonably have been foreseen, by the construction of a side track by a railroad company without a ditch in connection therewith, it was held that the company, if the side track was a reasonable use of the land, was not made liable for the injuries resulting from the original failure to construct the ditch.[20]

[7] Shahan v. Alabama &c. R. Co., 115 Ala. 181, 22 So. 449, 67 Am. St. 20; Central &c. Ry. Co. v. Keyton, 148 Ala. 675, 41 So. 918.

[8] Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593 and note, 35 Am. St. 163.

[9] Farkas v. Towns, 103 Ga. 150, 29 S. E. 700, 68 Am. St. 88.

[10] Gilham v. Madison Co. R. Co., 49 Ill. 484, 95 Am. Dec. 627; Toledo &c. R. Co. v. Morrison, 71 Ill. 616; Chicago &c. Ry. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166.

[11] Pohlman v. Chicago &c. R. Co. 131 Iowa 89, 107 N. W. 1025; Wirds v. Vierkandt, 131 Iowa 125, 108 N. W. 108. But compare Lamb v. Stone, 178 Iowa 1268, 160 N. W. 907.

[12] Martin v. Jett, 12 La. 501, 32 Am. Dec. 120.

[13] Philadelphia &c. R. Co. v. Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. 440.

[14] Boynton v. Longley, 19 Nev. 69, 6 Pac. 437, 3 Am. St. 781.

[15] Mullen v. Lake Drummond &c. Co., 130 N. Car. 490, 41 S. E. 1027, 61 L. R. A. 833 and note. Compare, however, Brown v. Southern R. Co., 165 N. Car. 392, 81 S. E. 450.

[16] Butler v. Peck, 16 Ohio St. 335, 88 Am. Dec. 452.

[17] Glass v. Fritz, 148 Pa. St. 324, 23 Atl. 1050; Pfeiffer v. Brown, 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. 600.

[18] Carriger v. East Tennessee &c. R. Co., 7 Lea (Tenn.), 388. Common law rule changed by statute in Texas. Hester v. McAdams (Texas Civ. App.), 203 S. W. 121.

[19] Rindge v. Sargent, 64 N. H. 294, 9 Atl. 723; Priest v. Boston &c. R. Co., 71 N. H. 114, 51 Atl. 667.

[20] Priest v. Boston &c. R. Co., 71 N. H. 114, 51 Atl. 667. So, it has been held that under the civil law as well as under the common law there is no liability for obstructing or fighting off accidental and extraordinary floods and causing water to back over land above even

§ 1392 (1057g). Further of obstruction of surface waters.—Neither of the theories as to the disposition of surface waters, referred to in the last preceding section, authorizes a railroad company to concentrate or accumulate surface waters on its lands and cast them in great volume and force on the lands of another proprietor.[21] But unless standing water on the right of way is a nuisance, a railroad company will not be held negligent in discharging such water on a portion of its own land. It is under a duty in this respect towards other owners only.[22] A Texas statute imposes upon railroad companies in that state the duty to construct necessary culverts and sluices in its roadbed required by the natural lay of the land for necessary drainage thereof, and makes them liable in damages to persons injured by a failure to observe the statute. Where the statute is

though it is not surface water and the obstruction is in the form of a levee, embankment, or the like along or near the natural bank of a river. And it is said by the Supreme Court of the United States that there is no decided case anywhere that denies this doctrine. Cubbins v. Mississippi R. Co., 241 U. S. 351, 36 Sup. Ct. 671, 60 L. ed. 1041; Chesapeake &c. R. Co. v. Merriwether, 120 Va. 55, 91 S. E. 92.

[21] Frisbie v. Cowen, 18 App. (D. C.) 381; Chorman v. Queen Ann's R. Co., 3 Penn. (Del.) 407, 54 Atl. 687; Clay v. Pittsburg &c. R. Co., 164 Ind. 439, 73 N. E. 904; New Jersey &c. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420; Cleveland &c. R. Co. v. Griswold, 51 Ind. App. 497, 97 N. E. 1030; Ready v. Missouri Pac. R. Co., 98 Mo. App. 467, 72 S. W. 142; Lynch v. St. Louis &c. Ry. Co., 180 Mo. App. 169, 168 S. W. 224; Grimes v. St. Louis &c. R. Co., 184 Mo. App. 117, 168 S. W. 317; Wickham v. Lehigh Valley R. Co., 85 App. Div. 182, 83 N. Y. S. 146; Branson v. New York Cent. &c. R. Co., 111 App. Div. 737, 97 N. Y. S. 788; Rice v. Norfolk &c. R. Co., 130 N. Car. 375, 41 S. E. 1031; Craft v. Norfolk &c. R. Co., 136 N. Car. 49, 48 S. E. 519; Idabel v. Harrison, 42 Okla. 469, 141 Pac. 1110; Toole v. Delaware &c. R. Co., 27 Pa. Super. Ct. 577; Tyrus v. Kansas City &c. R. Co., 114 Tenn. 579, 86 S. W. 1074; Gulf &c. R. Co. v. Ryon (Tex. Civ. App.), 72 S. W. 72; Gulf &c. R. Co. v. Harbison (Tex. Civ. App.), 88 S. W. 452. See also Fleming v. Elgin &c. R. Co., 275 Ill. 486, 114 N. E. 187, and note in 12 L. R. A. (N. S.) 680, 682. This rule does not apply, however, as to storm water where the damage results from properly doing an act at the request of the landowner and as incidental thereto Kirkland &c. Co. v. Seaboard Air Line R., 109 S. Car. 331, 96 S. E. 122.

[22] Fremont &c. R. Co. v. Gayton, 67 Nebr. 263, 93 N. W. 163.

obeyed the railroad companies are not liable.[23] Under this statute it is not a defense that the company exercised due care in seeking to make sufficient outlets if it did not in fact do so.[24] The duty to construct these culverts cannot be delegated so as to absolve the company from liability for injuries resulting from failure to properly construct the culverts.[25] In the states accepting the civil law on this subject it is required that the railroad company should so construct the outlets as to provide for such heavy and extraordinary rain falls as may be reasonably anticipated in the locality.[26]

§ 1393. **Obstruction or diversion of waters continued—Damages—Measure of damages.**—It is the general rule, that the person entitled to the damages from flooded lands is the one who owned and was in possession of the land when the injury was done and not a subsequent purchaser.[27] The damages paid for

[23] See McFadden v. Missouri &c. R. Co., 41 Tex. Civ. App. 350, 92 S. W. 989; Houston &c. R. Co. v. Barr, 44 Tex. Civ. App. 571, 99 S. W. 437; Taylor v. San Antonio &c. R. Co., 36 Tex. Civ. App. 658, 83 S. W. 738; San Antonio &c. R. Co. v. Dickson, 42 Tex. Civ. App. 163, 93 S. W. 481.

[24] McFadden v. Missouri &c. R. Co., 41 Tex. Civ. App. 350, 92 S. W. 989; San Antonio &c. R. Co. v. Gurley, 37 Tex. Civ. App. 283, 83 S. W. 842; St. Louis &c. R. Co. v. Baer, 39 Tex. Civ. App. 16, 86 S. W. 653.

[25] Denison &c. R. Co. v. Barry, 98 Tex. 248, 80 S. W. 634, 83 S. W. 5.

[26] Houghtaling v. Chicago &c. R. Co., 117 Iowa 540, 91 N. W. 811; Texas &c. R. Co v. Whitaker, 36 Tex. Civ. App. 571, 82 S. W. 1051.

[27] Texas &c. R. Co. v. Brown (Tex. Civ. App.), 86 S. W. 659; Gulf &c. R. Co. v. Provo (Tex. Civ. App.), 84 S. W. 275; Fremont &c. R. Co. v. Gayton, 67 Nebr. 263, 93 N. W. 163. A railroad company changed the natural topography of a tract of land, which it then owned, by the digging of a ditch, so as to turn the surface water from its tract. Afterwards part of this tract, upon which was the ditch, was sold; the purchaser buying with the fact of the change having been made open to his observation. Upon his obstructing the ditch suit was brought. It was held that, so far as the defendant is concerned, the natural topography was and is the ground as it was located when he bought it, and he had no right to change what had thus become the natural topography by obstructions causing the water to flow upon the property of the railroad company. Louisville &c. R. Co. v. Binkley, 1 Tenn. Ch. App. 531.

the location of the road are generally held not to include damages from this source. The compensation for the land is estimated on the theory that the road will be constructed in a reasonably proper manner.[28] It has been held, that the question whether water has been diverted from its natural course is an issue of fact for the jury, while the effect of such diversion is a question of law for the court.[29] Where insufficient methods have been devised for allowing the flow of surface water through culverts in the roadbed, the company owning the road at the time of the injury is liable, at least after notice thereof, though the embankment was constructed by a predecessor.[30] The construction of an embankment in such a way as to prevent the flow of eighty per cent of the water through the openings has been held proof of negligent construction, in violation of the rights of adjoining land-owners.[31] In a state adopting the common-law view, it has been held that a railroad company may construct its road upon or across water courses and canals, but the law makes it the duty of such companies where they cross public ditches and drains, to restore them to their original state and usefulness.[32] The measure of damages for permanent in-

[28] Chicago &c. R. Co. v. Ely, 77 Nebr. 809, 110 N. W. 539; Childers v. Louisville &c. R. Co., 24 Ky. L. 2375, 74 S. W. 241.

[29] Rice v. Norfolk &c. R. Co., 130 N. Car. 375, 41 S. E. 1031.

[30] Chicago &c. R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166. It is held in Graham v. Chicago &c. R. Co., 39 Ind. App. 294, 77 N. E. 57, 1056, that where it is in defiance of statute the purchaser or grantee is liable no matter whether it has notice or not. But compare Cleveland &c. R. Co. v. Wisehart, 161 Ind. 208, 67 N. E. 993. A railroad company succeeding by foreclosure to obligations of its predecessor, which had constructed a ditch overflowing the plaintiff's land, was held not entitled to formal notice or demand from plaintiff before it could be held liable, in Irminger v. Wabash R. Co. (Mo. App.), 203 S. W. 660.

[31] Lampley v. Atlantic Coast Line R. Co., 63 S. Car. 462, 41 S. E. 517.

[32] Watts v. Evansville &c. R. Co. (Ind. App.), 120 N. E. 611; Southern R. Co. v. Weidenbrenner, 61 Ind. App. 314, 109 N. E. 926; Pittsburgh &c. R. Co. v. Greb, 34 Ind. App. 625, 73 N. E. 620; Terre Haute &c. R. Co. v. Soice, 128 Ind. 105, 107 27 N. E. 429; Lake Erie &c. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743; New York &c. R. Co. v. Hamlet Hay Co., 149 Ind. 344, 347, 47 N. E. 1060, 1061, 49 N. E. 269. But see as to where mandamus will not lie in such cases. State v. Board, 157

juries from flooding lands by the erection of these embankments, in jurisdictions where such damages are recoverable, has been held to be the depreciation in the value of the land, and is the difference in the value of the land immediately before and immediately after the overflow, and not the difference in value immediately before and after the construction of the embankment.[33] In other jurisdictions, in some instances at least, the measure of damages is held to be the difference in the rental value of the land before and after the injury.[34] In Missouri—a state recognizing the common-law theory—it is held that the measure of recovery for injuries caused by the collection of surface water on the railroad company's premises and its discharge in large quantities on the premises of another, is the actual damage sustained by the land owner up to the beginning of the action, and not the difference between the value of the land just before and just after the injury.[35] For injury to crops, the measure of damages is the value of the crop destroyed, and not the expense of the removal of the obstruction which was the efficient cause of the injury, particularly where the landowner to have removed such obstruction would have consti-

Ind. 96, 60 N. E. 939; State v. Minneapolis &c. R. Co., 28 N. Dak. 621; 150 N. W. 463 (distinguishing); Chicago &c. R. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596.

[33] Atlanta &c. R. Co. v. Higdon, 111 Tenn. 121, 76 S. W. 895; Denison &c. R. Co. v. Barry, 98 Tex. 248, 83 S. W. 5, modifying (Tex. Civ. App.) 80 S. W. 634; San Antonio &c. R. Co. v. Kiersey, 98 Tex. 590, 86 S. W. 744; Texas &c R. Co. v. Whitaker, 36 Tex. Civ. App. 571, 82 S. W. 1051; Houston &c. R. Co. v. Lensing (Tex. Civ. App.), 75 S. W. 826; Missouri &c. R. Co. v. Bell (Tex. Civ. App.), 93 S. W. 198; Missouri &c. R. Co. v. Green, 44 Tex. Civ. App. 247, 99 S. W. 573; San Antonio &c. R. Co. v. Pemberton (Tex. Civ. App.) 204 S. W. 253.

[34] Baltimore &c. R. Co. v. Quillen, 34 Ind. App. 330, 72 N. E. 661; Atchison &c. R. Co. v. Jones, 110 Ill. App. 626; Standley v. Atchison &c. R. Co., 121 Mo. App. 537, 97 S. W. 244. See also Dunn v. Chicago &c. Ry. Co., 63 Ind. App. 553, 114 N. E. 888. Where only part of a farm is overflowed it is held that damages to the soil may be allowed on the basis of the difference in value of the whole farm before and after, and the measure of damages to a leasehold is the difference in its value before and after. Straight Bros. Co. v. Chicago &c. R. Co., 183 Iowa 934, 167 N. W. 705.

[35] Ready v. Missouri &c. R. Co., 98 Mo. App. 467, 72 S. W. 142.

tuted himself a trespasser.[36] It has also been held, that the damages for the destruction of crops consists of the rental value of the land, the cost of fertilization, cost of preparation and cultivation of the crops, value of the services of the owner in overlooking the work, and interest on the amount lost until verdict.[37]

§ 1394. Duty of land-owners to prevent or minimize damages. —The railroad company is in no event liable for damages resulting from causes for which it was not responsible.[38] It has also been held that the land-owner on his part rests under the duty of using efforts to minimize his damages, and cannot recover damages which he could have prevented by the exercise of reasonable care. Thus, it has been held proper to admit evidence to prove that the owner of land which has been damaged by reason of obstruction of its system of drainage, could have lessened his damage by constructing another system.[39] And in several other cases it has been held to be the duty of the land-owner to make reasonable efforts to avoid or reduce damages.[40] But it seems that a tenant is not obliged to mini-

[36] Cincinnati &c. R. Co. v. Ward, 120 Ill. App. 212. See also Morse v. Chicago &c. R. Co., 81 Nebr. 745, 116 N. W. 859.

[37] Lampley v. Atlantic Coast Line R. Co., 53 S. Car. 462, 41 S. E. 517.

[38] Taylor v. San Antonio &c. R. Co., 36 Tex. Civ. App., 658, 83 S. W. 738. In an action against a railroad company for overflowing land by the construction of an embankment, it has been held that where the evidence shows that the embankment was partially constructed by another, acting independently of defendant, defendant would be liable only for the proportion of the injury contributed to by it; but, if both acted in concert, or if defendant consented to or participated in the conduct of such other in the construction of the embankment, both or either are liable for the entire damages resulting. San Antonio &c. R. Co. v. Gurley, 37 Tex. Civ. App. 283, 83 S. W. 842.

[39] Atchison &c R. Co. v. Jones, 116 Ill. App. 626. Southern R. Co. v. Poetker, 46 Ind. App. 295, 91 N. E. 610.

[40] Brous v. Wabash R. Co. 100 Iowa 701, 142 N. W. 416; Wood Mosaic Co. v. Britt, 150 Ky. 357, 150 S. W. 355. But see Galveston &c. R. Co. v. Ryan (Tex.), 21 S. W. 1013; Galveston &c. R. Co. v. Borsky, 2 Tex. Civ. App. 545, 21 S. W. 1011. Failure to do so, it is said, may mitigate but is not a complete defense. Belnap v. Widdison, 32

mize the injuries to his crops by so doing,[41] and he certainly should not be required to go to great and unreasonable expense in order to do it.

§ 1395 (1057h). Hastening the flow of surface water so as to injure land above.—In a recent Iowa case the rather unusual or uncommon question was presented as to whether a railroad company was liable in trespass for accelerating the flow of surface water from its land in such a manner as to draw it from the higher adjoining land so rapidly as to wear away the soil and make ditches in such upper land. It was held that the company was not liable.[42] The surface water was treated as a common enemy and the owner of the servient estate held entitled to get rid of it as best he could, except that he must receive the flowage and could not, therefore, by dams or artificial structures back it up and flood the dominant estate.[43] The right to accelerate or hasten the flow of surface water along the natural drainway or channel, within proper limits, even though it may incidentally increase the drainage going to the land of the lower land-owner, is included in the doctrine stated in a prior section and is established by the great weight of authority.[44]

Utah 246, 90 Pac. 393. In a late Iowa case it is held that the burden is on the company obstructing a drain on its right of way to show that the landowner whose land was thereby flooded knew of the obstruction and had a right to enter upon the right of way and remove the obstruction or change the course of the drain. Straight Bros. Co. v. Chicago &c. Ry. Co., 183 Iowa 934, 167 N. W. 705.

[41] Yazoo &c. R. Co. v. Sultan, 106 Miss. 373, 63 So. 672, 49 L. R. A. (N. S.) 760. See also Kankakee &c. R. Co. v. Horan, 23 Ill. App. 259, and Texas cases cited in last preceding note.

[42] Pohlman v. Chicago &c. R. Co. 131 Iowa 89, 107 N. W. 1025, 6 L. R. A. (N. S.) 146.

[43] The court said: "We can not conceive that any such further burden may be imposed (upon the owner of the servient estate). This must be so because the necessity out of which the servitude is born is obviously satisfied by acceptance at all times of the water to the extent of the natural flow. Where necessity ends, the reason for the rule, and hence the rule itself, ends."

[44] Jenkins v. Wilmington &c. R. Co., 110 N. Car. 438, 15 S. E. 193; Whitney v. Willamette Bridge R.

§ 1396 (1057i). Injuries from stagnant waters.—A railroad company is liable on the principle of nuisance, to an abutting owner where it constructs a ditch along its right of way in such a manner as to allow waters to collect therein and stagnate and pollute the air.[45] In cases of this character where the injury is temporary, the courts generally hold that the measure of damages is the depreciation in the rental value of the property during the time the nuisance exists. Where the injury is permanent the measure of damages has been held to be the difference in the market value of the land before and after the construction of the ditch.[46] It has also been held in many cases that there is no right, in the absence of statutory, prescriptive or contractual provision, to so drain ponds and marshes as to cause the water to flow upon the lower land of another to its detriment.[47]

§ 1397 (1057j). Other acts constituting a nuisance.—Notwithstanding the general rule that an action can not be maintained for incidental damages which are the result of loss or inconvenience, that is, the necessary consequence of an authorized thing done in an authorized manner and the principle, often invoked and sometimes misleading, that what the legislature has

Co., 23 Ore. 188, 31 Pac. 472; Manteufel v. Wetzel, 133 Wis. 619, 114 N. W. 91, 19 L. R. A. (N. S.) 167, and note citing many other cases to this effect and also to the effect that the limitation is that natural barriers must not be opened or removed and waters thus let on to the lower lands where they would not otherwise flow in that direction. See also Trigg v. Timmerman, 90 Wash. 678, 156 Pac. 846, L. R. A. 1916F 424, and note reviewing other recent cases.

[45] Cane Belt R. Co. v. Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496.

[46] Cane Belt R. Co. v. Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496.

[47] Hicks v. Silliman, 93 Ill. 255; Anderson v. Henderson, 124 Ill. 164, 16 N. E. 232; Jordan v. St. Paul &c. R. Co., 42 Minn. 172, 43 N. W. 849, 6 L. R. A. 573n; Cain v. South Bound R. Co., 62 S. Car. 23, 39 S. E. 792. But compare Launstein v. Launstein, 150 Mich. 524, 114 N. W. 383, 121 Am. St. 635; Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632n; Gilfillan v. Schmidt, 64 Minn. 29, 66 N. W. 126, 31 L. R. A. 547, 58 Am. St. 515; Arthur v. Glover, 82 Nebr. 528, 118 N. W. 111; Other cases on both sides are cited in the note in 19 L. R. A. (N. S.) 169-171.

authorized can not well be a nuisance, there are many other instances, in addition to those considered in preceding sections, in which railroad companies have been held liable in damages as for maintaining a nuisance or the like, although they were exercising an authorized power. In most, if not all of them, however, they were guilty of negligence or in some respect exercising the power in a manner not authorized. In a recent case a railroad company had erected and maintained, on a lot occupied by it outside its right of way, a spur track on a trestle ten feet high, extending within five or six feet of the line fence of the adjoining owners, who had acquired their property before the erection of the line, and extending to within about twenty-seven feet of their dwelling and sleeping apartments, and its cars were several times wrecked and dropped over toward the adjoining owners' dwelling, so that they had reasonable grounds to believe and did believe that they were in danger of being hurt, and it was held that the operation of the track constituted a nuisance, for which the railroad was liable.[48] An instruction was also approved, in the same case, to the effect that if trains were negligently operated upon such spur tracks, and kept adjoining owners in constant dread, and because of the proximity of the track to their house, and because of the soot, cinders and smoke, their house was rendered less valuable as a residence and was made uncomfortable and disagreeable to the owners, such facts, if proven by greater weight of evidence, constituted a nuisance, for which the defendant was liable. There are several other decisions in somewhat similar cases to much the same effect.[49] But, on the other hand, the mere con-

[48] Thomason v. Seaboard &c. Ry., 142 N. Car. 318, 55 S. E. 198. The court distinguished Romer v. Railway Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. 455, and Dolan v. Railroad, 118 Wis. 362, 95 N. W. 385. And another North Carolina case is to the same effect. Staton v. Atlantic &c. R. Co., 153 N. Car. 432, 69 S. E. 413.

[49] Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739; Chicago &c. R. Co. v. First Methodist Church, 162 Fed. 85, 50 L. R. A. 488; Willis v. Kentucky &c. Co., 20 Ky. L. 475, 46 S. W. 488; Ridge v. Pennsylvania R. Co., 58 N. J. Eq. 172, 43 Atl. 275; Bates v. Holbrook, 171 N. Y. 460, 64 N. E. 181; Louisville Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A.

struction and use of switch tracks or depots or even of switch yards, in a residence neighborhood, has been held not to render the company liable where they were authorized and due care was used in locating, constructing and operating the same.[50] Where a public road was laid out and opened to the ordinary width, and the statute required railroad companies to reconstruct any such road changed by them, it was held that it must be reconstructed of the original width and that if the company erected buildings of its own within the legal limits or extended a chute across it, though above the surface, the same would constitute a nuisance, and the company should be enjoined.[51] So, damages have been allowed to property owners whose access was cut off or seriously impeded by the obstruction of a street in constructing a railroad, even though the obstruction was not permanent but would terminate with the completion of the work of construction.[52]

188, and other cases cited in notes to ante, § 1380. See also Alabama &c. R. Co. v. King, 93 Miss. 379, 47 So. 857, 22 L. R. A. (N. S.) 603; Fisher v. Railroad, 102 Va. 363, 46 S. E. 381; Terrell v. Chesapeake &c. R. Co., 110 Va. 340, 66 S. E. 55, 32 L. R. A. (N. S.) 371 and note.

[50] Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; Walther v. Chicago &c. R. Co. 215 Ill. 456, 74 N. E. 461; Kilcoyn v. Chicago &c. R. Co., 141 Ky. 237, 132 S. W. 438; Romer v. Railway Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. 455; Herrlich v. New York &c. R. Co., 126 N. Y. S. 311; Church &c. v. Oregon Short Line R. Co., 36 Utah 238, 103 Pac. 243, 23 L. R. A. (N. S.) 860; Dolan v. Railroad, 118 Wis. 362, 95 N. W. 385. But compare Anderson v. Chicago &c. Ry. Co., 85 Minn. 337, 88 N. W. 1001. And see Matthias v. Minneapolis &c. R. Co., 125 Minn. 224, 146 N. W. 353. Cutting off view by raising grade of railroad or the like gives no right of action. Crofford v. Atlanta &c. R. Co., 158 Ala. 288, 48 So. 366; Kotz v. Illinois Cent. R. Co. 188 Ill. 578, 59 N. E. 240; Howell v. New York &c. R. Co., 221 Mass. 169, 108 N. E. 934, L. R. A. 1917C, 1131 and note on p. 1135; Houston &c. R. Co. v. Simpson (Tex. Civ. App.), 81 S. W. 353. See also upon the general subject, Richards v. Washington Terminal Co., 233 U. S. 546, 34 Sup. Ct. 654, 58 L. ed. 1088, L. R. A. 1915A, 887, and references there made in foot note; Stuhl v. Great Northern R. Co., 136 Minn. 158, 161 N. W. 501, L. R. A. 1917D 317, and note; Gordon v. Ellenville &c. R. Co., 195 N. Y. 137, 88 N. E. 14, 47 L. R. A. (N. S.) 463.

[51] Commonwealth v. Delaware &c. R. Co., 215 Pa. 149, 64 Atl. 417.

[52] McKeon v. New York &c. R. Co., 75 Conn. 343, 347, 53 Atl. 656.

§ 1398 (1058). Construction contracts—Invalid when made by directors with themselves.—It is said that it is against public policy to let contracts for the construction of a railroad to a director or officer of the company as "the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal"[53] and on the same grounds it has been held that such a contract cannot be assigned to a director or officer.[54] It has also been held that an agreement by which directors are to share with the contractor in the profits of a contract with the company can only be confirmed, so as to be binding, by the stockholders and not by the board of directors of which the guilty parties are a part,[55] and even if confirmed by the stockholders and the company, such a contract is open to attack by creditors or bondholders affected by the fraud and may be set aside by a court of equity.[56] Where a construction contract was

61 L. R. A. 730, reversed in 189 U. S. 508, 23 Sup. Ct. 853, 47 L. ed. 921. See also Putnam v. Boston &c. R. Co., 182 Mass. 351, 65 N. E. 790.

[53] Wardell v. Union Pac. R. Co., 4 Dill. (U. S.) 330; United States v. Union Pac. R. Co., 98 U. S. 569, 610, 25 L. ed. 143. Thomas v. Brownville Ft. K. & P. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. ed. 1018, 16 Am. & Eng. R. Cas. 557; Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. ed. 819; Gilman &c. R. Co. v. Kelly, 77 Ill. 426; Ryan v. Leavenworth &c. R. Co., 21 Kans. 365; European &c. R. Co. v. Poor, 59 Maine 277; Flint &c. R. Co. v. Dewey, 14 Mich. 477; Blake v. Buffalo &c. R. Co., 56 N. Y. 485. See also McGourkey v. Toledo & Ohio Central R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079. Stockholders or bondholders, or a corporation itself may bring suit to set aside a construction contract with a dominant stockholder for his own benefit. Central Trust Co. v. Bridges, 57 Fed. 753.

[54] Paine v. Lake Erie &c. R. Co., 31 Ind. 283; Flint &c. R. Co. v. Dewey, 14 Mich. 477.

[55] Paine v. Lake Erie &c. R. Co., 31 Ind. 283; Flint &c. R. Co. v. Dewey, 14 Mich. 477.

[56] Paine v. Lake Erie &c. R. Co., 31 Ind. 283. Such contracts when executed are voidable only upon attack by stockholders or existing creditors, i. e., parties affected by the fraud, and can not be denied on the same ground by the contractor. Robison v. McCracken, 52 Fed. 726, citing Barr v. New York &c. R. Co., 125 N. Y. 263, 26 N. E. 145; Thomas, Tr. v. Brownville Ft. K. & P. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. ed. 1018; Railroad Co. v. Durant, 95 U. S. 576, 24 L. ed. 391. See Union Pac.

otherwise free from fraud, however, the fact that the president of the company had an interest in it unknown to the directors, was held, in a comparatively recent case, not to render it absolutely void, and all parties interested having tacitly ratified the contract after discovering his interest they were not allowed to disaffirm it long afterwards.[57] But all such contracts are regarded with suspicion and, at least in the absence of good faith, are voidable, or according to some authorities, "void, upon the clearest principles of public policy."[58]

§ 1399. Construction contracts — Acceptances—Repudiation —Construction.—Where a construction contract is signed by the company only, but is assigned by the contractor, the assignment is held to be evidence of acceptance by the contractor,[59] and so on the other hand, a company can not repudiate a contract by questioning the authority of the officer who executed it, when the contractor has performed and received pay for a large portion of the work with the knowledge and ratification of the company, and the contractor may recover damages for a wrongful obstruction of the progress of his work.[60] So where contractors submitted bids to receivers for the completion of construction in accordance with the order of the court and a written contract was drawn up and signed by the contractors, and one of the receivers testified that the receivers accepted the

R. Co. v. Credit Mobilier, 135 Mass. 367, 16 Am. & Eng. R. Cas. 570.

[57] Augusta &c. R. Co. v. Kittel, 52 Fed. 63. A president of a railway corporation taking an assignment of such a contract will hold it in trust for the company. Risley v. Indianapolis &c. R. Co., 1 Hun (N. Y.), 202, 62 N. Y. 240.

[58] Antè, §§ 317, 403. Wardell v. Union Pac. R. Co., 4 Dill. (U. S.) 330, per Miller, J. See also Gilman &c. R. Co. v. Kelly, 77 Ill. 426; European &c. R. Co. v. Poor, 59 Maine 277; York &c. R. Co. v. Hudson, 19 Eng. L. & Eq. 365; Shepang Voting Trust Cases, 60 Conn. 553, 24 Atl. 32. In Union Pac. R. Co. v. Credit Mobilier, 135 Mass. 367, 16 Am. & Eng. R. Cas. 570, it was held that the granting of a construction contract to a company in which the railway officers were interested was not fraud where the railway stockholders had opportunity to become stockholders in the construction company.

[59] Western M. R. Co. v. Orendorff, 37 Md. 328.

[60] Buffalo &c. Co. v. Whitehead, 8 Grant's Ch. (U. C.) 157.

same while the other receiver knew the work was going on, but professed ignorance of the contract, it was held that the evidence justified a finding that the work was done under a valid contract with the receivers.[61] Contracts for the construction of railways are subject, in general, to the same rules of construction as other contracts,[62] but for the reason that the time within which a railroad must be completed is often prescribed in the charter of the company and that it is a matter of public concern that the road should be well and safely constructed, the law sometimes allows and enforces provisions in this class of con-

[61] Girard &c. Co. v. Cooper, 51 Fed. 332, 4 U. S. App. 631.

[62] Williams v. Chicago &c. R. Co., 153 Mo. 487, 54 S. W. 689; Baltimore &c. R. Co. v. Resley, 7 Md. 297. For construction of particular contracts, see Mansfield v. New York &c. R. Co., 102 N. Y. 205, 6 N. E. 386, 24 Am. & Eng. R. Cas. 628; Wright, assignee, v. Kentucky & Gt. E. R. Co., 117 U. S. 72, 6 Sup. Ct. 697, 29 L. ed. 821, 24 Am. & Eng. R. Cas. 312; Snell v. Cottingham, 72 Ill. 161; Laidlou v. Hatch, 75 Ill. 11; Ayres v. Chicago &c. R. Co., 52 Iowa 478, 3 N. W. 522; Louisville &c. R. Co. v. Holerbach, 105 Ind. 137, 5 N. E. 28, 24 Am. & Eng. R. Cas. 340; Brownlee v. Lowe, 117 Ind. 420, 20 N. E. 301; Hutchinson v. New Sharon &c. R. Co., 63 Iowa 727, 18 N. W. 915, 16 Am. & Eng. R. Cas. 617; Campbell v. Trustees of Cincinnati &c. Co., 9 Ky. L. 799, 6 S. W. 337, 34 Am. & Eng. R. Cas. 113; Dudley v. Toledo &c. R. Co., 65 Mich. 655, 32 N. W. 884, 30 Am. & Eng. R. Cas. 236; Smith v. Boston &c. R. Co., 35 N. H. 458; Woodruff v. Rochester &c. R. Co., 108 N. Y. 39, 14 N. E. 832; Wolff v. McGavock, 29 Wis. 290. Time of payment where not specified. Boody v. Rutland &c. R. Co., 24 Vt. 660. Payment on forfeiture. Hennessey v. Farrell, 4 Cush. (Mass.) 267; Phelan v. Albany &c. R. Co., 1 Lans. (N. Y.) 258. On contract to construct road-bed between two towns, construction to the corporate limits of each will not complete performance. Western Union R. Co. v. Smith, 75 Ill. 496. The practical construction given by the parties should control. Galveston &c. R. Co. v. Johnson, 74 Tex. 256, 11 S. W. 1113. As to classification of material, provisions as to "hard pan," "solid rock," and the like, see Choctaw &c. R. Co. v. Newton, 140 Fed. 225; Fruin-Bambrick Const. Co. v. Ft. Smith &c. R. Co., 140 Fed. 465; Fruin v. Crystal R. Co., 89 Mo. 397, 14 S. W. 557; Wilkin v. Ellersburg Water Co., 1 Wash. 236, 24 Pac. 460. As to the written terms of the contract generally controlling specifications, see Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937; Early v. O'Brien, 51 App. Div. 569, 64 N. Y. S. 848; Harvey v. United States, 8 Ct. of Cl. 501.

tracts which would not usually be binding in ordinary contracts. The right to terminate the contracts is often reserved to the railway company, when, in its opinion, the work is not progressing properly, or the contractor is not duly complying with the provisions of the contract, or his acts are negligent and wrongful.[63] Such a reservation is not equivalent to an arbitrary power to terminate a contract without cause and must be exercised in good faith,[64] but the burden is upon the contractor to show a fraudulent exercise of the reserved power.[65] Although the right be enforced and the contract thus terminated the contractor will not thereby necessarily forfeit such money as he had already earned.[66] It is not unusual for the contract to contain

[63] The validity of such reservations is denied by some authorities which hold that they do not preclude resort to the courts. Kistler v. Indianapolis &c. R. Co., 88 Ind. 460, 12 Am. & Eng. R. Cas. 314; Louisville &c. R. Co. v. Donnegan, 111 Ind. 179, 12 N. E. 153, 34 Am. & Eng. R. Cas. 116. See also Starkey v. DeGraff, 22 Minn. 431. But the weight of authority sustains the doctrine that such a stipulation precludes an action at law concerning the matters embraced in the stipulation, unless the estimate of the arbiter is assailed by allegations of fraud or gross error implying bad faith. See Grant v. Savannah &c. R. Co., 51 Ga. 348; Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035; 29 L. ed. 255; Chicago S. F. & C. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. ed. 917, 47 Am. & Eng. R. Cas. 298; Fox v. Hempfield R. Co., 2 Abb. (U. S.) 151; Lauman v. Young, 31 Pa. St. 306, and cases cited.

[64] Philadelphia W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157, 1 Am. R. Cas. 70; Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; Wood v. Chicago &c. R. Co., 39 Fed. 52. However, it has been held that a provision in the contract making the company itself sole arbiter is valid and binding. Gray v. Central R. Co., 11 Hun (N. Y.) 70.

[65] Where the contract provides that the estimate of the engineer shall be final and conclusive it will stand until impeached by evidence of fraud or such gross mistake as would imply bad faith. Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255. Citing Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; Sweeney v. United States, 109 U. S. 618, 27 L. ed. 1053; Wood v. Chicago &c. R. Co., 39 Fed. 52. See also Indianapolis Northern Tract. Co. v. Brennan, 174 Ind. 1, 87 N. E. 215 (citing text), 90 N. E. 65, 68, 91 N. E. 503.

[66] Philadelphia W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157, 1 Am. Ry. Cas. 70;

a provision that the contractor shall pay or forfeit a certain sum as liquidated damages, for delay in the work or other deviations from the terms of the agreement, and even though it may be called a penalty such sum may be regarded as in the nature of liquidated damages,[67] at least where it is reasonable and such appears to have been the intention. Provision is also sometimes made for payment, in part at least in bonds and stock of the company, and this has been held valid.[68] In defense to a suit

Memphis &c. R. Co. v. Wilcox, 48 Penn. St. 161. In case of such termination of the contract any percentum reserve retained by the company out of the previous earnings does not inure to the company, but is at once payable to the contractor, less damages incurred, if any, by failure of the contractor to perform. Philadelphia W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157, 1 Am. R. Cas. 70. Unless the reserve fund is forfeited by terms of the contract. Hennessey v. Farrell, 4 Cush. (Mass.) 267.

[67] Philadelphia W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157; Texas &c. R. Co. v. Rust, 19 Fed. 239; Nilson v. Jonesboro, 57 Ark. 168, 20 S. W. 1093; Wolf v. Des Moines &c. R. Co., 64 Iowa 380, 20 N. W. 481; Elizabethtown &c. R. Co. v. Geoghegan, 9 Bush. (Ky.) 56; Geiger v. Western &c. R. Co., 41 Md. 4; Easton v. Penn. &c. Canal Co., 13 Ohio 79; Faunce v. Burke, 16 Pa. St. 469, 55 Am. Dec. 519; Ranger v. Great Western R., 5 Ho. Lds. Cas. 72, 27 Eng. L. & Eq. Cas. 35, 61. See also Alcoy &c. R. Co. v. Greenhill, 76 L. T. N. S. 542; Florida Northern R. Co. v. Southern &c. Co., 112 Ga. 1, 37 S. E. 130. But see Cochran v. People's R. Co., 113 Mo. 359, 21 S. W. 6; Clements v. Schuylkill &c. R. Co., 132 Pa. St. 445, 19 Atl. 274. See generally 3 Elliott Ev. § 2000; 2 Elliott Cont. §§ 1559, 1563, 2126; 8 Elliott Cont. § 2125, et seq. (courts are inclined to construe such provisions as for penalties rather than liquidated damages in case of doubt). As to value of use of railroad as measure of damages, see Snell v. Cottingham, 72 Ill. 161; but compare Washington &c. R. Co. v. American Car Co., 5 App. Cas. (D. C.) 524. For case in which time was held not to be of the essence of the contract, see Cleveland &c. R. Co. v. Scott, 39 Ind. App. 420, 79 N. E. 226.

[68] See Wells v. Northern Trust Co., 195 Ill. 288, 63 N. E. 136; Orange &c. R. Co. v. Placide, 35 Md. 315; Hatch v. Minnesota &c. Const. Co., 26 Minn. 451; Barr v. New York &c. R. Co., 125 N. Y. 263, 26 N. E. 145; Cleveland &c. R. Co. v. Kelly, 5 Ohio St. 180; McElrath v. Pittsburg &c. R. Co., 55 Pa. St. 189; Boody v. Rutland &c. R. Co., 24 Vt. 660; Kidwell v. Baltimore &c. R. Co., 11 Grat. (Va.) 676.

against the company for damages arising from a termination of the contract the company may show the inability of the contractor to perform his obligations and it is not necessary that the company wait until too late to complete the contract before terminating it and thus delay the enterprise when it is obvious that the contractor is unable to perform.[69] But the company has no right to terminate a contract on account of the insolvency of the surety without giving the contractor opportunity to furnish new surety.[70]

§ 1400 (1058a). Construction of particular terms.—Cases illustrating the rules of construction and showing the interpretation of many particular contracts are cited in a note to the last preceding section.[71] The classification of material and the construction of many more or less technical terms will often be found somewhat difficult. Many of the terms used in such contracts have come before the courts, and, while other meaning must sometimes depend upon the contest, a reference to the cases in which their meaning has been determined or considered will be of value in determining the meaning of the same term in any particular contract or case. We shall not attempt to define such terms, as they can be better understood by consulting the decisions to which reference is made. Among the terms that have been construed, defined or considered by the courts are "hard pan,"[72] "solid rock,"[73] "loose rock,"[74] "grad-

[69] Waco Tap. R. Co. v. Shirley, 45 Tex. 355, 13 Am. Rep. 233. But a contractor may recover in a proper case even where a contract is conditioned upon the railroad company securing a certain right of way if it is the companys' own fault that the right of way was not obtained. St. Louis &c. R. Co. v. Hall, 186 Ala. 353, 65 So. 33.

[70] Waco Tap. R. Co. v. Shirley, 45 Tex. 355, 13 Am. Rep. 233.

[71] See ante, § 1399, note 62.

[72] Mansfield &c. R. Co. v. Veeder, 17 Ohio 385; Fruin v. Crystal R. Co., 89 Mo. 397, 14 S. W. 557; Choctaw &c. R. Co. v. Newton, 140 Fed. 225, 236. See also Williams v. Chicago &c. R. Co., 153 Mo. 487, 54 S. W. 689.

[73] Fruin-Bambrick Const. Co. v. Ft. Smith &c. Co., 140 Fed. 405. See also Fruin v. Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

[74] Lewis v. Chicago &c. R. Co., 49 Fed. 708. "Rock excavation," Dhrew v. Altoona, 121 Pa. 401, 15 Atl. 636. "Earth," Nesbitt v. Louisville &c. R. Co., 2 Spears L. (S. Car.) 697.

ing,"[75] "surfaced,"[76] "filling in,"[77] "build and complete road,"[78] "between termini,"[79] and "borrow pits."[80]

§ 1401 (1059). **Engineers' estimates and certificates.**—Contracts for the construction of railways ordinarily contain stipulations that the company's engineer shall make estimates as to the value, character and progress of the work, and that his decision shall be conclusive and binding upon both parties. Such stipulations are upheld as founded upon a consideration which enters into and becomes a part of the contract.[81] Unlike a submission to arbitration, which can usually be withdrawn before an award is made, these stipulations, having been made upon a consideration, have been held irrevocable in the absence of fraud in the procurement of the contract.[82] This view has been criticised by some of the courts on the ground that any agreement

[75] Snell v. Cottingham, 72 Ill. 161.

[76] Western &c. R. Co. v. Smith, 75 Ill. 496.

[77] East Tenn. &c. R. Co. v. Matthews, 85 Ga. 457, 11 S. E. 841.

[78] Central Trust Co. v. Condon, 67 Fed. 84; Barker v. Troy &c. R. Co., 27 Vt. 766.

[79] Western &c. R. Co. v. Smith, 75 Ill. 496.

[80] Choctaw &c. R. Co. v. Newton, 140 Fed. 225, 235. See also Fruin-Bambrick Const. Co. v. Ft. Smith &c. R. Co., 140 Fed. 465, 469.

[81] Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1635, 29 L. ed. 255; Summers v. Chicago &c. R. Co., 49 Fed. 714; Denver &c. Construction Co. v. Stout, 8 Colo. 61 5 Pac. 627; Snell v. Brown, 71 Ill. 133; Mitchell v. Kavanagh, 38 Iowa 286; Wilson v. York &c. R. Co., 11 Gill & J. (Md.) 58; Williams v. Chicago &c. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403; McMahon v. New York &c. R. Co., 20 N. Y. 463; Delaware &c. R. Co. v. Penn. Coal Co., 50 N. Y. 250; Easton v. Penn &c. Canal Co., 13 Ohio 79; Mansfield &c. R. Co. v. Veeder, 17 Ohio 385; Lauman v. Young, 31 Pa. St. 306; O'Reilly v. Kerns, 52 Pa. St. 214; Howard v. Allegheny &c. R. Co., 69 Pa. St. 489; McCauley v. Keller, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. 758, 40 Am. & Eng. R. Cas. 509; Vanderwerker v. Vermont &c. R. Co., 27 Vt. 130; Herrick v. Belknap's Estate and Vermont &c. R. Co., 27 Vt. 673; Candon v. Southside R. Co., 14 Grat. (Va.) 302. See also Kansas City &c. R. Co. v. Perkins, 88 Tex. 66, 29 S. W. 1048; Fruin-Bambrick Const. Co. v. Ft. Smith &c. R. Co., 140 Fed. 465.

[82] Denver &c. Construction Co. v. Stout, 8 Colo. 61; Herrick v. Belknap's Estate and Vermont &c. R. Co., 27 Vt. 673; O'Reilly v. Kerns, 52 Pa. St. 214; Howard v. Allegheny &c. R. Co., 69 Pa. St. 489.

intended to preclude resort to the courts would, if valid, render the contract as a basis for legal redress wholly idle, and as against public policy and void,[83] and such seems to be the doctrine announced in other analogous cases,[84] but the large majority of American cases involving contracts for the construction of railroads uphold the validity of such an agreement.[85] Even those authorities, however, which maintain most strongly the validity of such stipulations agree that an estimate or certificate which is fraudulent or so grossly erroneous as to imply bad faith on the part of the engineer may be corrected by a court of equity,[86] and that in case estimates are not furnished at

[83] Kistler v. Indianapolis &c. R. Co., 88 Ind. 460, 12 Am. & Eng. R. Cas. 314; Louisville &c. R. Co. v. Donnegan, 111 Ind. 179, 12 N. E. 153, 34 Am. & Eng. R. Cas. 116; Bauer v. Samson Lodge, 102 Ind. 262, 1 N. E. 571. See 1 Elliott Gen. Pr., § 404, and authorities cited on general question. Also Hart v. Lauman, 29 Barb. (N. Y.) 410.

[84] It has been decided in many cases that parties can not by contract oust the courts of their ordinary jurisdiction. The clause requiring arbitration is not a condition precedent, but is an independent covenant, for whose breach damages may be recovered in an independent action, but which can not be pleaded in bar of abatement of a suit on the insurance certificate. Smith v. Preferred &c. Assn., 51 Fed. 520; Laflin v. Chicago &c. R. Co., 34 Fed. 859; Tobey v. Bristol, 3 Story (U. S.) 800; Scott v. Avery, 4 H. L. Cas. 811.

[85] Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; Chicago S. F. & C. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. ed. 917, 47 Am. & Eng. R. Cas. 298; Fox v. Hempfield R. Co., 2 Abb. (U. S.) 151; Wood v. Chicago &c. R. Co., 39 Fed. 52; Lewis v. Chicago &c. Co., 49 Fed. 708; Mundy v. Louisville &c. R. Co., 57 Fed. 633; Choctaw &c. R. Co. v. Newton, 140 Fed. 465; St. Paul &c. R. Co. v. Bradbury, 42 Minn. 222, 44 N. W. 1; Williams v. Chicago &c. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403, 59 Am. & Eng. R. Cas. 4; note to Williams v. Mt. Hood R. &c. Co., 57 Ore. 251, 110 Pac. 490, 111 Pac. 17, in Ann. Cas. 1913A, 177, 181, where additional authorities are cited; Lauman v. Young, 31 Pa. St. 306; Galveston &c. R. Co. v. Henry, 65 Tex. 685, 25 Am. & Eng. R. Cas. 265; Kidwell v. Baltimore &c. R. Co., 11 Grat. (Va.) 676. Under a contract which provided that in case of dispute the decision of the engineer should be final and conclusive, a suit can not be maintained. Howard v. Allegheny &c. R. Co., 69 Pa. St. 489; Reynolds v. Caldwell, 51 Pa. St. 298; O'Reilly v. Kerns, 52 Pa. St. 214.

[86] Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; Martins-

the proper time, the contractor may otherwise prove the value of his work.[87] It is well-settled that the engineer's decision can be conclusive only as to matters designated in the contract, and that his powers can not be extended by implication,[88] but there is some difference among the authorities which uphold these stipulations as to how far and over what subjects the enigneer's authority extends.[89]

burg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; Wood v. Chicago &c. R. Co., 59 Fed. 52; Grant v. Savannah &c. R. Co., 51 Ga. 348; Gray v. Central Railroad Co., 11 Hun (N. Y.) 70; O'Reilly v. Kerns, 52 Pa. St. 214; Herrick v. Belknap's Est. & Vermont &c. R. Co., 27 Vt. 673; Kidwell v. Baltimore &c. R. Co., 11 Grat. (Va.) 676; Baltimore &c. R. Co. v. Polly, 14 Grat. (Va.) 447; Baltimore &c. R. Co. v. Laffertys, 14 Grat. (Va.) 478. Engineers estimates are not binding when so plainly a violation of the terms of the contract so as to amount to fraud. Mills v Norfolk &c. R. Co., 96 Va. 523, 19 S. E. 171. See also Boston Store v. Schleuter, 88 Ark. 213, 114 S. W. 242; Indianapolis Northern Tract. Co. v. Brennan, 174 Ind. 1, 87 N. E. 215, 226 (citing text), 90 N. E. 65, 68, 91 N. E. 503; Frohlich v. Klein, 160 Mich. 142, 125 N. W. 14; Dorwin v. Westbrook, 86 Hun 363, 33 N. Y. S. 449; Isle v. Aetna Indemnity Co, 55 Wash. 487, 104 Pac. 789.

[87] Fletcher v. New Orleans &c. R. Co., 19 Fed. 731; Crumlish v. Wilmington &c. R. Co., 5 Del. Ch. 270; Crawford v. Wolf, 29 Iowa 567; Starkey v DeGraff, 22 Minn. 431; Bean v. Miller, 69 Mo. 384; Williams v. Chicago &c. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403, 59 Am. & Eng. R. Cas. 4; McMahon v. New York &c. R. Co., 20 N. Y. 463; Herrick v. Belknap's Est. & Vt. &c. R. Co., 27 Vt. 673.

[88] Denver &c. R. Co. v. Riley, 7 Colo. 494, 4 Pac. 785; Campbell v. Trustees Cincinnati &c. R. Co., 9 Ky. L. 799, 6 S. W. 337, 34 Am. & Eng. R. Cas. 113, Annapolis &c. R. Co. v. Ross, 68 Md. 310, 11 Atl. 820; Starkey v. DeGraff, 22 Minn. 431, 18 Am. Rep. 444; Lauman v. Young, 31 Pa. St. 306; Hostetter v. Pittsburgh, 107 Pa. St. 419; Drhew v. Altoona City, 121 Pa. St. 401, 15 Atl. 636; McGovern v. Bockius, 10 Phila. (Pa.) 438; Galveston &c. R. Co. v. Henry, 65 Tex. 685, 25 Am. & Eng. R. Cas. 265. See also Gubbins v. Lautenschlager, 74 Fed. 160; Gammino v. Dedham, 164 Fed. 593; Derby Desk Co. v. Conners Bair Constr. Co., 204 Mass. 461, 90 N. E. 543. He can not alter the terms of the contract. Sharpe v. San Paulo &c. R. Co., 27 L. T. R. 699, L. R. 8 Ch. App. Cas. 605n. Where there is an essential alteration of the written contract the engineer's decision will not be conclusive as to the alterations, nor to the balance of the contract if not separated. Malone v. Philadelphia &c. R. Co., 157 Pa. St. 430, 27 Atl. 756.

[89] See Williams v. Mt. Hood &c.

§ 1402 (1059a). Engineer's decision—Fraud—What is covered.[90]—Many well-reasoned decisions hold that clear proof of fraud or of such gross error as necessarily implies bad faith is necessary in order to successfully assail the engineer's certificate.[91] There are other decisions to the effect that the courts will relieve against mistakes in measurements and calculation that are apparent on the face of the estimate, or that can be clearly proved, although the contract contains a provision that the engineer's decision upon "every question which can or may arise between the parties in the execution of this contract shall be final."[92] It is held by still other courts that it is in the

R. Co., 57 Ore. 251, 110 Pac. 490, 111 Pac. 17, Ann. Cas. 1913A, 177, and note, and see generally upon the entire subject of this and the next section Elliott Cont. §§ 1601, 1602, 3641, 3659.

[90] Part of this section was originally part of § 1401.

[91] If the engineer's decision in such case be honest and does not appear to be tainted with fraud, it will stand, even if somewhat arbitrary and unreasonable. Kidwell v. Baltimore &c. R. Co., 11 Grat. (Va.) 776; Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; Sweeney v. United States, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. ed. 1053; Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446; Central &c. R. Co. v. Spurck, 24 Ill. 587; Gibson v. Cranage, 39 Mich. 49; Yeats v. Ballentine, 56 Mo. 530; Gray v. Central R. Co., 11 Hun (N. Y.) 70; Sweet v. Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. 376; McCauley v. Keller, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. 758, 40 Am. & Eng. R. Cas. 509; Bowman v. Stewart, 165 Pa. St. 394, 30 Atl. 988.

[92] Lewis v. Chicago &c. R. Co., 49 Fed. 708. Engineer's estimates may be avoided in chancery on ground of fraud, gross negligence or mistake of fact. Wood v. Chicago &c. R. Co., 39 Fed. 52. "The most irrefragable proof of mistake in fact" may be ground for recovery. Vanderwerker v. Vermont &c. R. Co., 27 Vt. 130. A court of equity has power to correct the estimate for fraud or mistake. Mansfield &c. R. Co. v. Veeder, 17 Ohio 385. See also Baltimore &c. R. Co. v. Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. 307 and note; Indianapolis Northern Tract. Co. v. Brennan, 174 Ind. 1, 87 N. E. 215, 226 (citing text), 90 N. E. 65, 68, 91 N. E. 503; Williams v. Chicago &c. R. Co., 112 Mo. 463, 20 S. W. 631; Norfolk &c. R. Co. v. Mills, 91 Va. 613, 22 S. E. 556; Central Trust Co. v. Louisville &c. R. Co., 70 Fed. 282. The estimate of the engineer is to be tested by its correctness. Memphis &c. R. Co. v. Wilcox, 48 Pa. St. 161. The presumption is that the engineer's

province of the court to construe the agreement, and that the engineer's general authority to conclusively decide all questions arising between the parties does not extend to questions of construction of the contract.[93] Decisions of the engineer as to the quality of material, efficiency of work, or any question involving the judgment and skill of the engineer will not be disturbed unless bad faith is proven.[94] In a recent decision the general rule is stated that in order to successfully attack the engineer's decision, it must be shown that he "was guilty of collusion or fraud or exhibited such an arbitrary and wanton disregard of the complainant's plain rights under the contract as to be equivalent to fraud, or committed errors or mistakes to the complainant's prejudice so gross and palpable as to leave no doubt in the mind of the court that grave injustice was done."[95] In order that the engineer's certificate shall be conclusive the contract must expressly stipulate that his estimate shall be a final adjudication of disputed matters, and it must be plain that the

measurements are correct and the burden is upon the plaintiff to overthrow them. Torrance v. Amsden, 3 McLean (U. S.) 509; Bumpass v. Webb, 4 Port. (Ala.) 65, 29 Am. Dec. 274; Pleasants &c. Co. v. Ross, 1 Wash. (Va.) 156, 1 Am. Dec. 449.

[93] Martinsburg &c. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; King Iron Bridge &c. Co. v. St. Louis, 43 Fed. 768, 10 L. R. A. 826 and note; Lewis v. Chicago &c. R. Co., 49 Fed. 708; Gammino v. Dedham, 164 Fed. 593; Galveston &c. R. Co. v. Henry & Dilley, 65 Tex. 685, 25 Am. & Eng. R. Cas. 265; Galveston &c. R. Co. v. Johnson, 74 Tex. 256; 11 S. W. 1113. If the engineer bases his estimates upon an erroneous view of the contract they will not conclude the parties. McAvoy v. Long, 13 Ill. 147; Alton &c. R. Co. v. Northcott, 15 Ill. 49. It is presumed that the parties contract "to abide by a legal award and not an illegal award." Atlanta &c. R. Co. v. Mangham & Prickett, 49 Ga. 260. But if the contractor accepts an estimate based upon a particular construction of the contract he is bound by it. Kidwell v. Baltimore &c. R. Co., 11 Grat. (Va.) 676.

[94] Ranger v. Great Western &c. R. Co., 1 Eng. R. & Canal Cas. 1, 13 Simons 368; Lewis v. Chicago &c. R. Co., 49 Fed. 708.

[95] Frnin-Bambrick Const. Co. v. Ft. Smith &c. R. Co., 140 Fed. 465, 468. Citing Mundy v. Louisville &c. R. Co., 67 Fed. 633; Lewis v. Chicago &c. R. Co., 49 Fed. 708; Choctaw &c. R. Co. v. Newton, 140 Fed. 225. In the first case cited the evidence was held sufficient to show collusion and bad faith.

subject is clearly within the submission as his absolute authority can not be extended by implication.[96] It is the general rule that an engineer is not disqualified by reason of being a stockholder in the company, for he is employed by and stands for the company by which he is paid, and ownership of stock does not change his relation to the parties,[97] but it has been held that where an engineer was a stockholder in the company, and that fact was unknown to the contractors at the time of the agreement making him arbitrator, he was by that reason disqualified and his award was set aside by a court of equity.[98] A duty rests upon the company to employ competent and trustworthy engineers, and to see that estimates are made in a proper time and

[96] Mercantile Trust Co. v. Hensey, 205 U. S. 298, 27 Sup Ct. 535, 51 L. ed. 811, 10 Ann. Cas. 572; Lauman v. Young, 31 Pa. St. 306; Williams v. Mt. Hood R. &c. Co., 57 Ore. 251, 110 Pac. 490, 111 Pac. 17, Ann. Cas. 1913A, 177 and note; Memphis &c. R. Co. v. Wilcox, 48 Pa. St. 161; Hostetter v. Pittsburgh 107 Pa. St. 419; Drhew v. Altoona City, 121 Pa. St. 401, 15 Atl. 636. A provision in a construction contract that there should be a final estimate, by the engineer, of the quantity, character and value of the work according to the terms of the contract, and that upon receiving this certificate and signing a release, the contractor should be paid in full, does not bind the contractor to accept the engineer's estimate as final and conclusive. Central Trust Co. v. Louisville &c. R. Co., 70 Fed. 282. The engineer can not, ordinarily, change the contract and thereby bind the company. Baltimore &c. R. Co. v. Jolly Bros., 71 Ohio St. 92, 72 N. E. 888. See also White v. San Rafael &c. R. Co., 50 Cal. 417; Thayer v. Vermont Cent. R. Co., 24 Vt. 440; Alexander v. Robertson, 86 Tex. 511, 26 S. W. 41.

[97] Williams v. Chicago &c. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403, 59 Am. & Eng. R. Cas. 4; Smith v. Boston &c. Railroad, 30 N. H. 458; Monongahela Navigation Co. v. Fenlon, 4 Watts and S. (Pa.) 205; Faunce v. Burke, 10 Pa. St. 469, 55 Am. Dec. 519; Baltimore &c. R. Co. v. Polly, 14 Grat. (Va.) 447; Ranger v. Great Western &c. R. Co., 5 H. L. Cas. 72. The company itself may be the sole arbiter. Gray v. Central R. Co., 11 Hun (N. Y.) 70. It is held that the engineer of a railway company is not disqualified from certifying payments to a contractor although he has become lessee of the railway and the amount of rent depends upon the payments so certified. Hill v. South Staffordshire R. Co., 11 Jur. N. S. 192, 12 L. T. R. 63. But it seems to us that this case carries the doctrine beyond reasonable limits.

[98] Milnor v. Georgia &c. R. Co., 4 Ga. 385.

manner,[99] and in one case it was held that, where the contract provides that the decision of the engineer shall be final, as to measurements and estimates of the amount of labor performed, the contractor is entitled to notice and opportunity to be present and is not concluded by measurements made ex parte.[1] Standing, as he does, in the employ of one of the parties, it is held in some jurisdictions that the estimates and awards of the engineer should receive the closest scrutiny of the courts.[2] Where an estimate by the engineer is required by the terms of the agreement before either an installment or final payment may be demanded, such stipulation is held to be a condition precedent to payment, and the parties, if a dispute arises, must refer the matter in question to the tribunal provided by the contract before resort may be had to the courts,[3] but if the engineer fails or refuses to make estimates or render decisions, it is held that an action at law will lie for compensation.[4] Estimates hav-

[99] Smith v. Boston &c. R. Co., 36 N. H. 458; Herrick v. Belknap's Est. and Vermont &c. R. Co., 27 Vt. 673; McMahon v. New York &c. R. Co., 20 N. Y. 463; Kistler v. Indianapolis &c. R. Co., 88 Ind. 460. See Washington Bridge Co. v. Land &c. Co., 12 Wash. 272, 40 Pac. 982.

[1] McMahon v. New York &c. R. Co., 20 N. Y. 463. See also Wilson v. York &c. R. Co., 11 Gill & J. (Md.) 58.

[2] Wood v. Chicago &c. R. Co., 39 Fed. 52.

[3] United States v. Robeson, 9 Pet. (U. S.) 319, 9 L. ed. 142; Fox v. The Railroad, 3 Wall. (U. S.) Jr. 243; Humaston v. Telegraph Co., 20 Wall. (U. S.) 20, 22 L. ed. 279; McNamara v. Harrison, 81 Iowa 486, 46 N. W. 976; President &c. Delaware &c. Canal Co. v. Pennsylvania &c. Co., 50 N. Y. 50; Reynolds v. Caldwell, 51 Pa. St. 298; Herrick v. Belknap's Est. and Vermont &c. R. Co., 27 Vt. 673; Jackson v. Cleveland, 19 Wis. 400; Hudson v. McCartney, 33 Wis. 331. See also Elliott Cont. §§ 1601, 3730. It is held in Pennsylvania that the contractor is not entitled to an action in court against the company unless the action of the engineer has been influenced by the company. Reynolds v. Caldwell, 51 Pa. St. 298; Howard v. Allegheny &c. R. Co., 69 Pa. St. 489.

[4] Starkey v. DeGraff, 22 Minn. 431; Wood v. Chicago &c. R. Co., 39 Fed. 52; Kistler v. Indianapolis &c. R. Co., 88 Ind. 460; United States v. Robeson, 9 Pet. (U. S.) 319, 326, 9 L. ed. 142; Herrick v. Belknap's Est. & Vermont &c. R. Co., 27 Vt. 673. See also St. Louis &c. R. Co. v. Kerr, 153 Ill. 182, 38 N E. 638. If the company should fail to appoint an engineer the contractor has right to action at

ing been made or decisions rendered, it has been held that relief can only be found in a court of equity.[5] It has been held that in case of fraudulent estimates, the remedy of the contractor is against the engineer guilty of the fraud, and not against the company,[6] but it seems to us that this decision is unsound, as the engineer, while in one sense an arbitrator, is employed and paid by the company, and stands in its place, and good conscience will not allow the company to profit by his fraud and thus escape liability to the contractor. If the contract provides that the company's engineer shall himself measure and estimate the work, it is essential that its terms be strictly complied with, and an estimate made by a third person, although approved by the engineer, is not binding,[7] but it has been held that if it is provided that the "engineer's certificates" shall be final, the actual measurements and estimates may be made by subordinates.[8] This is determined, of course, by the language of the particular contract. The same rules as to the validity and binding force of engineer's estimates and certificates are held to

law. North Lebanon &c. R. Co. v. McGrann, 33 Pa. St. 530, 75 Am. Dec. 624. Unreasonable delay in making estimates, if from fault of company or engineer, entitles the contractor to bring an action at law. Grant v. Savannah &c. R. Co., 51 Ga. 348; Atlanta &c. R. Co. v. Mangham & Prickett, 49 Ga. 266. A request made to the company for such estimates is sufficient, and if they are not produced recovery may be had upon other evidence. McMahon v. New York &c. R. Co., 20 N. Y. 463. But see McIntosh v. Great Western &c. R. Co., 2 De G. & S. 758.

[5] Martinsburg & P. R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; Wood v. Chicago &c. R. Co., 39 Fed. 52; Grant v. Savannah &c. Railroad Co., 51 Ga. 348; Mansfield &c. R. Co. v. Veeder, 17 Ohio 385; Lauman v. Young, 31 Pa. St. 306; Sharpe v. San Paulo Railway Co., L. R. 8 Ch. 597.

[6] Reynolds v. Caldwell, 51 Pa. St. 298; Howard v. Allegheny &c. R. Co., 69 Pa. St. 489.

[7] Wilson v. York &c. R. Co., 11 Gill & J. (Md.) 38; Snell v. Brown, 71 Ill. 133. See North Lebanon R. Co. v. McGrann, 33 Pa. St. 530; 75 Am. Dec. 624; Sweet v. Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. 376; McMahon v. New York &c. R. Co., 20 N. Y. 463. Where estimates are prevented by death of the engineer, equity will afford relief. Firth v. Midland R. Co., L. R. 20 Eq. 100.

[8] Chicago S. F. & C. R. Co. v. Price, 138 U. S. 185; 11 Sup. Ct. 290, 34 L. ed. 917, 47 Am. & Eng. R. Cas. 298.

apply to contracts between contractors and subcontractors, as between the company and contractor, and upon the same grounds.[9]

§ 1403 (1060). Extra work.—Where work is performed at the request of the company in addition to that required by the plans, specifications and stipulations in the contract, or, if those plans and specifications are so changed by the company as to require extra work, the contractor is entitled to compensation for the excess, unless the extra labor has been rendered necessary by his own negligence or lack of skill.[10] Thus, where a contractor, at the request of the company encased the embankments with stone to protect them from flood, he was allowed extra compensation, it being shown that the work was not necessary to protect his other construction,[11] but in another case the contractor was required to remove, without compensation, dirt which fell in after cuts had been made.[12] Where the contractor has bound himself to complete the railway for a prescribed amount of money and the agreement waives any claim for extra work or damages or provides that the specified sum shall be the limit of the company's liability, he cannot, ordi-

[9] O'Reilly v. Kerns, 52 Pa. St. 214; Reynolds v. Caldwell, 51 Pa. St. 298; Guilbault v. McGreevy, 18 Can. Sup. Ct. 609.

[10] Fruin v. Crystal R. Co., 89 Mo. 397, 14 S. W. 557; Seymour v. Long Dock Co., 20 N. J. Eq. 396; Western Union R. Co. v. Smith, 75 Ill. 496; Orange &c. R. Co. v. Placide, 35 Md. 315; Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. ed. 934. See also 4 Elliott Cont., § 749. For a case in which it was held he could not recover for extra work necessitated by his own negligence, see Vanderhoof v. Shell, 42 Ore. 578, 72 Pac. 126.

[11] Western Union R. Co. v. Smith, 75 Ill. 496. See also Wyandotte &c. R. Co. v. King Bridge Co., 100 Fed. 197; Carroll County v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16. So, where the extra work was rendered necessary by the negligence of the railroad company. C. W. Hunt Co. v. Boston El. R. Co., 199 Mass. 220, 85 N. E. 446.

[12] Woodruff v. Rochester &c. R. Co., 108 N. Y. 39, 14 N. E. 832. So ordinarily the contractor can not recover for work as extra where it was caused by the engineer rejecting part of the work or the like as authorized by the contract. Bowe v. United States, 42 Fed. 761; Richards v. May, 10 Q. B. D. 400. But see where there is no such provision in the contract, Ohio &c. R. Co. v. Crumbo, 4 Ind. App. 456, 30 N. E. 434.

narily at least, recover beyond the stipulated sum,[13] but if a clause in the contract provides that the engineer may make changes which shall be paid for by the company, the contractor may recover for the extra work occasioned by such changes.[14] One who contracted for a certain sum to erect depot buildings according to plans and dimensions to be adopted and fixed by the engineer was refused an extra allowance because the buildings required were of larger dimension than the engineer indicated at the time the contract was signed.[15] Under a contract to build and complete a railroad at a stipulated

[13] Sharpe v. San Paulo &c. R. Co., L. R. 8 Ch. 605n, 27 L. T. R. 699; Berlinquet v. Queen, 13 Can. Sup. Ct. 26; Jones v. Queen, 7 Can. Sup. Ct. 570. The contractor takes the risk in such cases of the work being more difficult and expensive than he anticipated, and the like. Venable Const. Co. v. United States, 114 Fed. 763; Moffett H. &c. Co. v. Rochester, 91 Fed. 28 (reviewed, however, in 178 U. S. 373, 20 Sup. Ct. 957, 44 L. ed. 1108); Sanitary Dist. v. Ricker, 91 Fed. 833; South &c. R. Co. v. Highland &c. R. Co., 98 Ala. 400, 13 So. 682, 39 Am. St. 74; Indiana &c. R. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5; St. Paul &c. R. Co. v. Bradbury, 42 Minn. 222, 44 N. W. 1; Groton &c. Co. v. Alabama &c. R. Co., 80 Miss. 162, 31 So. 739; Nesbit v. Louisville &c. R. Co., 2 Spears L. (S. Car.) 697; Elliott Roads & Streets, (3rd ed.), § 648; 4 Elliott Cont., §§ 3742, 3743. Mere estimates made by the company or builder do not ordinarily affect the rule. St. Paul &c. R. Co. v. Bradbury, 42 Minn. 222, 44 N. W. 1; Sullivan v. Sing Sing, 122 N. Y. 389, 25 N. E. 366; Cannon v. Wildman, 28 Conn. 472.

[14] Logan v. Stranaham, 12 U. C. Q. B. 15. See also Houston &c. R. Co. v. Trentum, 63 Tex. 42; Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. ed. 934; Chicago &c. R. Co. v. Moran, 187 Ill. 316, 58 N. E. 335. But the engineer has no discretion to extend the work and bind the company for payment when not so provided in the contract. O'Brien v. New York, 139 N. Y. 543, 35 N. E. 323, affirmed 142 N. Y. 671, 37 N. E. 465; Thayer v. Vermont Cent. R. Co., 24 Vt. 440; Howard v. Pensacola &c. R. Co., 24 Fla. 560, 5 So. 356; Baltimore Cemetery Co. v. Coburn, 7 Md. 202; Woodruff v. Rochester &c. R. Co. 108 N. Y. 39, 14 N. E. 832.

[15] Cannon v. Wildman, 28 Conn. 472. One contracting to make excavations at an agreed price per yard of earth is not entitled to extra pay for removal of hardpan unexpectedly found. Nesbitt v. Louisville &c. R. Co., 2 Spears (S. Car.), 697. But where on account of the unexpected hardship the contractor abandoned the contract, but returned under an agreement by the company to pay him reasonable compensation, the company was held liable under the new contract. Hart v. Lauman, 29 Barb. (N. Y.) 410.

price per mile, side tracks and Y's, being necessary to the operation of the road, are held to be included although not enumerated, and the contractor is not entitled to extra compensation for building them,[16] especially where the contractor, by not asking for an extra allowance therefor in his monthly estimate, has given a practical construction to the contract.[17] Practical construction by the parties in such cases is usually of great and often controlling weight.[18] Under such a contract, extra compensation has also been refused for the building of cattle guards, water-tanks, stock gaps and slides, for the reason that they are considered necessary to the complete construction of the road,[19] but by binding himself "to build and complete the railroad" the contractor did not obligate himself to equip the road with rolling stock or to pay the expenses of engineering, and the court held that he was entitled to compensation for building a temporary track around a mountain so that the road might be in operation while a more direct route was being constructed.[20] Some of the courts have held that where the contract expressly provides that no allowance will be made for extra work unless authorized in writing by the engineer, or some other designated agent, the contractor, in the absence of such writing, can not recover either at law or in equity, although the agent of the company verbally assured him that he would be paid,[21] but on the

[16] Barker v. Troy &c. R. Co., 27 Vt. 766; Central Trust Co. v. Condon, 67 Fed. 84.

[17] Barker v. Troy &c. R. Co., 27 Vt. 766. But it has been held that the fact that the company had paid similar claims to others does not give such practical construction to the contract as will bind the company, unless the contractor was thereby influenced to perform the work. Vanderwerker v. Vermont &c. R. Co., 27 Vt. 125.

[18] Fulton Co. v. Gibson, 158 Ind. 471, 63 N. E. 982; Galveston &c. R. Co. v. Johnson, 74 Tex. 256, 11 S. W. 1113; Henderson Bridge Co. v. O'Connor, 88 Ky. 303, 11 S. W. 957. See also Kidwell v. Baltimore &c. R. Co., 7 Grat. (Va.) 676; McGraun v. North Lebanon &c. R. Co., 29 Pa. St. 82; Western R. Co. v. Smith, 75 Ill. 496.

[19] Central Trust Co. v. Condon, 67 Fed. 84.

[20] Central Trust Co. v. Condon, 67 Fed. 84.

[21] Thayer v. Vermont &c. R. Co., 24 Vt. 440; Herrick v. Belknap's Est. and Vermont &c. R. Co., 27 Vt. 673; Vanderwerker v. Vermont &c. R. Co., 27 Vt. 125, 130; White v. San Rafael &c. R. Co., 50 Cal. 417; Simpson v. New York &c. R. Co., 19 J.

other hand, it has been held by other courts that where the company had knowledge of the work while it was progressing it could not enjoy the benefit without paying therefor although the contractor might not be able to recover on the express contract.[22] It has also been held that where the contract provides that changes may be made and extra work be performed it is usually to be at the contract rate.[23]

§ 1404 (1060a). Bonds of contractors—Rights and liabilities of sureties.—Contractors for railroad construction are usually required to give a bond to secure the performance of the contract. Such bonds and the rights and liabilities of the parties are, in general, the same as in other cases where similar bonds are given. They usually provide that the contractor shall pay all claims for labor and materials, and in many, but not all, jurisdictions, the laborer or material man may sue on the bond.[24]

& S. (N. Y.) 419. See also Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Woodruff v. Rochester &c. R. Co., 108 N. Y. 39, 14 N. E. 832; 4 Elliott Cont., §§ 3742, 3748.

[22] Dyer v. Jones, 8 Vt. 205; Gilman v. Hall, 11 Vt. 510, 34 Am. Dec. 700; Nixon v. Taff &c. R. Co., 7 Hare 136. See also Houston &c. R. Co. v. Trentem, 63 Tex. 442; McLeod v. Gennis, 31 Nebr. 1, 47 N. W. 473; Lovelock v. King, 1 M. & Rob. 60; Chicago &c. R. Co. v. Mohan, 187 Ill. 281, 58 N. E. 335; Miller v. McCaffrey, 9 Pa. St. 245. See as to when notice is necessary, Kinsley v. Charnley, 33 Ill. App. 553; Essex v. Murray, 29 Tex. Civ. App. 368, 68 S. W. 736; Gibbons Case, 15 Ct. Cl. (U. S.) 174. As to the right to recover on the quantum meruit, see Hinkle v. San Francisco &c. R. Co., 55 Cal. 627, 6 Am. & Eng. R. Cas. 595; Jammison v. Gray, 29 Iowa 537; Chicago &c. R. Co. v. Vosburgh, 45 Ill. 311; Davis v. Badders, 95 Ala. 348, 10 So. 422; Adams v. Cosby, 48 Ind. 153, 4 Elliott Cont., § 3745. The burden, of course, is upon the party claiming extra compensation to show the extra work. Nesbitt v. Louisville &c. R. Co., 2 Spears (S. Car.) 697; Crocker v. United States, 21 Ct. Cl. (U. S.) 255.

[23] Chicago &c. R. Co. v. Vosburgh, 45 Ill. 311, 314. See also Board Carrol Co. v. O'Connor, 137 Ind. 622, 631, 35 N. E. 1006; Cleveland &c. R. Co. v. Moore, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540; Eigemann v. Board, 82 Ind. 413; Sullivan v. President &c., 122 N. Y. 389, 25 N. E. 366; Clark v. Mayor, 4 N. Y. 338, 340, 53 Am. Dec. 379. But not when of a different character. Wood v. Ft. Wayne, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. ed. 416.

[24] Young v. Young, 21 Ind. App. 509, 52 N. E. 776. And see as to the rule in other jurisdictions, Mangrum v. Truesdale, 128 Cal. 145,

The rights and liabilities of the sureties are the same, in general, as in other similar cases.[25] Where the contract expressly provides that changes may be made the surety is usually bound by such changes as are made under the contract.[26] It has also been held that even if building or construction contract provides for a written order of the architect or other written notice of the change, it may be waived by the contractor without releasing a compensated surety.[27] But, ordinarily, any material change not so provided for will release the surety.[28]

§ 1405 (1061). Subcontractors.—A subcontractor is one who takes from the principal contractor a specific part of the work,[29]

60 Pac. 775; Baker v. Bryan, 64 Iowa 561, 21 N. W. 83; St. Louis v. Von Puhl, 133 Mo. 561, 34 S. W. 843, 54 Am. St. 695; Fitzgerald v. McClay, 47 Nebr. 816, 66 N. W. 828; Buffalo &c. Co. v. McNaughton, 90 Hun 74, 35 N. Y. S. 453; Gastonia v. McEntee &c. Co., 131 N. Car. 363, 42 S. E. 858; Hamilton v. Gambell, 31 Ore. 328, 48 Pac. 433; Spokane &c. Co. v. Loy, 21 Wash. 501, 58 Pac. 672. See also Elliott Roads & Streets (3rd ed.), § 646, 4 Elliott Cont., § 3796.

[25] See as to stricter construction against a compensated surety than against a simple accomodation surety, Crowles v. United States &c. Guaranty Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; American Surety Co. v. Pauly, 170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. ed. 977. And see generally as to the rights and liabilities of the sureties, 4 Elliott Cont., § 3798.

[26] Fidelity &c. Co. v. Robertson, 136 Ala. 379, 34 So. 933; People's &c. Co. v. Gillard, 136 Cal. 55, 68 Pac. 576; Schreiber v. Worm, 164 Ind. 7, 72 N. E. 852; American Surety Co. v. Lauber, 22 Ind. App. 326, 53 N. E. 793; Getchell &c. Co. v. National Surety Co., 124 Iowa 617, 100 N. W. 556; Moore v. School Comrs. (Miss.), 8 So. 509; Howard County v. Baker, 119 Mo. 397, 24 S. W. 200; De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402.

[27] Cowles v. United States &c. Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859; Chester v. Leonard, 68 Conn. 495, 37 Atl. 397. See also Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669.

[28] General Steam Nav. Co. v. Rolt, 6 C. B. (N. S.) 550; Miller v. Stewart, 9 Wheat. (U. S.) 680; 6 L. ed. 189; Judah v. Zimmerman, 22 Ind. 388; 4 Elliott Cont., § 3798.

[29] "We suppose a sub-contractor to be one who takes from the principal contractor a specific part of the work, as for instance, one who agrees with the principal contractor to construct ten miles of a railroad out of a line of twenty or more miles which the principal contractor has undertaken to build." Farmers' Loan and Trust Co. v. Canada

contracting under and with the principal contractor.[30] The courts have clearly marked and enforced the distinction between subcontractors and laborers, as well as between subcontractors and material men,[31] and the subcontractor is not entitled to a lien under a statute thus protecting "laborers" and "material men." In most states the subcontractor, especially in railway construction, is by statute given a lien on the road or property of the company for his compensation.[32] Stipulations that the estimates and certificates of the company's engineer shall be final and conclusive are binding as between contractor and subcontractor to the same extent, and may be enforced or assailed in the same manner as like stipulations between the original contractor and the company.[33] The subcontractor may be excused from performance by failure of the company to procure right of way,[34] to fix the grade as promised, [35] or by the failure of the contractor to furnish cars as required by the contract,[36] and if, on the strength of promises, he holds himself

&c. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740 and note. Lester v. Houston, 101 N. Car. 605, 8 S. E. 366.

[30] Richmond &c. Co. v. Richmond &c. R. Co., 68 Fed. 105, 34 L. R. A. 625. The term contractor as used in statutes may include subcontractors where the context of the statute demands such construction. Kent v. New York &c. R. Co., 12 N. Y. 628; Peters v. St. Louis &c. R. Co., 24 Mo. 586; Mundt v. Sheboygan &c. R. Co., 31 Wis. 451. But if it appear that the term contractor is used in a more limited sense a sub-contractor will be excluded. Dawson v. Harrington, 12 Ill. 300.

[31] Duncan v. Bateman, 23 Ark. 327, 79 Am. Dec. 109; Pitts v. Bomar, 33 Ga. 96; Barker v. Buell, 35 Ind. 297; Colter v. Frese, 45 Ind. 96; Farmers' Loan &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740 and note; Chicago &c. R. Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213, 6 Am. & Eng. R. Cas. 619; Huck v. Gaylord, 50 Tex. 578.

[32] See post, §§ 1412, 1416.

[33] Faunce v. Burke, 16 Pa. St. 469, 55 Am. Dec. 519; Monongahela &c. Co. v. Fehon, 4 Watts & S. (Pa.) 205; Guilbault v. McGreevy, 18 Can. Sup. Ct. 609; Thayer v. Vermont &c. R. Co., 24 Vt. 440. See Hendrie v. Canadian Bank, 49 Mich. 401, 13 N. W. 792; Maloney v. Malcolm, 31 Mo. 45. See as to general subject, ante, § 1401.

[34] Bean v. Miller, 69 Mo. 384.

[35] Hammond v. Beeson, 112 Mo. 190, 20 S. W. 474; O'Connor v. Smith, 82 Tex. 232, 19 S. W. 168.

[36] McAndrews v. Tippett, 39 N. J. L. 105.

ready to prosecute the work he can recover for his enforced idleness, as well as for his estimated loss of profits on the contract.[37] Where his contract provides that the work shall be done under the specifications and on the same terms as the original contract, the subcontractor is, in general, bound by the same conditions and entitled to the same benefits thereof as the first contractor under the original contract,[38] which is construed with the second contract and as a part of it, as between the contractor and subcontractor. He can not pass by his immediate employer and recover of the company,[39] but if, on default of the contractor, the company, by a duly authorized agent, make such representations or promises as induces the subcontractor to go on with the work, a contract based upon a valid consideration arises between the subcontractor and the company, and he will be protected.[40] The subcontractor having contracted for the performance of a particular contract with the principal contractor cannot under his contract be compelled to perform other services outside the contract on the same terms. As to these matters a new contract must be entered into. This principle is illustrated by a case where a contractor having a contract to furnish 100,000 cubic yards of riprapping

[37] Hammond v. Beeson, 112 Mo. 190, 20 S. W. 474; Smith v. O'Donnell, 8 Lea (Tenn.) 468; Phila. W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157; McAndrews v. Tippett, 39 N. J. L. 105.

[38] Price v. Garland, 3 N. Mex. 285, 6 Pac. 472. See also Collins v. Barnes, 83 Pa. St. 15.

[39] Lake Erie &c. R. Co. v. Eckler, 13 Ind. 67; Branin v. Connecticut &c. R. Co., 31 Vt. 214. See also Powrie v. Kansas Pac. R. Co., 1 Colo. 529; Kelly's Appeal (Pa.), 12 Atl. 256. Compare O'Brien v. Champlain Const. Co., 107 Fed. 338.

[40] Chapman v. Pittsburgh &c. R. Co., 18 W. Va. 184, 9 Am. & Eng. R. Cas. 484. Where a sub-contractor placed material on the company's ground and the company took possession of it, although the contractor had defaulted and the subcontractor had failed to perform his contract within the time limited, the company was held liable. Sherwood v. Saginaw &c. R. Co., 53 Mich. 317, 19 N. W. 14, 16 Am. & Eng. R. Cas. 605. So where drafts of the company are accepted by its treasurer as payment to a sub-contractor for labor, the sum becomes the debt of the company. Ney v. Dubuque &c. R. Co., 20 Iowa 347. See also Iron Mountain &c. R. Co. v. Stansell, 43 Ark. 275; Indianapolis &c. R. Co. v. Miller, 71 Ill. 463. See Mann v. Burt, 35 Kans. 10, 10 Pac. 95.

on a railroad division, contracted with a subcontractor to perform all of the provisions of his contract with the railroad company, and that he, the principal contractor, should be entitled to increase the quantity to an amount not exceeding 300,000 cubic yards if the amount was increased by the railroad company, provided necessary proportional time was given the subcontractor to furnish the increased amount, and that, if a greater price could be obtained therefor, the subcontractor should have the benefit of the proportional increase. Under this contract it was held that the principal contractor's right to require materials to the extent of 300,000 cubic yards from the subcontractor was dependent on the action of the railroad company under its contract with the principal contractor and that neither he nor his successor in interest were entitled to call on the subcontractor to furnish materials to the extent of 300,000 cubic yards for use in other contracts than that entered into with the railroad company.[41] The company has been held liable for materials furnished the subcontractor at its order and on its promise to pay therefor, although not indebted to the contractor,[42] but in the absence of any agreement or promise to pay, or in any statutory provision to that effect, the liability of the company can not be so extended.[43] The subcontractor, has no right to pledge the credit of the contractor for supplies furnished by third persons, and it has been held that the payment by the contractor of a portion of the bills presented does not amount to a ratification of such a pledge.[44] A subcontractor, employed by an independent contractor is in no such privity of contract with the company as will render it liable for his negligent acts in building its road,[45] unless it assumes direction and control of the work; nor such as will render it liable, either to him or to those employed by him for work performed on the road of the company,[46] unless the contractor

[41] Shanklin v. Brown, 102 App. Div. 473, 92 N. Y. S. 860.

[42] Chicago &c. R. Co. v. West, 37 Ind. 211.

[43] St. Louis &c. R. Co. v. Ritz, 30 Kans. 30, 1 Pac. 27, 11 Am. & Eng. R. Cas. 35; Atchison &c. R. Co. v. Davis, 34 Kans. 199, 8 Pac. 146, 25 Am. & Eng. R. Cas. 305.

[44] Wells v. Martin, 32 Mich. 478.

[45] Town v. Rutland &c. R. Co., 28 Vt. 297; Cuff v. Newark &c. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

[46] Not liable to laborers employed

stands in the relation of an agent for the railway company in subletting the contract.[47] A subcontractor who has completed his portion of the work to the satisfaction of the chosen engineer is entitled to recover of the contractor the amount agreed upon, and the contractor cannot withhold the percentage reserved to insure good faith performance for the reason that he has not completed his original contract and the company withholds from him an agreed amount.[48]

§ 1406 (1062). Breach of contract—Remedies.—Courts of equity usually refuse to enforce specific performance of contracts for the construction of a railroad, for the reason that it would entail upon the courts the supervision of a great number of acts extending over a long period of time, and thus involve an immense amount of labor and detail which does not properly belong to them,[49] and it follows that if the courts will not decree

by sub-contractor. Indianapolis &c. R. Co. v. O'Reily, 38 Ind. 140; Marks v. Indianapolis &c. R. Co., 38 Ind. 440. See also notes in Ann. Cas. 1912A, 596, 65 L. R. A. (N. S.) 622, et seq.

[47] As to what does not constitute such a relation. See Baltzer v. Raleigh & A. R. Co., 115 U. S. 634, 6 Sup. Ct. 216, 29 L. ed. 505, 24 Am. & Eng. R. Cas. 354. The fact that the contractor is the largest and controlling stockholder in the railroad company does not make him the agent of the company in subletting contracts, although the sub-contractor is ignorant of the relation. Central Trust Co. v. Bridges, 57 Fed. 753. As to who are independent contractors, see generally note in Ann. Cas. 1913B, 573.

[48] Blair v. Corby, 29 Mo. 480; McBrien v. Shanly, 24 U. C. C. P. 28. Where such is the agreement the contractor may withhold estimates and pay the laborers and creditors of the sub-contractor and such sums will be applied to the discharge of his debt to the sub-contractor. Solomon v. Nicholas, 113 Ill. 351, 1 N. E. 901.

[49] Fallon v. Missouri &c. R. Co., 1 Dill (U. S.) 121; Strang v. Richmond &c. R. Co., 101 Fed. 511; Danforth v. Philadelphia &c. R. Co., 30 N. J. Eq. 12, 18 Am. Ry. Rep. 66; Ranger v. Great Western &c. R. Co., 1 Eng. R. & Canal Cas. 1; Heathcote v. North Staffordshire R. Co., 6 Eng. R. & Canal Cas. 358, 369; South Wales R. Co. v. Wythes, 1 K. & J. 186. See also Windham Cotton Mfg. v. Hartford &c. R. Co., 23 Conn. 373; Lone Star Salt Co. v. Texas &c. R. Co., 99 Tex. 434, 90 S. W. 863, and cases there cited. In Ross v. Union Pac. R. Co., 1 Woolw. (U. S.) 26, the court said: "Years must elapse before this work can be done and paid for. At every step in its progress, the interposition of the court, either by

specific performance against the contractor, they will not enforce such contract in favor of the contractor as against the railroad company, since it is well settled that equity will only exercise the power against one party where it can enforce the contract against the other party as well.[50] But in rare instances the court has appointed a receiver to complete the construction of the railroad where the company was out of funds and failure to construct within a limited time would cause the lapse of a land grant, which was the principal security of the bondholders.[51] The contractor may, in a proper case, abandon his contract and recover compensation for work already done and profits which he would have otherwise earned if at any time the company, without good cause, prevents him from completing the contract,[52] or is guilty of repeated defaults in

orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to forsee the mischiefs of such a course. The rule is settled, even in the English chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty, extending over a number of years, but will leave the opposite party to his remedy at law."

[50] Ross v. Union Pac. R. Co., 1 Woolw. (U. S.) 26; Heathcote v. North Staffordshire R. Co., 6 Eng. R. & Canal Cas. 358; Munro v. Wivenhoe &c. R. Co., 4 DeG. J. & S. 723; Peto v. Brighton &c. R. Co., 1 H. & M. 468; Waring v. Manchester &c. R. Co., 7 Hare 482. See Texas Pac. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. ed. 385, 42 Am. & Eng. R. Cas. 637, and cases cited in last preceding note.

[51] Kennedy v. St. Paul &c. R. Co., 2 Dillon (U. S.) 448; Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316; Storer v. Great Western R. Co., 2 Younge &c. Ch. 48; Lytton v. Great Northern R. Co., 2 K. & J. 94. See also Murray v. Northwestern R. Co., 64 S. Car. 520, 42 S. E. 617; Hood v. North Eastern R. Co., L. R. 5 Ch. App. 525; ante, § 630.

[52] Cox v. Western Pac. Co., 47 Cal. 87; Lake Shore &c. R. Co. v. Richards, 40 Ill. App. 560; Whitfield v. Zellnor, 24 Miss. 663. See also Roberts v. Glass, 112 Ga. 456, 37 S. E. 704; Vaughn v. Digman, 19 Ky. L. 130, 43 S. W. 251; American Bonding &c. Co. v. Baltimore &c. R. Co., 124 Fed. 866; Lee v. Briggs, 99 Mich. 487, 58 N. W. 477. The acts of the company must be such as to indicate an intention to prevent completion of the contract, and must in effect prevent performance. Lake Shore &c. R. Co. v.

payment.[53] However, where but one default occurred, and a recovery of the contractor abandoned the work, damages for the remainder of the work was denied, since the breach of the company did not deny the right to complete it.[54] If, by virtue of the stipulation in the contract giving it the right to terminate the contract whenever its engineer was not satisfied with the work or its progress, the company should annul the contract merely for the purpose of injuring or oppressing the contractor or getting the work done cheaper, the contractor is entitled to recover damages for loss of profits.[55] The contractor may re-

Richards, 40 Ill. App. 560. The measure of damages as regards the uncompleted portion is the difference between the contract price for completing it and the actual cost to the contractor of completing it. Grand Rapids &c. R. Co. v. Van Dusen, 29 Mich. 431; Masterton v. Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38 and note. Where one party absolutely repudiates the contract, the other is released from further performance and may sue for damages. Cort v. Ambergate &c. R., 17 Q. B. 127, 6 Eng. L. & Eq. 230; Hochster v. De La Tour, 2 El. & Bl. 678, 20 Eng. L. & Eq. 157.

[53] Grand Rapids &c. R. Co. v. Van Dusen, 29 Mich. 431; Dobbins v. Higgins, 78 Ill. 440; Bean v. Miller, 69 Mo. 384; Wharton v. Winch, 140 N. Y. 287, 35 N. E. 589. See also Eastern Arkansas &c. Co. v. Tanner, 67 Ark. 156, 53 S. W. 886; San Francisco &c. Co. v. Dumbarton Land Co., 119 Cal. 272, 51 Pac. 335; Springtown &c. R. Co. v. Riley, 8 Ky. L. 267. Where the contractor has given bond for faithful performance he is entitled to be paid in the manner provided in the contract. If the company withhold money to pay laborers or sub-contractors he may abandon the contract and recover damages. Dobbins v. Higgins, 78 Ill. 440. But where the company, in order to protect itself against liens of laborers and material men, paid their claims, the amount of such claims may be set off in a suit by the contractors against the company although the abandonment was caused by a breach of the company. Moore v. Taylor, 42 Hun (N. Y.) 45, 651.

[54] Moore v. Taylor, 42 Hun (N. Y.) 45, 651; Wharton v. Winch, 140 N. Y. 287, 35 N. E. 589. But if after breaches of the company have occurred, causing delay, the contractor resumes the work and makes no claim for damages, his assignee in bankruptcy can make no claim for such damages. Geiger v. Western Maryland R. Co., 41 Md. 4.

[55] Philadelphia W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157. See also Myers v. York &c. R. Co., 2 Curtis (U. S.) 28; South &c. R. Co. v. McLendon, 63 Ala. 266; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Smith v. O'Donnell, 8 Lea (Tenn.), 468. In such case it has been held that the contractor can recover on the quantum meruit. Merrill v.

cover for any damages resulting to him from delay caused by the negligence or lack of due diligence of the company in performing its part of the contract or in providing him the necessary access or means to prosecute his work; as where the company neglected to procure the dissolution of an injunction which the contractor was bound to obey,[56] to make the necessary preliminary surveys,[57] to procure right of way,[58] or where the contractor was delayed by reason of the failure of the company to do certain preliminary work,[59] or to furnish cars for transportation of material.[60] Where the right is reserved by the company to suspend or delay the work, the company is only authorized to suspend for a reasonable time, after which the contractor may proceed and recover his compensation when the work is completed, and if, during the suspension, he is requested to keep his plant in readiness to proceed, the company is liable for expenses so incurred.[61] It has been held that where the company terminates the contract, it can not, on estimates of work already done, retain the per cent reserved to insure good faith performance, beyond actual damages suffered, and the contractor is entitled to the amount beyond indemnity to the company.[62] And where the work was not being completed within

Ithaca &c. R. Co., 16 Wendell (N. Y.) 586, 30 Am. Dec. 130 and note, 2 Am. Ry. Cas. 421. But if the company has reserved the right to terminate the contract whenever the enterprise should prove unprofitable the contractor can not insist that the work proceed in the face of failure. Zimmer v. Brooklyn &c. R. Co., 53 Hun 637, 6 N. Y. S. 316.

[56] Philadelphia W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157.

[57] O'Connor v. Smith, 84 Tex. 232, 19 S. W. 168; Hammond v. Beeson, 112 Mo. 190, 20 S. W. 474.

[58] Bean v. Miller, 69 Mo. 384; Lauman v. Young, 31 Pa. St. 306; Elizabethtown &c. R. Co. v. Pottinger, 10 Bush (Ky.) 185.

[59] Louisville &c. R. Co. v. Hollerbach, 105 Ind. 137, 5 N. E. 28, 24 Am. & Eng. R. Cas. 340.

[60] Louisville &c. R. Co. v. Hollerbach, 105 Ind. 137, 5 N. E. 28, 24 Am. & Eng. R. Cas. 340. See also Memphis &c. R. Co. v. Wilcox, 48 Pa. St. 161; McAndrews v. Tippett, 39 N. J. L. 105; McPherson v. San Joaquin Co., 124 Cal. xvii, 56 Pac. 802; Western &c. R. Co. v. Smith, 75 Ill. 496.

[61] Curnan v. Delaware &c. R. Co., 138 N. Y. 480, 34 N. E. 201.

[62] Phildalphia W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157; Ricker v. Fairbanks, 40 Maine 43. In one case it was held that the forfeiture provided in the contract could only be enforced

the specified time, but the company waived the right to terminate the contract, it was held also to have waived the right to an absolute forfeiture on such account.[63] The amount of the liability of the contractor to the company for failure to complete the work within the time limited or in a proper manner is generally fixed in the contract as a stipulated penalty or forfeiture, which is regarded and enforced as in the nature of liquidated damages.[64]

§ 1407 (1063). Company generally not liable for injuries resulting from negligence of independent contractor or his servants.—The liability of the company for injuries resulting from the negligence of the contractor usually depends primarily upon whether or not he is an independent contractor. An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work.[65] Generally, where an independent contractor is employed to perform a work lawful in itself and not intrinsically dangerous, the

within the time fixed for the completion of the work. Walker v. London &c. R. Co., L. R. 1 C. P. D. 518, 36 L. T. R. 53.

[63] Henderson Bridge Co. v. O'Connor, 88 Ky. 303, 11 S. W. 18 and 957. But see McDonnell v. Canada &c. R. Co., 33 U. C. Q. B. 313. See generally as to waiver United States v. Walsh, 108 Fed. 502; Woodruff v. Hough, 91 U. S 596, 23 L. ed. 332; Oregon Imp. Co. v. Roach, 117 N. Y. 527, 23 N. E. 168; Austin v. Austin, 47 Vt. 311; Atlantic &c. R. Co. v. Delaware Const. Co., 98 Va. 503, 37 S. E. 13.

[64] See ante, § 1398.

[65] Alabama &c. R. Co. v. Martin, 100 Ala. 511, 14 So. 401; Wheeler & Co. v. Fitzpatrick, 135 Ark. 117, 205 S. W. 302 (quoting text); Savannah &c. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82; Wabash &c. R. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696, 31 Am. & Eng. R. Cas. 134; Knowlton v. Hoit, 67 N. H. 155, 30 Atl. 346; Harrison v. Collins, 86 Pa. St. 153, 27 Am. Rep. 699 and note; Edmundson v. Pittsburgh &c. Co., 111 Pa. St. 316, 2 Atl. 404; Elliott Roads and Streets (3rd ed.), § 814; 1 Thomp. Neg. (2d ed.), 622. See also Boyd v. Chicago &c. R. Co., 217 Ill. 332, 75 N. E. 496, 498; Bodwell v. Webster, 98 Nebr. 664, 154 N. W. 229, Ann. Cas. 1918C, 624 and note; Watson v. Hecla Min. Co., 79 Wash. 383, 140 Pac. 317; note in Ann. Cas. 1913B, 573; and note to Knicely v. West Virginia &c. R. Co., 64 W. Va. 278, 61 S. E. 811, in 17 L. R. A. (N. S.) 370.

company, if it is not negligent in selecting the contractor, is not liable for the wrongful acts or negligence of such contractor,[66] and in order that the company shall be liable in such a case it must appear that it either exercised or reserved the right to exercise control over the work, or had the power to choose, direct and discharge the employes of the contractor.[67] In general

[66] Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. ed. 582; Chicago &c. R. Co. v. Ferguson, 3 Colo. App. 414, 33 Pac. 684; West v. St. Louis &c. R. Co., 63 Ill. 545; Boyd v. Chicago &c. R. Co., 217 Ill. 332, 75 N. E. 496, 497, 498 (citing text); Wabash &c. R. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696, 31 Am. & Eng. R. Cas. 134; Waltemeyer v. Wisconsin &c. R. Co., 71 Iowa 626, 33 N. W. 140, 30 Am. & Eng. R. Cas. 384; Kansas &c. R. Co. v. Fitzsimmons, 18 Kans. 34; St. Louis &c. R. Co. v. Willis, 38 Kans. 330, 16 Pac. 728, 33 Am. & Eng. R. Cas. 397; Louisville &c. R. Co. v. Wiggington, 156 Ky. 400, 161 S. W. 209; Eaton v. European &c. R. Co., 59 Maine 520, 8 Am. Rep. 430; Tibbetts v. Knox &c. R. Co., 62 Maine 437; Sweeney v. Boston &c. R. Co., 128 Mass. 5; Conlon v. Eastern R. Co., 135 Mass. 195, 15 Am. & Eng. R. Cas. 99; Speed v. Atlantic &c. R. Co., 71 Mo. 303; Thurston v. Kansas City &c. R. Co. (Mo. App.), 168 S. W. 236; Cuff v. Newark &c. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; McCafferty v. Spuyten &c. R. Co., 61 N. Y. 178, 19 Am. Rep. 267; King v. New York &c. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Deming v. Terminal R. Co., 169 N. Y. 1, 61 N. E. 983, 88 Am. St. 521; Hughes v. Cincinnati &c. R. Co., 39 Ohio St. 461; Edmundson v. Pittsburgh &c. R. Co., 111 Pa. St. 316, 23 Am. & Eng. R. Cas. 423; Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Burton v. Galveston &c. R. Co., 61 Tex 526, 21 Am. & Eng. R. Cas. 218; Angelina &c. R. Co. v. Due (Tex. Civ. App.), 166 S. W. 918; Powlet v. Rutland &c. R. Co., 28 Vt. 297; Bailey v. Troy &c. R. Co., 57 Vt. 252, 52 Am. Rep. 129; Elliott Roads and Streets (3rd ed.), § 814, and cases cited. But see where the contractor is exercising a special charter power of the company. Lesher v. Wabash &c. Co., 14 Ill. 85, 56 Am. Dec. 494; Chicago &c. R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Cairo &c. R. Co. v. Woolsey, 85 Ill. 370; North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477, 56 N. E. 796.

[67] Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Wabash &c. R. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; New Orleans &c. R. Co. v. Norwood, 62 Miss. 565, 52 Am. Rep. 191; Speed v. Atlantic &c. R. Co., 71 Mo. 303; Burmeister v. New York &c. R. Co., (15 J. & S.) 47 N. Y. S. C. 264; Hughes v. Cincinnati &c. R. Co., 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; Hunt v. Pennsylvania R. Co., 51 Pa. St. 475; Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Hackett v. W. U. Tel. Co., 80 Wis. 187, 49 N. W. 822.

it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work.[68] But neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily,[69] the right to exercise general supervision and inspect the work as it progresses,[70] nor the right to enforce forfeitures will of itself change the relation so as to render the company liable.[71] The company may reserve the right to determine what work shall be done,[72] but, as a general rule, the contractor must have control of the means by

See 41 Cent. L. J. 6. And even the latter is not always a conclusive test.

[68] New Orleans &c. R. Co. v. Hanning, 15 Wall. (U. S.) 649, 121 L. ed. 220; Fuller v. Cit. N. B., 15 Fed. 875; Fulton &c. St. R. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828; Pottaroff v. Fidelity &c. Co., 86 Kans. 774, 122 Pac. 120; Nelson v. American Cement &c. Co., 84 Kans. 797, 115 Pac. 578; Madisonville &c. R. Co. v. Owen, 147 Ky. 1, 143 S. W. 421; Samuelson v. Cleveland &c. Co., 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456, 14 Am. & Eng. Ency. of Law, 830; Warburton v. Great Western R. Co., L. R. 2 Exch. 30. But compare Peters v. St. Louis &c. R. Co., 150 Mo. App. 721, 131 S. W. 917, 160 Mo. App. 629, 140 S. W. 1197.

[69] Reedie v. London &c. Co., 4 Exch. 244; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304 and note; Cuff v. Newark &c. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Wray v. Evans, 80 Pa. St. 102; Schular v. Hudson River R. Co., 38 Barb. (N. Y.) 653. But see Aarens v. Great Northern R. Co., 129 Minn. 467, 152 N. W. 866; and note in Ann. Cas. 1918C, 649, 650.

[70] Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. ed. 582; Prestolite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474; Eaton v. European &c. R. Co., 59 Maine 520, 8 Am. Rep. 430; Kelly v. Mayor, 11 N. Y. 432; Carman v. Steubenville &c. R. Co., 4 Ohio St. 399; Hunt v. Pennsylvania R. Co., 51 Pa. St. 475; Allen v. Willard, 57 Pa. St. 374; Wray v. Evans, 80 Pa. St. 102; Watson v. Hecla Min. Co., 79 Wash. 383, 140 Pac. 317; Steel v. Southeastern R. Co., 32 Eng. L. & Eq. 366; note in Ann. Cas. 1918C, 643.

[71] Tibbetts v. Knox &c. R. Co., 62 Maine 437; Allen v. Willard, 57 Pa. St. 374. This section is quoted this far and approved in St. Louis &c. R. Co. v. Gillihan, 77 Ark. 551, 92 S. W. 793, and in Louisville &c. R. Co. v. Cheatham, 118 Tenn. 160, 100 S. W. 902, 907.

[72] Schular v. Hudson &c. R. Co., 38 Barb. (N. Y.) 653; Callahan v. Burlington &c. R. Co., 23 Iowa 562. See note to Stone v. Cheshire &c. R. Co., 19 N. H. 427, 51 Am. Dec. 192, 203; Chicago R. I. & P. R. Co. v. Bond, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. ed. 735

which it is to be accomplished, or he will not be liable for the consequences.[73] The fact that the contractor is paid by the day,[74] or that the company pays the employes of the contractor directly,[75] does not necessarily destroy the independent character of the employment.

§ 1408. **When company is liable for acts of contractor.**—If the company has a public duty to perform, or if statutory duties rest upon it, the employment of an independent contractor, with entire control of prescribed work, can not avert its liability; it must perform those duties or be directly liable for any neglect thereof.[76] If the contract be in itself unlawful, as where the

[73] Burmeister v. New York &c. R. Co., (15 J. & S.), 47 N. Y. S. C. 264; Hughes v. Cincinnati &c. R. Co., 39 Ohio St. 461; King v. New York &c. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; New Orleans &c. R. Co. v. Hanning, 15 Wall. (U. S.) 649, 21 L. ed. 220.

[74] Corbin v. American Mills, 27 Conn. 274, 71 Am. Dec. 63; Forsyth v. Hooper, 11 Allen (Mass.) 419; Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703, 23 Cent. L. J. 249; Harrison v. Collins, 86 Pa. St. 153, 27 Am. Rep. 699. See as to mode of payment tending to show independence. Ireland v. Clark, 109 Maine 239, 83 Atl. 667; Westover v. Hoover, 88 Nebr. 201, 129 N. W. 285. Mere mode of payment is not of itself ordinarily very strong evidence either way. Lewis v. Detroit Vitrified Brick Co., 164 Mich. 409, 129 N. W. 726; Edmunson v. Coca Cola Co. (Tex. Civ. App.), 150 S. W. 273.

[75] Rourke v. White Moss Colliery Co., L. R. 1 C. P. Div. 556.

[76] Montgomery &c. Co. v. Montgomery &c. R. Co., 86 Ala. 372, 5 So. 735; Donovan v. Oakland &c. Co., 102 Cal. 245, 36 Pac. 516; Chicago &c. R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Rockford &c. R. Co. v. Heflin, 65 Ill. 366; Anderson v. Fleming, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119 and extended note; Cleveland &c. R. Co. v. Simpson, 182 Ind. 693, 104 N. E. 301, 108 N. E. 9; St. Louis &c. R. Co. v. Madden, 77 Kans. 80, 93 Pac. 586, 17 L. R. A. (N. S.) 788; City &c. R. Co. v. Moores, 80 Maine 348, 30 Atl. 643; Hilliard v. Richardson, 3 Gray (Mass.), 349, 63 Am. Dec. 743; Lowell v. Boston &c. R. Co., 23 Pick. (Mass.) 24, 34 Am. Dec. 33 and note; Boucher v. New York &c. R. Co., 196 Mass. 355, 82 N. E. 15, 13 L. R. A. (N. S.) 1177; Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. 427, 4 L. R. A. 213; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437; Senford v. Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564; Houston &c. R. Co. v. Meader, 50 Tex. 77; Nelson v. Vermont &c. R. Co., 26

prosecution or result of the work is necessarily a nuisance, the company can not escape liability by letting the work to a contractor.[77] And if the work be intrinsically dangerous in its nature the company will be held liable for such injuries as might have been contemplated.[78] However, if the nuisance is not a necessary incident to the work, but arises from the manner in which it is conducted,[79] or if the contractor use unnecessarily

Vt. 717, 62 Am. Dec. 614; Carrico v. West Virginia &c. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; Gray v. Pullen, 34 L. J. Q. B. 265; West Riding &c. R. Co. v. Wakefield Local Board, 33 L. J. M. C. 174; Hole v. Settingbourne R. Co., 6 H. & N. 488, 30 L. J. N. S. Exch. 81. See also Montgomery St. R. Co. v. Smith, 146 Ala. 316, 39 So. 757; Curtis v. St. Louis &c. R. Co., 96 Ark. 394, 131 S. W. 947, 34 L. R. A. (N. S.) 466; Interstate Coal Co. v. Baxavenie, 144 Ky. 172, 137 S. W. 859; Mullery v. Missouri &c. R. Co., 180 Mo. App. 128, 168 S. W. 213; Vickers v. Kanawha &c. R. Co., 64 W. Va. 474, 63 S. E. 367, 20 L. R. A. (N. S.) 793, 131 Am. St. 929. But see Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304.

[77] Louisville &c. R. Co. v. Hughes, 134 Ga. 75, 67 S. E. 542; Stone v. Cheshire &c. R. Co., 19 N. H. 427, 51 Am. Dec. 192 and note; Carmen v. Steubenville &c. R. Co., 4 Ohio St. 399; King v. New York &c. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Sabin v. Vermont Central R. Co., 25 Vt. 363. See also Southern Ohio R. Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269. 7 L. R. A. 701; North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477, 56 N. E. 796; Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. 221; Louisville &c. R. Co. v. Smith, 134 Ky. 47, 119 S. W. 241; note to Thomas v. Harrington, 65 L. R. A. 742.

[78] Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17; Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; City of Anderson v. Fleming, 160 Ind. 597, 67 N. E. 443, 444, 66 L. R. A. 119n (citing 2 Elliott Roads and Streets (3rd ed.), § 815; Mississippi Cent. R. Co. v. Holden, 99 Miss. 124, 54 So. 851; Stone v. Cheshire &c. R. Co., 19 N. H. 427, 51 Am. Dec. 192; Booth v. Rome &c. R. Co., 17 N. Y. S. 336; Carman v. Steubenville &c. R. Co., 4 Ohio St. 399. See also for other illustrative cases to the same effect, note to Jacobs v. Fuller &c. Co., 65 L. R. A. 833; Laffery v. United States Gypsum Co., 83 Kans. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, and note; Lexington &c. R. Co. v. Baker, 156 Ky. 431, 161 S. W. 228; Stephenville &c. R. Co. v. Couch, 56 Tex. Civ. App. 336, 121 S. W. 189; Freebury v. Chicago &c. R. Co., 77 Wash. 464, 137 Pac. 1044.

[79] Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161, 27 Am. St. 231 and note; 13 S. E. 277; Tibbetts v. Knox &c. R. Co., 62 Maine 437; McCafferty v. Spuyten &c. R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Bailey v. Troy &c. R. Co., 57 Vt. 252, 52 Am. Rep. 129. See also Louisville &c. R. Co.

dangerous means not contemplated by the parties, the fault is usually imputed to him alone.[80] Where blasting is contemplated by the contract, the company may be liable for such injuries as will result directly from the acts which the contractor is authorized to do, if he does them in a proper manner; but for those injuries which arise from the careless or wrongful acts of the contractor or his servants in employing blasting as a means of performing the work or in conducting the blasting authorized by the contract, the company will be in nowise liable.[81] Where the company contracts to haul the material for the contractor and operates its trains for such purpose entirely by its own employes, the contractor having no control of the train, the company is liable for injuries resulting from the negligent running of the train,[82] but where the contract gives the contractor the right to control the train, the liability rests upon him.[83] However, it is held that if the railroad be operated by

v. Smith, 134 Ky. 47, 119 S. W. 241; Missouri Val. Bridge &c. Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S. W. 93.

[80] West v. St. Louis &c. R. Co., 63 Ill. 545; Hackett v. W. U. Tel. Co., 80 Wis. 187, 49 N. W. 822. See Elliott Roads and Streets (3rd ed.), § 814, 14 Am. & Eng. Ency. of Law, 832n; McGrath v. St. Louis, 215 Mo. 191, 114 S. W. 611, and authorities last cited in last preceding note.

[81] Tibbetts v. Knox &c. R. Co., 62 Maine 437; Booth v. Rome &c. R. Co., 17 N. Y. S. 336, 63 Hun 624; McCafferty v. Spuyten &c. R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Carman v. Steubenville &c. R. Co., 4 Ohio St. 399; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; Edmunson v. Pittsburgh &c. R. Co., 111 Pa. St. 316, 2 Atl. 404. See also Cuff v. Newark R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Kendall v. Johnson, 51 Wash. 477, 99 Pac. 310. But see, ante, § 1384. An examination of the cases shows that the conflict sometimes referred to by writers is only an apparent one and that the rules laid down in the text have been followed in both classes of cases. See note to Blumb v. Kansas, 84 Mo. 112, 54 Am. Rep. 87. See also and compare notes in 65 L. R. A. 644, 645, 742, 833.

[82] Burton v. Galveston &c. R. Co., 61 Tex. 526, 21 Am. & Eng. R. Cas. 218; Chicago &c. R. Co. v. Clark, 26 Nebr. 645, 42 N. W. 703, 38 Am. & Eng. R. Cas. 192; Railroad v. Norwood, 62 Miss. 565, 52 Am. Rep. 191. But see Illinois Central R. Co. v. Finnigan, 21 Ill. 646; Chicago &c. R. Co. v. Whipple, 22 Ill. 105.

[83] Rome &c. R. Co. v. Chasteen, 83 Ala. 591, 7 So. 94; Central R. & B. Co. v. Grant, 46 Ga. 417; Miller v. Minnesota &c. R. Co., 76 Iowa 655, 39 N. W. 188, 14 Am. St. 258, 38 Am. & Eng. R. Cas. 234; Kansas &c. R. Co. v. Fitzsimmons, 18 Kans. 34; Meyer v. Midland &c. R. Co., 2

the contractor for purposes of traffic with the knowledge or authority of the company, he is considered the agent of the company for that purpose, and the company is liable for his negligence.[84] For trespass in entering upon land under the franchise of a railroad company, the company may be held liable, although the actual entry was made by contractors. So, where the contractor cuts trenches and throws up embankments, hauls stone across adjacent premises, cuts down trees, or leaves waste dirt upon arable land, in the exercise of the charter power, the company is liable, unless the contractor has exceeded his authority,[85] and a wrongful appropriation by an independent contractor will render a company liable if it rati-

Nebr. 319; Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. 925; Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Union &c. R. Co. v. Hause, 1 Wyo. 27. But compare St. Louis &c. R. Co. v. Coutch, 111 Ark. 5, 162 S. W. 1103.

[84] Lakin v. Willamette &c. R. Co., 13 Ore. 436, 11 Pac. 68, 57 Am. Rep. 25 and note; Chattanooga &c. R. Co. v. Whitehead, 89 Ga. 190, 15 S. E. 44; Cogswell v. West &c. Elec. Ry. Co., 5 Wash. 46, 31 Pac. 411. In St. Louis &c. R. Co. v. Coutch, 111 Ark. 5, 162 S. W. 1103, a railroad company under contract to haul ties on a train over which the contractor was given charge while loading by the agreement was held liable to an employe of the contractor injured by negligence of the trainmen or the contractor.

[85] Alabama &c. R. Co. v. Williams, 92 Ala. 277, 9 So. 203; West v. St. Louis &c. R. Co., 63 Ill. 545; Rockford &c. R. Co. v. Wells, 66 Ill. 321; St. Louis &c. R. Co. v. Drennan, 26 Ill. App. 263; Vermont &c. R. Co. v. Baxter, 22 Vt. 365. See also Alabama Midland R. Co. v. Martin, 100 Ala. 511, 14 So. 401; St. Louis &c. R. Co. v. Knott, 54 Ark. 424, 16 S. W. 9; Bloomfield R. Co. v. Grace, 112 Ind. 130, 13 N. E. 680; Hughes v. Cincinnati &c. R. Co., 39 Ohio St. 461; New Orleans &c. R. Co. v. Reese, 61 Miss. 581. There are many authorities that hold that the company is liable for improper entries, and all abuses of the right of eminent domain committed by the contractor. Lesher v. Wabash Nav. Co., 14 Ill. 85, 56 Am. Dec. 494 and note; Chicago &c. R. Co. v. Whipple, 22 Ill. 105; Chicago &c. R. Co. v. Woolsey, 85 Ill. 370; Vermont &c. R. Co. v. Baxter, 22 Vt. 365; Macon &c. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678; Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632. See also Ullman v. Hannibal &c. R. Co., 67 Mo. 118; Leber v. Minneapolis &c. R. Co., 29 Minn. 256, 13 N. W. 31; Houston &c. R. Co. v. Meador, 50 Tex. 77. Landowners who stand by and permit contractors to commit waste on adjacent soil without objection can not recover damages in a court of equity.

fies his acts.[86] But for trespasses by contractors or subcontractors, which were not the natural result of the work, or were not authorized, directed or ratified by the company, and not done under its charter, no liability attaches to the company.[87] The negligent selection of an incompetent contractor may render the company liable for his negligent or wrongful acts,[88] and where injury is caused by defective construction, which was inherent in the original plan of the employer, the fault may be imputed to him.[89] When the contract provides that the company shall furnish appliances or material the liability of the company for injuries resulting from defects in such appliances or material furnished depends largely upon the circumstances of each case.[90]

Murdfeldt v. New York &c. R. Co., 102 N. Y. 703, 7 N. E. 404, 25 Am. & Eng. R. Cas. 144.

[86] Bloomfield R. Co. v. Grace, 112 Ind. 128, 13 N. E. 680; Lesher v. Wabash Nav. Co., 14 Ill. 85, 56 Am. Dec. 494. See also Eaton v. European &c. R. Co., 59 Maine 520, 8 Am. Rep. 430.

[87] St. Louis &c. R. Co. v. Knott, 54 Ark. 424, 16 S. W. 9; Callahan v. Burlington &c. R. Co., 23 Iowa 562; Waltemeyer v. Wisconsin &c. R. Co., 71 Iowa 626, 33 N. W. 140, 30 Am. & Eng. R. Cas. 384. Eaton v. European &c. R. Co., 59 Maine 520, 8 Am. Rep. 430; Clark v. Hannibal &c. R. Co., 36 Mo. 202; Hughes v. Cincinnati &c. R. Co., 39 Ohio St. 461; Clark v. Vermont &c. R. Co., 28 Vt. 103; Steel v. South Eastern R. Co., 16 C. B. 550. See Salliotte v. King Bridge Co., 122 Fed. 378, 65 L. R. A. 620 and note; St. Louis &c. R. Co. v. Gillihan, 77 Ark. 551, 92 S. W. 793 (citing text).

[88] 1 Thomp. Neg. (2nd ed.), § 677; Berg v. Parsons, 84 Hun 60, 31 N. Y. S. 1091; Norwalk Gas Light Co. v. Norwalk, 63 Conn. 495, 28 Atl. 32; Cuff v. Newark &c. Railroad Co., 35 N. J. L. 17, 10 Am. Rep. 205; Robbins v. Chicago City, 4 Wall. (U. S.) 657, 18 L. ed. 427. See also Pine Mt. R. Co. v. Finley (Ky.), 117 S. W. 413.

[89] Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. 231 and note, and cases cited.

[90] See King v. New York &c. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Tobin v. Portland &c. R. Co., 59 Maine 183, 8 Am. Rep. 415. Where a poisonous substance was applied to timber to prevent decay and a servant of the contractor was injured thereby the company was held not liable. West v. St. Louis &c. R. Co., 63 Ill. 545. Where a derrick was supplied by the company, which being defective, fell and injured a servant, it was held that no implied duty to keep in repair existed as the relation to the contractor was not that of a master and servant, and the company was held not liable. King v. New York &c. R. Co., 66 N. Y. 181.

§ 1409 (1064). **Liability of contractor—Joint liability.**—As a general rule the independent contractor is alone liable to third persons for the consequence of his own negligence and that of his servants,[91] and where the contract is for delivery of the completed work his liability continues until the work is accepted,[92] when, it is held, that of the employer begins.[93] This rule, that the contractor is not liable to third parties injured after the work is turned over and accepted, is well settled as a general rule;[94] but there may be peculiar and exceptional cases in which he will still be liable.[95] If the contractor employ means unnecessarily dangerous, not contemplated in the agreement, or

But see contra, Conlon v. Eastern R. Co., 135 Mass. 195, 15 Am. & Eng. R. Cas. 99.

[91] West v. St. Louis &c. R. Co., 63 Ill. 545; Whitney &c. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Wabash &c. R. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; Milier v. Minnesota &c. R. Co., 76 Iowa 655, 39 N. W. 188; 14 Am. St. 258; City &c. Ry. Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. 345; Hitte v. Republican &c. R. Co., 19 Neb. 620, 28 N. W. 284, 29 Am. & Eng. R. Cas. 586. The contractor must answer for his own wrongs committed in the course of the work of his servants. 1 Thomp. Neg. (2nd ed.), § 685; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077. See also authorities cited in last section. We do not, of course, mean that the contractor's servant may not also be held liable for his own negligence. What we mean is that the company is not liable.

[92] St. Louis &c. R. Co. v. Knott, 54 Ark. 424, 16 S. W. 9; Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am St. 231 and note.

[93] Sturges v. Society, 130 Mass. 414, 39 Am. Rep. 463; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Cork v. Blossom, 162 Mass. 330, 38 N. E. 495, 26 L. R. A. 256, 44 Am. St. 362; Harding v. City of Boston, 163 Mass. 14, 39 N. E. 411. See also Daugherty v. Herzog, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. 204; First Presb. Cong. v. Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. 808, 26 L. R. A. 504 and note.

[94] Additional cases to this effect are Memphis Asphalt Co. v. Flemming, 96 Ark. 442, 132 S. W. 222, Ann. Cas. 1912B 709, and cases there cited in note; Young v. Smith & Co., 124 Ga. 475, 52 S. E. 765, 110 Am. St. 186; Willis v. White, 150 N. Car. 199, 63 S. E. 942, 134 Am. St. 906; McCrory v. Thomas, 109 Va. 373, 63 S. E. 1011.

[95] Pennsylvania Steel Co. v. Elmore &c. Contracting Co., 175 Fed. 176 (where contractor wilfully violated contract and made the work dangerous and misled the owner); Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330.

commit an unauthorized trespass, or neglect to use proper precaution in conducting dangerous work which could be safely conducted by the means prescribed in the contract, the liability rests upon him alone.[96] But where the work is wrongful or unlawful in itself, or if done in the ordinary manner would result in a nuisance or injury to others, the company and contractor may be jointly liable.[97] And so if the company's contractor by its direction enters upon lands before the right to do so has been acquired they are both trespassers and are jointly liable.[98] It has been held, however, that where the company can foresee the danger attendant upon the construction it is incumbent upon the company to take precautions against it, and that if the work be done in a careful manner no liability attaches to the contractor.[99] The employer will share the liability where he se-

[96] Burke v. Anderson, 69 Fed. 814; Chicago &c. R. Co. v. Ferguson, 3 Colo. App. 414, 33 Pac. 684; Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. 231 and note; Fulton County St. R. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828; West v. St. Louis &c. R. Co., 63 Ill. 545; Wabash &c. R. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. R. 696; Louisville Ry. Co. v. Wiggington, 156 Ky. 400, 161 S. W. 209; City &c. R. Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. 345; McDonnell v. Rifle Boom Co., 71 Mich. 61, 38 N. W. 681; Cuff v. Newark &c. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; McCann v. Kings County R. Co., 19 N. Y. S. 68; Hackett v. Western &c. Co., 80 Wis. 187, 49 N. W. 822; White's Supp. to Thompson Corp. § 685.

[97] Chicago City v. Robbins, 2 Black (U. S.) 418, 17 L. ed. 298; Robbins v. Chicago City, 4 Wall. (U. S.) 657, 18 L. ed. 427; Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. 231 and note; Booth v. Rome &c. R. Co., 63 Hun (N. Y.) 624; Hughes v. Cincinnati &c. R. Co., 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; Ohio &c. R. Co. v. Morey, 47 Ohio St. 207; 24 N. E. 269; 7 L. R. A. 701; 1 Thomp. Neg. (2nd ed.) §§ 652, 903. See also Lemaitre v. Davis, 19 Ch. D. 281. And where an independent contractor made an excavation on the depot grounds and he and the company were negligent in not barricading or lighting it, both were held liable to one who fell into it while about to take passage on a train. Louisville &c. R. Co. v. Cheatham, 118 Tenn. 160, 100 S. W. 902.

[98] St. Louis &c. R. Co. v. Knott, 54 Ark. 424, 16 S. W. 9; Ullman v. Hannibal &c. Railroad Co., 67 Mo. 118; McKinley v. Chicago &c. Railroad Co., 40 Mo. App. 449; Turman v. Bell, 54 Ark. 273, 15 S. W. 886, 26 Am. St. 35.

[99] Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, 27

lects an incompetent contractor to perform dangerous work, notwithstanding the contractor may have agreed to assume all risk.[1] The contractor stands in the relation of master to those immediately employed by him and his liability to them is determined by the settled rules determining the liability of master to servant.[2]

§ 1410 (1065). Rights of laborers.—In many of the states statutes have been enacted giving the laborers employed in the construction of a railway a claim upon the company for any arrears of wages.[3] In the absence of a statute whose terms are broad enough to include them, the laborers employed by a contractor or subcontractor are not in any such privity of contract with the company as to render it liable for their wages.[4] In

Am. St. 231 and note, citing Bower v. Peate, L. R. 1 Q. B. Div. 321; Tarry v. Ashton, L. R. 1 Q. B. Div. 314; Pickard v. Smith, 10 C. B. (N. S.) 470. So held as to defects in plan or material selected and furnished by the builder. Pearson v. Zable, 78 Ky. 170; McCall v. Pacific &c. Co., 123 Cal. 42, 55 Pac. 706. See also Charlock v. Freel, 125 N. Y. 357, 26 N. E. 262; First Presb. Cong. v. Smith, 163 Pa. St. 561, 30 Atl. 279, 26 L. R. A. 504 and note 43 Am. St. 808; 1 Thomp. Neg. (2nd ed.) § 652.

[1] Berg v. Parsons, 84 Hun 60, 31 N. Y. S. 1091; Cuff v. Newark &c. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Eaton v. European &c. R. Co., 59 Maine 520, 8 Am. Rep. 430 and cases cited infra.

[2] Under ordinary circumstances a contractor is not liable for the negligence of a subcontractor. Luce v. Holloway, 156 Col. 162, 103 Pac. 886; Murphy v. New York, 128 App. Div. 463, 112 N. Y. C. 807; Bancroft v. Godwin, 41 Wash. 253, 83 Pac. 189. See also St. Louis &c. Ry. Co. v. Yates, 111 Ark. 486, 165 S. W. 282.

[3] The liability is the same whether the work is performed under a contract or at a stipulated price or on a quantum meruit. Chapman v. Utica &c. R. Co., 4 Lans. (N. Y.) 96.

[4] Indianapolis &c. R. Co. v. O'Reilly, 38 Ind. 140; Marks v. Indianapolis &c. R. Co., 38 Ind. 440; Gallagher v. Ashby, 26 Barb. (N. Y.) 143; Bontwell v. Townsend, 37 Barb. (N. Y.) 205; Rogers v. Dexter &c. R. Co., 85 Maine 372, 21 L. R. A. 528, 27 Atl. 257. See also Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Toledo D. & B. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. ed. 905. An unwritten promise by a railroad company to assume a contractor's obligations to his employes has been held insufficient to sustain an action. Bottomley v. Port Huron &c. R. Co., 44 Mich. 542, 7 N. W. 214.

several states the statutes are broad enough to include the laborers employed by contractors and subcontractors as well as the immediate servants of the company, while in others only laborers employed directly by the company are so protected.[5] Such statutes have been upheld as constitutional, as they can neither be regarded as special legislation nor as an impairment of the obligation of contracts, and they apply as well to companies chartered before the passage of the law as to those chartered afterward.[6] In a number of states labor claims of the com-

[5] See Indiana &c. R. Co. v. Larrew, 130 Ind. 368, 30 N. E. 517; Reynolds v. Manhattan Trust Co., 83 Fed. 593; St. Louis &c. R. Co. v. Kerr, 153 Ill. 182, 38 N. E. 638; Farmers' Loan &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 704 and note, 47 Am. & Eng. R. Cas. 271; Gulf &c. R. Co. v. Winder, 26 Tex. Civ. App. 263, 63 S. W. 1043; Texas &c. R. Co. v. Dorman (Tex. Civ. App.), 62 S. W. 1086. A superintendent and time-keeper are not within the statute. Missouri &c. R. Co. v. Baker, 14 Kans. 563. Laborers employed by a sub-contractor have their remedy under the statute. Mann v. Corrigan, 28 Kans. 194; Mundt v. Sheboygan &c. R. Co., 31 Wis. 451; Kent v. New York &c. R. Co., 12 N. Y. 628; Branin v. Connecticut &c. R. Co., 31 Vt. 214; Peters v. St. Louis &c. R. Co., 24 Mo. 586. See Hart's Appeal, 96 Pa. St. 355. The sub-contractor himself is not included, although his employes are. Rogers v. Dexter &c. R. Co., 85 Maine 372, 27 Atl. 257, 21 L. R. A. 528. The liability extends to labor of teams as well as of direct manual labor. Branin v. Connecticut &c. R. Co., 31 Vt. 214. But see contra Atcherson v. Troy &c. R. Co., 6 Abb. Pr. N. S. (N. Y.) 329 and cases cited; Groves v. Kansas City &c. R. Co., 57 Mo. 304. As to construction of such statutes and compliance with them, see Mundt v. Sheboygan &c. R. Co., 31 Wis. 451; Dudley v. Toledo &c. R. Co., 65 Mich. 655, 32 N. W. 884; Quackenbush v. Chicago &c. R. Co., 91 Mich. 308, 51 N. W. 883; Spafford v. Duluth &c. R. Co., 48 Minn. 515, 51 N. W. 469; Grannahan v. Hannibal &c. R. Co., 30 Mo. 546; Cosgrove v. Tebo &c. R. Co., 54 Mo. 495; Chapman v. Utica &c. R. Co., 4 Lans. (N. Y.) 96; National Bank v. Gulf &c. R. Co., 95 Tex. 176, 66 S. W. 203; Cartwright v. New York &c. R. Co., 59 Vt. 675, 9 Atl. 370, 30 Am. & Eng. R. Cas. 234; Redmond v. Galena &c. R. Co., 39 Wis. 426, 13 Am. Ry. 400.

[6] Shipley v. Terre Haute, 74 Ind. 297, 4 Am. & Eng. R. Cas. 345; Peters v. St. Louis &c. R. Co., 23 Mo. 107; Grannahan v. Hannibal &c. R. Co., 30 Mo. 546; Conner v. Hannibal &c. R. Co., 30 Mo. 549; Luther v. Saylor, 8 Mo. App. 424; Branin v. Connecticut &c. R. Co., 31 Vt. 214. But they are not retroactive so as to apply to claims previously accrued. Vanderpool v.

pany are made a liability of the stockholder, in some instances to the amount of the stock, and in other they are made an individual liability to the full amount of the claims.[7] In other states the company making contracts for building must require a bond from the contractor securing payment of all material men and labor and if it fails to take such a bond it is liable to the full extent of such unpaid debts.[8] But the most common remedy of the unpaid laborer is the lien given him by statute upon the property of the company.[9]

La Crosse &c. R. Co., 44 Wis. 652; Arbuckle v. Illinois Midland R. Co., 81 Ill. 429; Central &c. R. Co. v. Henning, 52 Tex. 466.

[7] In Michigan, liable only to the amount of the stock. Peck v. Miller, 39 Mich. 594. A suit against a railroad company for a labor debt can be maintained only on the theory that the company is owner of the road, and not upon the theory that it is agent of the owner. Chicago &c. R. Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213. A city having subscribed to stock as authorized by statute is bound by the same liability as attaches to the ordinary stockholder for labor done in construction of the road. Shipley v Terre Haute, 74 Ind. 297, 4 Am. & Eng. R. Cas. 345.

[8] The Kansas statute requires the company to take a bond of the contractor, and failing to do so the company is liable to laborers and their assignees. Missouri &c. R. Co. v. Brown, 14 Kans. 557; Maun v. Corrigan, 28 Kans. 194. But, ordinarily, the statute giving a lien does not make the railroad company personally liable. Bethune v. Cleveland &c. R. Co., 149 Mo. 587, 51 S. W. 465; Morgan v. Chicago &c. R. Co., 76 Mo. 161. The statute of Washington which provides that every person performing labor or furnishing material to be used in the construction of any railroad shall have a lien, provided that every railroad company shall take from a contractor a bond conditioned to pay all laborers and materialmen working for or supplying such contractor, which bond shall be filed in the office of the county auditor, and that, if any railroad company fail to take such bond, it shall be liable to the laborers and materialmen to the full extent of the debts contracted by the contractor, has been held to mean that railroad property is excepted from liens where the specified security is taken, and not that when the company fails to take a bond an action will lie directly against the company without any notice of the lien. Laidlaw v. Portland &c. Ry. Co., 42 Wash. 292, 84 Pac. 855.

[9] See post, § 1413, et seq. Under the Washington statute where the railroad company requires a bond from the contractor it takes the place of a lien in favor of laborers and materialmen, and notice of lien

§ 1411 (1065a). Guaranty of payment of claims by railroad company.—It has been held in Ohio that a railroad company may guaranty the payment of the claims of persons furnishing labor, materials and supplies to its contractors, and this may be done by the publication of notices undertaking to protect such claims, and that an obligation of this character may be enforced by one furnishing such labor or articles in reliance on the notice, though the time for filing a lien under the statute has expired. But such contracts are strictly construed. Thus, in a case where a railroad company improving its road-bed posted notices that it would "protect all claims for materials, labor and board," it was held that a claim for hay and feed furnished to a contractor for teams employed by the latter on said work is not a claim for either material, labor, or board within the meaning of the notice.[10]

§ 1412 (1066). Mechanics' liens—General laws do not include railroads.—The ordinary mechanics' lien laws do not, as a rule, embrace railroads. They may, of course, expressly provide for liens upon railroads, or, although the term, "railroad" is not used, the language and intent of the statute may be such as to clearly include railroads; but the courts will not presume that the legislature intended to subject the public to the annoyances and inconveniences which would necessarily attend the enforcement of a mechanics' lien against a railroad under a general mechanics' lien law, and will not so construe it unless such an interpretation is clearly required.[11] Thus, although a

is not necessary as a condition of liability on the bond. Clark v. Murphy, 99 Wash. 643, 170 Pac. 141.

[10] Pennsylvania Co. v. McHaffey, 75 Ohio 432, 80 N. E. 177.

[11] Buncombe Co. Comrs. v. Tommey, 115 U. S. 122, 5 Sup. Ct. 626, 1186, 29 L. ed. 305; Pennsylvania &c. Co. v. J. E. Potts &c. Co., 63 Fed. 11; Newcastle R. Co. v. Simpson, 26 Fed. 133; Detroit Trust Co. v. Detroit &c. R. Co., 159 Mich. 442, 124 N. W. 45; Easterley's Appeal, 54 Pa. St. 192; Tyler R. Co. v. Driscol, 52 Tex. 13; La Crosse &c. Co. v. Vanderpool, 11 Wis. 119, 124, 78 Am. Dec. 691 and note. See also Cleveland &c. R. Co. v. Knickerbocker Trust Co., 86 Fed. 73; Pittsburgh &c. Laboratory v. Milwaukee El. R. &c. Co., 110 Wis. 633, 86 N. W. 592, 595 (quoting text), 84 Am. St. 948 (but see McGrath Constr. Co. v. Waupaca &c. R. Co., 148 Wis. 372, 134 N. W. 824); Huntley Mfg. Co. v. Michi-

railroad is, in a general sense, a structure, it has been held in several cases that a statute giving a lien for materials and labor upon any "house, mill, manufactory, building or other structure," does not include a railroad.[12] But this may depend very largely upon the context, under the maxim noscitur a sociis, and the phrase "any other structure" has been held to include a railroad when preceded by a specific enumeration of works or property of a somewhat similar character.[13] So, the poles and wires of an electric light system have been held to constitute a structure within the meaning of the mechanics' lien law.[14] And as a statute providing for a lien on buildings or bridges has been held to cover a building or a bridge constructed for a railroad company.[15] There are also other decisions to the effect that there may be a right to such a lien where such appears to be the intent of the statute even though it does not expressly refer to railroads.[16]

§ 1413 (1067). Statutes authorizing liens—Railroads and street railways.—If it is clear that the statute includes rail-

gan Cent. R. Co., 76 Ill. App. 387; Dunn v. North Missouri R. Co., 24 Mo. 493.

[12] Rutherford v. Cincinnati &c. R. Co., 35 Ohio St. 559; Graham v. Mt. Sterling C. Co., 14 Bush (Ky.) 425, 29 Am. Rep. 412; Pennsylvania &c. Co. v. J. E. Potts &c. Co., 63 Fed. 11. See also United States &c. Trust Co. v. Western Supply &c. Co. (Tex. Civ. App.), 109 S. W. 382.

[13] Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. 470, 8 L. R. A. 700. See also Central Trust Co. v. Sheffield &c. Co., 42 Fed. 106, 9 L. R. A. 67; Giant Powder Co. v. Oregon Western R. Co., 59 Ore. 236, 117 Pac. 279, Ann. Cas. 1913C 93, 94 (citing text).

[14] Forbes v. Willamette &c. Co., 19 Ore. 61, 23 Pac. 670, 20 Am. St. 793. See also Helm v. Chapman, 66 Cal. 291, 5 Pac. 352; Putnam v. Ross, 46 Mo. 337; Taggard v. Buckmore, 42 Maine 77; Schmidt, Ex parte, 62 Ala. 252; Buchanan v. Smith, 43 Miss. 90.

[15] Botsford v. New Haven &c. R. Co., 41 Conn. 454; Hill v. La Crosse &c. R. Co., 11 Wis. 214; Purtell v. Chicago &c. Co., 74 Wis. 132, 42 N. W. 265; Smith Bridge Co. v. Bowman, 41 Ohio St. 37, 52 Am. Rep. 67. See also Schaghticoke &c. Co. v. Greenwich &c. R. Co., 183 N. Y. 306, 76 N. E. 153.

[16] Dunavant v. Caldwell &c. R. Co., 122 N. Car. 999, 29 S. E. 837; H. C. Huston Lumber Co. v. Wetzel &c. R. Co., 69 W. Va. 682, 72 S. E. 786; McGrath Constr. Co. v. Waupaca &c. R. Co., 148 Wis. 372, 134 N. W. 824 (even upon right of way used in operation of railroad).

roads, we suppose that it should be liberally construed as in other cases.[17] It was held in a recent case, however, that a statute giving laborers a lien upon a "railroad" or "any other structure" did not authorize a lien upon a street railway where the fee of the street was in the city.[18] And there are other cases to the effect that a street railway is not a railroad within a mechanic's lien statute authorizing a lien on railroads.[19] But this is not entirely beyond question, and in several cases the opposite view has been taken.[20] Other decisions showing that the right to acquire a lien upon a railroad must be clearly given and that a general statute will not be extended by construction so as to include railroads, are reviewed in the preceding section.

[17] Flagstaff Mining Co. v. Cullins, 104 U. S. 176, 26 L. ed. 705; Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84; Kiel v. Carll, 51 Conn. 440; Schulenburg v. Memphis &c. R. Co., 67 Mo. 442; Bradish v. James, 83 Mo. 313; White Lake &c. Co. v. Russell, 22 Neb. 126, 34 N. W. 104, 3 Am. St. 262; Edwards v. Derrickson, 28 N. J. L. 39; Texas &c. R. Co. v. Orman, 3 N. Mex. 308, 9 Pac. 253; Railway Co. v. Cronin, 38 Ohio St. 122, 127. Such statutes will not, however, be construed as retroactive and authorizing a lien for work done or materials furnished before their passage. Arbuckle v. Illinois Midland R. Co., 81 Ill. 429; Parker v. Massachusetts R. Co., 115 Mass. 580; Central &c. R. Co. v. Henning, 52 Tex. 466. For recent cases involving the construction of special statutory provisions extending such liens to railroads, see note in Ann. Cas. 1913C, 97. The recent Indiana case there cited has been overruled in a still more recent Indiana case and it is now held that the Indiana statute gives a lien to contractors and subcontractors. Moore-Mansfield Const. Co. v. Indianapolis &c. Ry. Co., 179 Ind. 356, 101 N. E. 296, 44 L. R. A. (N. S.) 816.

[18] Front Street Cable R. Co. v. Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693. This decision seems to be of questionable soundness. See St. Louis &c. Co. v. Donahoe, 3 Mo. App. 559; Pittsburg &c. Laboratory v. Milwaukee Elec. R. &c. Co., 110 Wis. 633, 86 N. W. 592, 84 Am. St. 948; Bethune v. Cleveland &c. R. Co., 149 Mo. 587, 51 S. W. 465.

[19] Messilon Bridge Co. v. Cambria Iron Co., 59 Ohio St. 179, 52 N. E. 192. See also Central Trust Co. v. Warren, 121 Fed. 323.

[20] New England Engineering Co. v. Oakwood St. R. Co., 75 Fed. 162; St. Louis &c. Co. v. Donohue, 3 Mo. App. 559. See ante, §§ 7, 8, and post § 1415. In Moore-Mansfield Constr. Co. v. Indianapolis &c. R. Co., 179 Ind. 356, 101 N. E. 296, it seems to be assumed that such a statute authorizes a lien upon interurban railroads.

It has been held that a statute expressly giving a lien upon a railroad for materials furnished and used in its construction is, in effect, a legislative declaration that prior statutes did not cover such cases.[21] Statutes giving a preference or lien to laborers and material men upon the insolvency of the company are to be distinguished from ordinary mechanics' lien statutes, and one who has lost his right to enforce his lien under the mechanics' lien statutes, by failing to file his notice in time can not enforce it as a preferred claim under the statute giving preferences to certain classes of claims upon the insolvency of the company, unless he shows that it is within the terms of such statute.[22] For instance, as held in the case just cited, where the mechanics' lien statute authorizes a lien in favor of "contractors" and another statute provides that the claims of "employes" shall be preferred and constitute a lien, upon the insolvency of the company, a contractor who has not filed notice of his lien as required by the former statute, is not entitled to a preference or a lien under the latter statute.

§ 1414 (1068). For what lien may be obtained.—The nature of the claim for which a lien may be acquired depends, of course, upon the governing statute in each particular case. It is generally required that the labor should be performed or the material used in the construction of the road.[23] But the latest cases seem to evince a tendency to relax this strict rule and to extend the right to a lien under many of the statutes to material not going directly into the structure so as to become a per-

[21] Tod v. Kentucky Un. R. Co., 52 Fed. 241, 18 L. R. A. 305. See also Voightman v. Southern R. Co., 123 Tenn. 452, 131 S. W. 987. Ann. Cas. 1912C, 211. And in Chicago &c. R. Co. v. Moore, 92 Ark. 446, 123 S. W. 233, it is held that the statute did not apply to work done under a contract before the passage of the statute.

[22] Tod v. Kentucky Un. R. Co., 52 Fed. 241, 18 L. R. A. 305.

[23] St. Louis &c. Ry. Co. v. Love, 74 Ark. 528, 86 S. W. 395, 397 (citing text); St. Louis &c. R. Co. v. Henry, 75 Ark. 603, 86 S. W. 841; Gordon Hardware Co. v. San Francisco &c. R. Co., 86 Cal. 620, 22 Pac. 406, 23 Pac. 1025, 25 Pac. 125; Ferguson v. Despo, 8 Ind. App. 532, 34 N. E. 575; Pennsylvania Co. v. Mehaffey, 75 Ohio 432, 80 N. E. 177. See also note in 36 L. R. A. (N. S.) 866.

manent part thereof.[24] Under such a statute it has been held that giant powder furnished to be used, and used, by the contractor in constructing the road is "material" for the value of which a lien may be acquired,[25] but where powder was sold to a contractor to quarry rock from his own land to be delivered to the railroad company on its cars, and it was not stated in the contract where and for what purpose the rock was to be used, it was held that the person who furnished such powder was not entitled to a lien under a statute giving a lien to all persons who furnish material to any railroad.[26] So, it has been held that a lien cannot be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge, under a statute authorizing a lien for all materials "used in and about" the construction of the bridge.[27] So, of course, groceries and food furnished for the workmen, while, in a sense, used in the construction of the road, are not materials which so enter into

[24] Chamberlain v. Lewiston, 23 Idaho 154, 129 Pac. 1069; B. L. Avery & Sons v. Woodruff & Cahill, 144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866. Johnson v. Starret, 127 Minn. 138, 149 N. W. 6; Moritz v. Sands Lumber Co., 158 Wis. 49, 146 N. W. 1120, 51 L. R. A. (N. S.) 1040 and note.

[25] Giant Powder Co. v. Oregon Pac. R., 42 Fed. 470, 8 L. R. A. 700; Kapauno &c. Co. v. Greenfield &c. R. Co., 59 Mo. App. 6. To the same effect are Pacific Sash &c. Co. v. Bumiller, 162 Cal. 664, 124 Pac. 230, 41 L. R. A. (N. S.) 296 (oil used for pipe joints); California Powder Works v. Blue Tent &c. Mines, 3 Cal. Unrep. 145, 22 Pac. 391 (explosives), George H. Sampson Co. v. Commonwealth, 202 Miss. 326, 88 N. E. 911 (gunpowder); Johnson v. Starret, 127 Minn. 138, 149 N. W. 6, L. R. A. 1915B, 708. See Hercules Powder Co. v. Knoxville &c. R. Co., 113 Tenn. 382, 106 Am. St. 836, 83 S. W. 354, 67 L. R. A. 487 (quoting and distinguishing text). "Timber" has been held to include railroad ties. Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67.

[26] Indiana Powder Co. v. St. Louis &c. R. Co., 116 Mo. App. 364, 92 S. W. 150. See also Cincinnati &c. R. Co. v. Shera, 36 Ind. App. 515, 73 N. E. 293; Barker &c. Lumber Co. v. Marathon Paper Mills Co., 146 Wis. 12, 130 N. W. 866, 36 L. R. A. (N. S.) 875.

[27] Basshor v. Baltimore &c. R. Co., 65 Md. 99, 3 Atl. 285. See also Gordon &c. Co. v. San Francisco &c. R. Co., 86 Cal. 620, 22 Pac. 406, 23 Pac. 1025, 25 Pac. 125; First Nat. Bank v. Perris &c. Dist., 107 Cal. 55, 40 Pac. 45. But compare Perry v. Duluth &c. R. Co., 56 Minn. 306, 57 N. W. 792.

its construction that a lien can be based upon them.[28] So the right to a lien has been denied to a person furnishing coal consumed in the operation of a steam shovel used by a contractor in the construction of a railroad.[29] Nor can one who furnishes an electric light plant for hotel premises at the instance of a railroad company obtain a lien therefor under a statute authorizing a lien for labor performed or materials furnished for the construction of the road, depot buildings or water tanks.[30] So it has been held that coal and oil and tools were not within a statute giving a lien to the furnisher of "material" for the construction or repair of a railroad.[31] And under most statutes there can be no lien for material contracted for and prepared but never delivered.[32] But it has been held that one who is employed to grub and clear the right of way and construct the

[28] Ferguson v. Despo, 8 Ind. App. 523, 528, 34 N. E. 575; Dudley v. Toledo &c. R. Co., 65 Mich. 655, 32 N. W. 884, 30 Am. & Eng. R. Cas. 236; Luttrell v. Knoxville &c. R. Co., 119 Tenn. 492, 105 S. W. 565, 123 Am. St. 737, 752 (citing text). Nor is lumber sold to a contractor on a railroad for shanties for his employes or stables for his teams. Stewart &c. Co. v. Missouri Pac. R. Co., 33 Nebr. 29, 49 N. W. 769. See also Central Trust Co. v. Texas &c. R. Co., 23 Fed. 703; Central Trust Co. v. Texas &c. R. Co., 27 Fed. 178.

[29] Cincinnati &c. R. Co. v. Shera, 36 Ind. App. 315, 73 N. E. 293.

[30] Industrial &c. Co. v. Electrical &c. Co., 58 Fed. 732.

[31] Waters-Pierce Oil Co. v. United States &c. Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212. See also Hercules Powder Co. v. Knoxville &c. R. Co., 113 Tenn. 382, 83 S. W. 354, 67 L. R. A. 487, 106 Am. St. 836 (citing text).

[32] Richmond &c. Co. v. Richmond &c. R. Co., 68 Fed. 105, 34 L. R. A. 625. This case also holds that there can be no lien where the material is lost through negligence of the party who claims the lien, although the title had passed, that furnishing a right of way is not furnishing "material", and that legal services are not "labor". See also Lee v. King, 99 Ala. 246, 13 So. 506; Weir v. Barnes, 38 Nebr. 875, 57 N. W. 750; Atlantic Terra Cotta Co. v. Moore Constr. Co., 73 W. Va. 449, 80 S. E. 924; and compare Howes v. Reliance Wire Works Co., 46 Minn. 44, 48 N. W. 448; Huttig Bros. &c. Co. v. Denny &c. Co., 6 Wash. 122, 32 Pac. 1073; Trammell v. Mount, 68 Tex. 210, 4 S. W. 377, 2 Am. St. 479. But in Tennis Bros. Co. v. Wetzel &c. R. Co., 140 Fed. 193, it is held that the fact that all the material had not been used at the time the railroad company terminated the contract did not affect the right to a lien therefor.

road-bed may take and enforce a lien for the grubbing and clearing as well as for constructing the road-bed where all the work is necessary in constructing the road.[33] So, it has been held that one who furnishes materials for the construction of a road in one state under a contract made therein is entitled to a lien against the road although the materials are delivered in another state,[34] but not so, it seems, according to another decision, for materials furnished for use in a state having no railroad lien law.[35] The word "provisions" has been held to include corn, oats and bran.[36] It is frequently provided that the material must be furnished for, as well as used in, the construction of the road or property upon which the lien is claimed, and it has been held that an allegation in a finding that it was purchased for such purpose is not equivalent to an averment or a finding that it was furnished for that purpose.[37] Elsewhere it is regarded as sufficient that plaintiff has in good faith complied with the statute in furnishing fit materials and he is not required to show their application for the purpose for which they were procured.[38]

[33] Dean v. Reynolds, 12 Ind. App. 97, 39 N. E. 763. See also Wabash R. Co. v. Achermire, 19 Ind. App. 482, 49 N. E. 835 (for digging a well). But see as to who are "laborers" within such a statute, note in 30 L. R. A. (N. S.) 85.

[34] Carnegie Bros. v. Lancaster &c. R. Co., 1 Ohio N. P. 300; Westinghouse &c. Brake Co. v. Kansas City &c. R. Co., 137 Fed. 26, 34, 35. See St. Louis &c. R. Co. v. Memphis &c. R. Co., 72 Mo. 664; Thompson v. St. Paul &c. R. Co., 45 Minn. 13, 47 N. W. 259; Mallory v. La Crosse &c. Co., 80 Wis. 170, 49 N. W. 1071. But compare Bagnell Timber Co. v. Missouri &c. R. Co., 180 Mo. 420, 79 S. W. 1130.

[35] Midland Valley R. Co. v. Moran Nut and Bolt Mfg. Co., 80 Ark. 339, 97 S. W. 679.

[36] Kansas City &c. R. Co. v. Graham, 67 Kans. 791, 74 Pac. 232.

[37] Crawfordsville v. Barr, 45 Ind. 258; Lawton v. Case, 73 Ind. 60; Jones v. Hall, 9 Ind. App. 458, 35 N. E. 923. Compare Jeffersonville &c. Co. v. Riter, 138 Ind. 170, 37 N. E. 652; Neeley v. Searight, 113 Ind. 316, 15 N. E. 598; Smith v. Newbaur, 144 Ind. 95, 42 N. E. 40.

[38] Westinghouse Air Brake Co. v. Kansas City &c. R. Co., 137 Fed. 26, citing Central Trust Co. v. Chicago &c. R. Co., 54 Fed. 598; Thompson v. St. Paul City R. Co., 45 Minn. 13, 47 N. W. 259; Neilson v. Iowa East R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124. See also Tennis Bros. v. Wetzel &c R. Co., 140 Fed. 193.

§ 1415 (1069). Upon what lien may be acquired.—It has been held that a mechanics' lien may be taken upon a stable built by a street railway company,[39] or a depot of a commercial railroad company.[40] And in a very recent case it is also held that such a lien may be acquired, even under a general statute, upon the right of way and land and buildings of the company used in the operation of the railroad.[41] But, as elsewhere shown, where materials are furnished or labor is performed in the construction of the road the statutes are usually construed as giving a lien upon the entire road, and the general rule is that it cannot be sold in parcels to satisfy the lien.[42] It has been held, however, that, unless the statute so provides, the lien does not extend to the cars and other movable property of the company,[43] and that even where it does, such property need not all be sold as an entirety in order to satisfy the lien.[44]

[39] McIlvain v. Hestonville &c. R. Co., 5 Phila. (Pa.) 13.

[40] Hill v. La Crosse &c. R. Co., 11 Wis. 214. See also Purtell v. Chicago &c. R. Co., 74 Wis. 132, 42 N. W. 265; Botsford v. New Haven &c. R. Co., 41 Conn. 454; Smith Bridge Co. v. Bowman, 41 Ohio St. 37,. 52 Am. Rep. 67. But compare King v. Alford, 9 Ont. R. 643, 24 Am. & Eng. R. Cas. 331; Breeze v. Midland R. Co., 26 Gr. Ch. (Can.) 225; Shrainka v. Rohan, 18 Mo. App. 340. The Texas constitution and laws are construed not to give to one furnishing material for construction or repair of a railroad a lien on the railroad, but only on the particular building or article made or repaired with the material furnished. Waters-Pierce Oil Co. v. United States &c. Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212.

[41] McGrath Constr. Co. v. Waupaca &c. R. Co., 148 Wis. 372, 134 N. W. 824. See also Ban v. Columbia &c. R. Co., 117 Fed. 21, 54 C. C. A. 407; Giant Powder Co. v. Oregon Western R. Co., 59 Ore. 236, 117 Pac. 279, Ann. Cas. 1913C, 93.

[42] Post, § 1420. See also Steger v. Arctic &c. Co., 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580; Brooks v. Railway Co., 101 U. S. 443, 25 L. ed. 1057; Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506; Farmers' &c. Co. v. Candler, 87 Ga. 241, 13 S. E. 560; Pittsburgh &c. Laboratory v. Milwaukee Elec. R. &c. Co., 110 Wis. 633, 86 N. W. 592, 595, 84 Am. St. 948 (citing and approving text and criticising the Wisconsin cases cited in the last preceding notes.)

[43] Neilson v. Iowa &c. R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124. See also New England &c. R. Co. v. Baltimore &c. R. Co., 11 Md. 81, 69 Am. Dec. 181.

[44] Knapp v. St. Louis &c. R. Co., 74 Mo. 374, 7 Am. & Eng. R. Cas. 394; Cranston v. Union T. Co., 75 Mo. 29.

So, in a recent case it was held, chiefly upon the ground of public policy, that, as the statute did not authorize a lien upon the franchise, it could not be acquired and enforced against a water works "plant" which the purchaser would have no franchise or authority to operate.[45]

§ 1416 (1070). Who may acquire lien.—Only those who are members of one of these classes designated by the statute can acquire a mechanics' lien upon a railroad for material furnished or labor performed in its construction. Nearly all the statutes give such a lien to laborers and material men, and some of them extend it to contractors and subcontractors. We have elsewhere attempted to show who are laborers within the meaning of these and similar statutes.[46] A corporation is a person within the meaning of a statute authorizing a lien in favor of "any person" who furnishes materials to be used in the construction of the road.[47] Many of the statutes authorize a lien in favor of con-

[45] Chapman &c. Co. v. Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. 830. But compare Oconto Water Co. v. National &c. Co., 59 Fed. 19.

[46] Ante, §§ 211, 697. See also note to Tod v. Kentucky Un. R. Co., in 18 L. R. A. 305 (where most of the authorities are collected and reviewed); and note to Indianapolis &c. Tract. Co. v. Breman, 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 91 N. E. 503, 30 L. R. A. (N. S.) 85n (reviewing later cases, but the principal case there reported is overruled in Moore-Mansfield Constr. Co. v. Indianapolis &c. R. Co., 179 Ind. 356, 101 N. E. 296); McDonald v. Charleston &c. R. Co., 93 Tenn. 281, 24 S. W. 252; McElwaine v. Hosey, 135 Ind. 481, 35 N. E. 272. A timekeeper in the employ of a railroad contractor, is not a laborer within the meaning of the Kansas Statute. Missouri &c. R. Co. v. Baker, 14 Kans. 563. Nor is the secretary of a railroad company a servant or employe within the meaning of such statute. Wells v. Southern &c. R. Co., 1 Fed. 270. But a corporation employed to supervise the construction of an electric railway by means of the personal services of its officers and servants has been held entitled to a lien therefor, under the West Virginia statute providing that every workman, laborer or "other person" who shall do any work or labor by virtue of any contract for any incorporated company. Wetzel &c. R. Co. v. Tennis Bros. Co., 145 Fed. 458. A sub-contractor procuring railroad construction work to be done through the labor of others is not a laborer entitled to a lien under the Texas statute. Eastern Tex. R. Co. v. Davis, 37 Tex. Civ. App. 342, 82 S. W. 883.

[47] Dallas &c. Co. v. Wasco &c. Co., 3 Ore. 527. See also Fagan v. Boyle

tractors and subcontractors as well as in favor of laborers, but when a lien is authorized in favor of only one of these classes, it cannot be acquired by those who are members of a different class. Thus, a lien in favor of contractors alone does not extend to subcontractors,[48] and a lien in favor of subcontractors does not extend to persons who furnish material under a contract with them.[49] So, neither a contractor nor a subcontractor can ordinarily obtain a lien as a laborer under a statute authorizing liens in favor of "laborers."[50] Under some of the statutes the

&c. Co., 65 Tex. 324; Doane v. Clinton, 2 Utah 417; South Carolina R. Co. v. McDonald, 5 Ga. 531. So, a foreign corporation may have a lien where it is authorized in favor of "any person". Chapman v. Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. 779. See also Tennis Bros. Co. v. Wetzel St. Ry. Co., 140 Fed. 193, affirmed in 145 Fed. 458. There may, perhaps, be a stronger reason for giving such a lien to laborers, but there is no such reason why the legislature may not just as well give it to corporations who furnish material as to material men generally or ordinary contractors.

[48] Cartter v. Rome &c. R. Co., 89 Ga. 158, 15 S. E. 36; Arbuckle v. Illinois Cent. R. Co., 81 Ill. 429; Tucker v. St. Louis &c. R. Co., 59 Ark. 81, 26 S. W. 375. But see Vaughn v. Smith, 58 Iowa 533, 12 N. W. 604, 7 Am. & Eng. R. Cas. 82. In McDonald v. Charleston &c. R. Co., 93 Tenn. 281, 24 S. W. 252, one who contracted with a construction company was held, as against creditors, to be a contractor with the railroad company under the peculiar circumstances of the case.

[49] Baltzer v. Raleigh & A. R. R. Co., 115 U. S. 634, 6 Sup. Ct. 216, 29 L. ed. 505; Smith Bridge Co. v. Louisville &c. R. Co., 72 Ill. 506; Cairo &c. R. Co. v. Watson, 85 Ill. 531; Schaar v. Knickerbocker &c. Co., 149 Ill. 441, 37 N. E. 54; Farmers' Loan &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740 and note, 47 Am. & Eng. R. Cas. 271; Mills v. Paul (Tex.), 30 S. W. 558. See also St. Louis &c. R. Co. v. Rogers, 72 Ark. 270, 79 S. W. 794, where a lien was denied to one acting as clerk for a sub-contractor.

[50] Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. ed. 310; Tod v. Kentucky Un. R. Co., 52 Fed. 241, 18 L. R. A. 305; St. Johns &c. R. Co. v. Bartola, 28 Fla. 82, 9 So. 853; Savannah &c. R. Co. v. Callahan, 49 Ga. 506; Chicago &c. R. Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213; Krakauer v. Locke, 6 Tex. Civ. App. 446, 25 S. W. 700; Parks v. Locke (Tex. Civ. App.), 25 S. W. 702. See also Eastern Tex. R. Co. v. Davis, 37 Tex. Civ. App. 342, 83 S. W. 883; and note in 30 L. R. A. (N. S.) 816. But compare Moore-Mansfield Constr. Co. v. Indianapolis &c. R. Co., 179 Ind. 356, 101 N. E. 296, 44 L. R. A. (N. S.) 816.

lien of the subcontractor is entirely independent of that of the contractor and neither an agreement by the latter to keep down liens nor payment to him can affect the right of the subcontractor to his lien.[51] But subcontractors are usually required to give notice to the owner of the property, and, in most of the states payment to the contractor in good faith before such notice is given will relieve him from liability to the subcontractors.[52] The Arkansas statute which provides that every mechanic, laborer, or other person who shall perform any work on the construction, equipment, or repair of any railroad, whether under contract with the railroad or with a contractor or subcontractor thereof, shall have a lien therefor, is held to include the services of a foreman who, under contract with a subcontractor, superintends and directs the laborers in the construction or repair.[53] In some jurisdictions, one who furnishes material or performs labor for a subcontractor may acquire a lien, while in others the materials must be furnished or the labor performed directly for the owner or the contractor, and in some of them it must be shown that the credit was given to the property. All these matters, however, depend upon the peculiar provisions of the particular statute under consideration. The only general rule that can be laid down, perhaps, is that one who asserts a lien must bring himself and his claim within the purview of the statute. A mere creditor of a material man or laborer is not entitled to a lien which his debtor might have acquired, even though the debt may have been incurred for money with which to purchase and furnish the

[51] Central Trust Co. v. Richmond &c. R. Co., 68 Fed. 90, 41 L. R. A. 458; Spokane &c. Co. v. McChesney, 1 Wash. 609, 21 Pac. 198; Henry &c. Co. v. Evans, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; Ammendale &c. Inst. v. Anderson, 71 Md. 128, 17 Atl. 1030. See also Norfolk &c. R. Co. v. Howison, 81 Va. 125.

[52] Central Trust Co. v. Bridges, 57 Fed. 753; Geiger v. Hussey, 63 Ala. 338; Whittier v. Hollister, 64 Cal. 283, 30 Pac. 846; Spaulding v. Thompson &c. Society, 27 Conn. 573; Whelan v. Young, 10 Mackey (21 D. C.) 51; Roland v. Centreville &c. R. Co., 61 Iowa 380, 16 N. W. 355, 11 Am. & Eng. R. Cas. 47; Rivers v. Mulholland, 62 Miss. 766; Crane v. Genin, 60 N. Y. 127; Griswold v. Wright, 69 Wis. 1, 31 N. W. 20.

[53] St. Louis &c. R. Co. v. Love, 74 Ark. 528, 86 S. W. 395.

material.[54] Nor will the fact that money obtained on a draft given by a railroad company to the contractor engaged in constructing its road was used by him to pay for labor and material entitle the holder of the draft to a mechanic's or materialman's lien on the road.[55]

§ 1417 (1071). Mode of acquiring lien.—As the lien is wholly statutory, it must not only be such as the statute provides for, both as to the claim upon which it is based and the person in whose favor it is claimed, but the statutory mode must also be pursued in order to obtain it.[56] A common requirement is that notice shall be given to the owner of the property or his agent.[57]

[54] Ray &c. Bank v. Cramer, 54 Mo. App. 587. See also Mellon v. Morristown &c. R. Co. (Tenn.), 35 S. W. 464; Pere Marquette R. Co. v. Smith, 36 Ind. App. 439, 74 N. E. 545. Under the railroad lien act of Arkansas, providing that any person furnishing material which entered into the construction, equipment, or repair of a railroad, whether furnished to the contractor or subcontractor, or directly to the railroad company, shall have a lien therefor, a materialman furnishing material to a subcontractor for railroad construction is entitled to such lien. Midland Valley R. Co. v. Moran &c. Mfg. Co., 80 Ark. 339, 97 S. W. 679. But see St. Louis &c. R. Co. v. Henry, 75 Ark. 603, 86 S. W. 841. In Indiana even a laborer of one having a subcontract under a subcontractor may have a lien. Pere Marquette R. Co. v. Smith, 36 Ind. App. 439, 74 N. E. 545; Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408, 74 N. E. 51.

[55] Central Trust Co. v. Bridges, 57 Fed. 753.

[56] See Cleveland &c. R. Co. v. Knickerbocker Trust Co., 86 Fed. 73; Houston First Nat. Bank v. Ewing, 103 Fed. 168; Templin v. Chicago &c. R. Co., 73 Iowa 548, 35 N. W. 634; Lounsbury v. Iowa &c. R. Co., 49 Iowa 255; Coleman v. Oregonian R. Co., 25 Ore. 286, 35 Pac. 656, and authorities cited in following notes. In Tennessee, for instance, notice must be given by the person claiming the lien and can not be given by his assignee. P. H. Norman & Co. v. Edington &c., 115 Tenn. 309, 89 S. W. 744.

[57] As to the necessity for giving such a notice as the statute requires and complying with the essential provisions of the statute in all respects, see note to Farmers' Loan &c. Co. v. Canada &c. R. Co., 11 L. R. A. 740; and note to Giant Powder Co. v. Oregon Pac. R. Co., 8 L. R. A. 700, where the recent decisions upon the subject are collected and classified by states; Tod v. Kentucky Un. R. Co., 52 Fed. 241, 18 L. R. A. 305; Arkansas Cent. R. Co. v. McKay, 30 Ark. 682;

It has been held that a notice served upon the secretary of the company is sufficient, where the statute makes no provision as to the mode of service of such a notice upon a corporation, and no higher officer can be found.[58] So, it has been held that such a notice may be served upon the station agent of a foreign corporation.[59] And under a statute providing that the notice should be served "upon the secretary or other officer or agent" of the company, it was held sufficient to serve it upon a director of the company.[60] But the mere fact that a director happened to be present on one occasion and saw that work was being done has been held insufficient notice to the company to validate the lien.[61] Under the Missouri statute declaring that lien claimants must serve a copy of the account on the person or corporation owning or operating the road, a personal service is required and service upon a station agent will not suffice.[62] Another common provision is that notice of the lien or claim shall be filed in a certain office within a specified time. If not so filed within the time designated the lien cannot be enforced.[63] But if a proper notice is filed within such time, the fact that a defec-

Greeley &c. R. Co. v. Harris, 12 Colo. 226, 20 Pac. 764; Cherry v. North &c. R. Co., 65 Ga. 633; Arbuckle v. Illinois &c. R. Co., 81 Ill. 429; Cairo &c. R. Co. v. Cauble, 85 Ill. 555; Cairo &c. R. Co. v. Cauble, 4 Ill. App. 133; Lounsbury v. Iowa &c. R. Co., 49 Iowa 255; Roland v. Centreville &c. R. Co., 61 Iowa 380, 16 N. W. 355; Scioto Valley R. Co. v. Cronin, 38 Ohio St. 122.

[58] Heltzell v. Chicago &c. R. Co., 77 Mo. 315, 16 Am. & Eng. R. Cas. 619. Compare Rapauno &c. Co. v. Greenfield &c. R. Co., 59 Mo. App. 6; Union Pac. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. 1095.

[59] Morgan v. Chicago &c. R. Co., 76 Mo. 161.

[60] Railway Co. v. Cronin, 38 Ohio St. 122, 127. See also Barnes v. Thompson, 2 Swan (Tenn.), 313; Buck v. Brian, 2 How. (Miss.) 874; Railway Co. v. McCoy, 42 Ohio St. 251.

[61] Lothian v. Wood, 55 Cal. 159. Mere knowledge on the part of the owner that materials are being furnished or that work is being done is not equivalent to the statutory notice generally required. Neeley v. Searight, 112 Ind. 316, 15 N. E. 598.

[62] Dalton v. St. Louis &c. R. Co., 113 Mo. App. 71, 87 S. W. 610; Williams & Pearson v. Dittenhoefer, 188 Mo. 134, 86 S. W. 242.

[63] Delaware &c. Co. v. Davenport R. Co., 46 Iowa 406; Central Trust Co. v. Richmond &c. R. Co., 68 Fed. 90, 41 L. R. A. 458; Alexandria &c. Co. v. McHugh, 12 Ind. App. 282, 40 N. E. 80.

tive notice had previously been filed is immaterial.[64] Where a road runs through a number of different counties and the statute simply contains a general provision that the notice shall be filed in a certain office "in the county," it is a question of some doubt as to whether the notice must be filed in every county through which the road extends. In a recent case, after a careful consideration of the subject, it was held sufficient to file the notice in the proper office in the county in which the work was done and the materials were furnished, and that the lien should be enforced against the entire road.[65] A different view, however, seems to have been taken by another court.[66]

§ 1418 (1072). Priority of liens.—The general rule is that liens on railroad property have priority according to the order of time or date at which they attached, as in ordinary cases.[67]

[64] Williams v. Chicago &c. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403, 7 Lewis' Am. Rep. & Corp. 86. But successive valid liens for the same thing can not be filed by the same party under one entire contract. Battle v. McArthur, 49 Fed. 715; Cox v. West. Pac. R. Co., 44 Cal. 18, 47 Cal. 87. In Tennessee it is held that where materials for the construction of a railroad are furnished or delivered pursuant to a contract to furnish same as needed by the purchaser, the several deliveries are so connected as an entirety that a notice of lien within 90 days from date of last delivery secures the lien on all the deliveries, though some were made more than 90 days before such notice of lien. And the fact that the last shipment of materials for which a lien is claimed was not delivered because of the notice that the purchaser was insolvent, and had abandoned the work, does not affect the seller's right of lien for prior materials furnished, though furnished more than 90 days prior to the notice of lien. Hercules Powder Co. v. Knoxville &c. R. Co., 113 Tenn. 382, 83 S. W. 354, 67 L. R. A. 487.

[65] Farmers' Loan &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E. 784.

[66] Boston &c. Co. v. Chesapeake &c. R. Co., 76 Va. 180, 12 Am. & Eng. R. Cas. 263. In Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. 470, 8 L. R. A. 700, the court held that it was sufficient to file this notice in the county in which that portion of the road for which it was furnished and used was situated, and that the lienor had a right to limit the lien by such notice to that section of the road, even if the whole road had to be sold, which the court inclined to doubt. See also Richmond &c. Co. v. Richmond &c. R. Co., 68 Fed. 105, 34 L. R. A. 625.

[67] Galveston R. Co. v. Cowdrey,

It is the spirit and intent of most of the mechanics' lien laws, however, that all such liens, whether for work performed or for materials furnished, should stand upon an equality and share pro rata in the proceeds of that which all the lien-holders contributed in creating.[68] There are also cases in which a mechanics' lien may take precedence of a prior mortgage. Thus, it has been held that where the railroad has not been constructed or completed when a mortgage is given upon it the mortgagees must take notice of that fact and of the fact that labor and materials would be needed to construct or complete it, and that a mechanics' lien for materials furnished or work and labor performed in constructing or completing it will take precedence of the mortgage.[69] So, it has been held that a mortgage executed before the company has acquired any title to

11 Wall. (U. S.) 459, 20 L. ed. 199 (and not as in maritime cases); Fox v. Seal, 22 Wall. (U. S.) 424, 22 L. ed. 774; Howard v. Railway Co., 101 U. S. 837, 25 L. ed. 1081; Coe v. New Jersey &c. R. Co., 31 N. J. Eq. 105. See also Central Trust Co. v. Louisville &c. R. Co., 70 Fed. 282, McDaniel v. Osborn, 166 Ind. 1, 75 N. E. 647, 2 L. R. A. (N. S.) 615. Ante § 566.

[68] Moxley v. Shepard, 3 Cal. 64; Crowell v. Gilmore, 18 Cal. 370; Wing v. Carr, 86 Ill. 347; Rosenthal v. Maryland &c. Co., 61 Md. 590; Choteau v. Thompson, 2 Ohio St. 114; Willamette &c. Co. v. Riley, 1 Ore. 183; Pennsylvania &c. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189.

[69] Railroad Co. v. Meyer, 100 U. S. 457, 25 L. ed. 593; Brooks v. Railway Co., 101 U. S. 443, 25 L. ed. 1057; Meyer v. Hornby, 101 U. S. 728, 25 L. ed. 1078; Farmers' Loan &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; Neilson v. Iowa &c. R. Co., 44 Iowa 71; Kilpatrick v. Kansas City R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. 741; Taylor v. Burlington &c. Co., 4 Dill. (C. C.) 570. See also Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219; Chicago & Alton R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. ed. 1081; H. F. Cady Lumber Co. v. Miles, 96 Nebr. 107, 147 N. W. 210; Addison v. Lewis, 75 Va. 701, 9 Am. & Eng. R. Cas. 702 and note. But compare Central Trust Co. v. Cameron &c. Co., 47 Fed. 130; Toledo D. & B. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 549, 33 L. ed. 905. It is held that a prior mortgage on the entire road takes precedence of liens for repairs or improvements forming an integral part of the road as it already existed. Bear v. Burlington &c. R. Co., 48 Iowa 659; Coe v. New Jersey &c. R. Co., 31 N. J. Eq. 105. See also Tommey v. Spartanburg &c. R. Co., 7 Fed. 429; Boston &c. R. Co. v. Chesapeake &c. R. Co., 76 Va. 180, 12 Am. & Eng. R. Cas. 263.

the property is subordinate to a lien thereon for labor performed after the execution of the mortgage and before the acquisition of the title.[70] As we have elsewhere shown, persons who perform labor or furnish materials may also be preferred, in certain cases, over mortgaged bondholders where the mortgage is foreclosed or the property placed in the hands of a receiver.[71] This rule is applied in proper cases, however, even where a preferred claim does not constitute a statutory lien, but such claims are frequently given priority as liens, or otherwise, by express provision of the statute.[72] The courts of Texas hold that claims for material furnished for the construction of a railroad are subordinate to the rights of holders of mortgage bonds where the mortgage was on the railroad at the time of the inception of the lien, unless the material was for new construction constituting a betterment whereby the security of the mortgage was increased.[73] It may be said to be the general rule, subject to exceptions on account of peculiar equities, that preferential claims in equity for labor or materials furnished for the operation of a railroad must accrue within approximately six months preceding the impounding of the income and seizure of the property by the mortgage bondholders.[74] Specific statutory liens acquired before the property passes into the hands of the receiver or the court are superior to the general equitable liens of creditors of an insolvent corporation upon the fund brought into the court for distribution.[75]

[70] Botsford v. New Haven &c. R. Co., 41 Conn. 454. See also Phoenix &c. Co. v. Batchen, 6 Ill. App. 621.

[71] Ante, §§ 606, 607, 681, 682.

[72] See Blair v. St. Louis &c. R. Co., 25 Fed. 232; Heckman v. Torumen, 184 Ill. 144; 56 N. E. 361; Reynolds v. Black, 91 Iowa 1, 58 N. W. 922.

[73] Waters-Pierce Oil Co. v. United States &c. Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212.

[74] Westinghouse Air Brake Co. v. Kansas City &c. R. Co., 137 Fed. 26 (also holding that a cause of action on mechanic's lien and on the claim for equitable preference may be united, but that, under the facts the former had been waived and the claim was too old to be allowed an equitable preference over the mortgage bondholders). See also ante, § 606.

[75] Farmers' L. &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E.

§ 1419 (1073). Assignability of lien.—There is some conflict among the authorities as to whether a lien for work done or materials furnished in the construction of a railroad can be assigned. The matter may, of course, be regulated by statute, but there is seldom any express statutory provision upon the subject. At common law choses in action were not assignable; but in equity they were, and we think the better rule is that such liens are assignable,[76] at least under most of the modern statutes, which have adopted the old equity rule, and many of which permit the assignee to sue in his own name. In some jurisdictions, however, he must sue in the name of his assignor,[77] and several of the courts have held that a mechanics' lien is in the nature of a personal privilege and cannot be assigned.[78] Where the claim is assigned before any lien has been acquired

784, 11 L. R. A. 740 and note. See also Brown v. Buck, 54 Ark. 453, 16 S. W. 195; Re Emslie, 102 Fed. 291; Re Cramond, 145 Fed. 966; Crane Co. v. Pneumatic Signal Co., 94 App. Dec. 53, 87 N. Y. S. 917; Eberle v. Drennan, 40 Okla. 59, 136 Pac. 162, 51 L. R. A. (N. S.) 68.

[76] Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506; Tuttle v. Howe, 14 Minn. 145, 100 Am. Dec. 205; Mason v. Germaine, 1 Mont. 263; Rogers v. Omaha &c. Co., 4 Nebr. 54; Skyrme v. Occidental &c. Co., 8 Nev. 219; Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262 and note; Austin &c. R. Co. v. Daniels, 62 Tex. 70; Texas &c. R. Co. v. McCaughey, 62 Tex. 271. See also Linnemann v. Bieber, 66 N. Y. St. 739, 33 N. Y. S. 129; Logue v. Walker, 141 Ga. 644, 81 S. E. 849 (under Georgia statute); Cairo &c. R. Co. v. Fackney, 78 Ill. 116; Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408, 74 N. E. 51; Kent v. Muscatine &c. R. Co., 115 Iowa 383, 88 N. W. 935; Davis v. Crookston &c. Co., 57 Minn. 402, 89 N. W. 482, 47 Am. St. 622; Kerr v. Moore, 54 Miss. 286; Little Rock Trust Co. v. Southern Missouri &c. R. Co., 195 Mo. 669, 93 S. W. 944; Brown v. Harper, 4 Ore. 89; Iage v. Bossieux, 15 Grat. (Va.) 83, 76 Am. Dec. 189; note in 49 Am. St. 530.

[77] Murphy v. Adams, 71 Maine 113, 36 Am. Rep. 299; Caldwell v. Lawrence, 10 Wis. 331. See also Rollin v. Cross, 45 N. Y. 766; Phoenix &c. Co. v. Batchen, 6 Ill. App. 621.

[78] Ruggles v. Walker, 34 Vt. 468; Fitzgerald v. Trustees &c., 1 Mich. N. P. 243; Dano v. Mississippi &c. R. Co., 27 Ark. 564. See also Tewksbury v. Bronson, 48 Wis. 581, 4 N. W. 749, St. John v. Hall, 41 Conn. 522. To the effect that the claim can not be assigned before the lien is obtained so as to enable the assignee to perfect the lien, see Frailey v. Winchester &c. R. Co., 96 Ky. 570, 29 S. W. 446; O'Connor v. Current River R. Co., 111 Mo. 185, 20 S. W. 16.

many of the courts hold that this does not carry with it the right to afterwards acquire such lien.[79] But in a number of other jurisdictions it is held that the inchoate right to a lien may be assigned and that the assignment of the claim carries with it the right to perfect the lien.[80] It has also been held that the assignment of an order drawn by a subcontractor in favor of a laborer is not a good assignment of the debt or claim itself.[81] But it has been held that the purchase of time checks of laborers showing the amounts due them for labor constitutes an assignment of the claims with the statutory lien securing same particularly where the transaction was suggested by the maker of the check.[82]

§ 1420 (1074). Enforcement of lien.—Where the statute gives a right, as in the case of a mechanics' lien, it may provide the remedy that shall be pursued, and one who obtains a lien in the authorized mode "has a right to have it enforced as the law directs, and not otherwise."[83] In some of the states scire facias has been adopted as the appropriate remedy for the en-

[79] Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 118 Pac. 103, 113; Peatman v. Centerville Light &c. Co., 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276; Noll v. Kenneally, 56 N. W. 722, 37 Nebr. 879; Tisdale Lumber Co. v. Read Realty Co., 154 App. Div. 270, 138 N. Y. S. 829; Rollin v. Cross, 45 N. Y. 766; Alderson v. Lee, 52 Ore. 92, 96 Pac. 234; Loud v. Gold Ray &c. Co., 72 Ore. 155, 142 Pac. 785; Smoot v. Checketts, 41 Utah 211, 125 Pac. 412, Ann. Cas. 1915C, 1113.

[80] Boyer v. Keller, 258 Ill. 106, 101 N. E. 237; Kinney v. Duluth &c. Co., 58 Minn. 455, 49 Am. St. 528; Mason v. Germaine, 1 Mont. 263; McDonald v. Kelly, 14 R. I. 335; Sickler v. Spencer, 17 British Columbia 41.

[81] Dudley v. Toledo &c. R. Co., 65 Mich. 655, 32 N. W. 884, 30 Am. & Eng. R. Cas. 236. See also Frailey v. Winchester &c. R. Co., 96 Ky. 570, 29 S. W. 446; Texas &c. R. Co. v. Dorman (Tex. Civ. App.), 62 S. W. 1086. But see Midland R. Co. v. Wilcox, 122 Ind. 84, 91, 23 N. E. 506; Skyrme v. Occidental &c. Co., 8 Nev. 219. In California it has been held that the assignment must be in writing. Ritter v. Stevenson, 7 Cal. 388. See and compare McCrea v. Johnson, 104 Cal. 224, 37 Pac. 902; Murray v. Micolino, 83 Hun 564, 31 N. Y. S. 1109.

[82] Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408, 74 N. E. 51.

[83] Farmers' Loan &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 259, 26 N. E. 784, 11 L. R. A. 740, and note;

foreclosure of a mechanics' lien, but in most jurisdictions a foreclosure suit, similar to a suit in equity to foreclose a mortgage, is the proper remedy.[84] And in a recent case it is held that where there is a right to the lien under the statute and also upon an equitable preference the union of both grounds in the same bill does not render it multifarious.[85] As we have elsewhere shown, it would be detrimental to the interest of the public as well as to that of the railroad company and the lien-holders, to permit a railroad to be broken up and sold in practically useless fragments,[86] and, for this reason it is generally held that the lien must be enforced against the entire road and all of it may be sold, in a proper case, to satisfy a lien thereon.[87] In some instances, however, the lien has been satisfied by sequestrating the earnings

Delaware &c. Co. v. Davenport &c. R. Co., 46 Iowa 406; Lounsbury v. Iowa &c. R. Co., 49 Iowa 255; Cranston v. Union Trust Co., 75 Mo. 29.

[84] See Albrecht v. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157, and authorities there cited; Davis v. Alvord, 94 U. S. 545; 24 L. ed. 283; Hamilton v. Dunn, 22 Ill. 259; McGraw v. Bayard, 96 Ill. 146; Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352. See also Central Trust Co. v. Condon, 67 Fed. 84; Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 Pac. 158, Ann. Cas. 1913B, 282 (no right to jury trial).

[85] Westinghouse &c. Co. v. Kansas City &c. R. Co., 137 Fed. 26.

[86] Ante, §§ 596, 598.

[87] Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Connor v. Tennessee Cent. R. Co., 109 Fed. 931, 939, 940, 54 L. R. A. 687, 694, 695 (citing text); Dano v. Miss. &c. R. Co., 27 Ark. 564; Cox v. Western Pac. R. Co., 44 Cal. 18; Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432; Midland R. Co. v. Wilcox, 122 Ind. 84; Farmers' Loan &c. Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E. 784 (so holding although notice of the lien was filed in only one of the counties through which the road ran); Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408, 74 N. E. 51; Knapp v. St. Louis &c. R. Co., 74 Mo. 374; Cranston v. Union Trust Co., 75 Mo. 29. See also Graham v. Mt. Sterling &c. R. Co., 11 Bush (Ky.), 425, 29 Am. Rep. 412; Bagnell Timber Co. v. Missouri &c. R. Co., 180 Mo. 420, 79 S. W. 1130; Voightman v. Southern R. Co., 123 Tenn. 452, 131 S. W. 982; Ann. Cas. 1912C, 211; Wetzel &c. R. Co. v. Tennis Bros. Co., 145 Fed. 458. See Ireland v. Atchison &c. R. Co., 79 Mo. 572, 20 Am. & Eng. R. Cas. 493, where this general rule was admitted, but it was held that the lien could only be enforced against that portion of the road within the state.

of the corporation or appointing a receiver, without a sale of the road.[88]

§ 1421 (1074a). Further of enforcement of lien.—The statutes giving these liens usually fix the time within which actions for their enforcement are to be brought after their accrual, and it goes without saying that the action will be barred unless brought within this time. In a case where the date of the suit was not disclosed by the record, but an amended complaint was shown to have been filed on a certain date, an appellate court treated the date of filing the amended complaint as the date of the commencement of the suit for the purpose of testing the plea of limitation.[89] But the limitation will not, in any event, begin to run until the suit can be brought, and if the wages subject to lien are payable in the future, not until the time specified has come.[90] The railroad company owning and operating the road at the time the action is brought is a necessary party to an action to establish the lien.[91] Likewise a contractor is a necessary party to an action to enforce a laborer's lien for material and labor furnished in the construction of a railroad under a contract with the contractor.[92] It has been held

[88] Foster v. Fowler, 60 Pa. St. 27. And there may be cases under particular statutes, where the lien is authorized and taken upon a single building or the like not necessary to the operation of the railroad, in which that alone may be sold on foreclosure of the lien.

[89] St. Louis &c. R. Co. v. Love, 74 Ark. 528, 86 S. W. 395. In Utah Implement &c. Co. v. Bowman, 209 Fed. 942, a mortgagee was not made a party to a proceeding to enforce the lien and it was held that it ceased to be enforceable as against the mortgagor after the statutory time had elapsed. See also Hiller v. Schulte, 184 Mo. App. 42, 167 S. W. 461.

[90] Gulf &c. R. Co. v. Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049.

[91] Little Rock &c. Co. v. Southern &c. R. Co., 195 Mo. 669, 93 S. W. 944.

[92] Eastern Texas R. Co. v. Davis, 37 Tex. Civ. App. 342, 83 S. W. 883; Winsor v. Commonwealth Coal Co., 63 Wash. 62, 114 Pac. 908, 33 L. R. A. (N. S.) 63. Compare also Lookout Lumber Co. v. Mansion &c. R. Co., 109 N. Car. 658, 14 S. E. 35; Williams v. Birmingham &c. Ry. Co., 129 Tenn. 680, 168 S. W. 160. This is the general rule, as shown in the note in 33 L. R. A. (N. S.) 69, especially where the account against the contractor is liquidated, but, as also

that, while the Missouri statute providing for the filing of railroad liens does not require the lien to be verified, yet, where such a lien has an affidavit attached, the signature to which is the only means of identifying the paper or connecting plaintiff with it, it must be regarded as an entire instrument, so that the plaintiff is not entitled to read the lien to the jury, omitting the affidavit.[93] The doctrine of the last preceding section against the sale of a portion of a railroad to satisfy a lien where such a procedure would interfere with the carrier's duty to the public has been held to apply to a road practically completed, though the company was not yet engaged in the business of a common carrier.[94] In these cases it has been held proper for the court, in the exercise of its equity powers, to direct a personal judgment against the railroad company.[95] It has been held in an action to enforce a lien under the Arkansas statute where a contractor was the primary debtor, but was a nonresident of the state, that a personal judgment against the contractor was not a prerequisite to the declaration of a lien against the property of the railroad, but it was sufficient to bring the nonresident contractor into the case by constructive service of process for the purpose of ascertaining the amount of the debt.[96]

§ 1422 (1075). Waiver of lien.—A mechanics' lien may, of course, be waived by the voluntary act or agreement of the lienholder.[97] In may also be waived, in some cases, by incon-

shown in such note, there are some cases to the contrary, especially where no personal judgment is asked against the contractor.

[93] Bagnell Timber Co. v. Missouri &c. R. Co., 180 Mo. 420, 79 S. W. 1130.

[94] Pere Marquette R. Co. v. Smith, 36 Ind. App. 439, 74 N. E. 545.

[95] Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408, 74 N. E. 51. See also Lake Erie &c. R. Co. v. Bowker, 9 Ind. App. 428, 36 N. E. 864; Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435n. But, ordinarily, in the absence of some special statutory provision, a personal judgment can not be taken by a subcontractor or material man where there is no contract between them. See authorities cited in notes in 14 L. R. A. (N. S.) 1036, and 24 L. R. A. (N. S.) 321.

[96] St. Louis &c. R. Co. v. Love, 74 Ark. 528, 86 S. W. 395. See also Massachusetts Bonding &c. Co. v. Realty Trust Co., 142 Ga. 499, 83 S. E. 210.

[97] See Harris v. Youngstown Bridge Co., 93 Fed. 355; Ports-

sistent acts, although he may have had, in fact, no intention to waive it, but the intent of the parties is usually controlling. The rule is thus stated in a recent case: "It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien. A contract for a security which is inconsistent with the intention that a mechanics' lien should exist will be held, generally, as a waiver of the statutory lien; but it is well-settled that though the owner obligate himself to give a security inconsistent with the intention that a mechanics' lien should exist, or where the contract is to pay in land, or other specific article of property, yet if the owner fail to fulfill the agreement for such mode of payment, or for different security, it will not be taken as an agreement to waive the mechanics' lien in case payment is not made in the manner provided for, or the security is not given according to the obligation of the owner.[98] According to this

mouth Iron Co. v. Murray, 38 Ohio St. 323; Griffin v. Booth, 152 Ill. 219, 38 N. E. 551; Hughes v. Lansing, 34 Ore. 118, 55 Pac. 95, 75 Am. St. 574; Davis v. La Crosse &c., 121 Wis. 579, 99 N. W. 351. But where the statute gives each claimant a direct and independent lien a stipulation in the contract between the owner and the principal contractor against mechanics' liens, does not preclude laborers, materialmen or subcontractors from filing a lien, unless they have expressly or impliedly assented thereto. Hume v. Seattle Dock Co., 68 Ore. 477, 137 Pac. 752, 50 L. R. A. (N. S.) 153, and note which also covers the general subject. It is held otherwise, however, where, as is often the case, the lien is derivative. Kelly v. Johnson, 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573 (also holding statute unconstitutional which attempts to give lien to subcontractor notwithstanding waiver by contractor). George B. Swift Co. v. Dolles, 39 Ind. App. 653, 80 N. E. 678; Schroeder v. Galland, 134 Pa. 277, 19 Atl. 632, 19 Am. St. 691; Seeman v. Breinam, 108 Wis. 365, 84 N. W. 490. And see where contractor has notice of it. Bates Mach. Co. v. Trenton &c. R. Co., 70 N. J. L. 684, 58 Atl. 935, 103 Am. St. 811. In Carson-Payson Co. v. Cleveland &c. R. Co., 57 Ind. App. 357, 105 N. E. 503, a subcontractor was held to have waived his right to a mechanic's lien by covenant to keep the property free from liens.

[98] Central Trust Co. v. Richmond &c. R. Co., 68 Fed. 90, 41 L.

rule, taking a mortgage or other security may operate as a waiver of the lien,[99] but it does not necessarily do so unless such was the intention of the parties,[1] and it seems that, as between the parties at least, the presumption will be indulged, in the absence of anything to the contrary, that the lien was not intended to be waived unless the conditions of the contract as to the security or manner of payment are performed.[2] The

R. A. 458. Citing Grant v. Strong, 18 Wall. (U. S.) 623, 21 L. ed. 859; Reiley v. Ward, 4 G. Greene (Iowa) 21; McMurray v. Brown, 91 U. S. 257, 23 L. ed. 321. In the latter case it is said: "If the labor has been performed, or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third parties intervene before he gives the required notice. Liens of the kind, except where the statute otherwise provides, arise by the operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed, or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time." Chicago & Alton R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 721, 722, 3 Sup. Ct. 594, 27 L. ed. 1081; Van Stone v. Stillwell &c. Manufacturing Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. ed. 961. See note in 41 Am. Dec. 221 and note in 41 Am. St. 761; Reynolds v. Manhattan Trust Co., 83 Fed. 593; Firth v. Rehfeldt, 164 N. Y. 588, 58 N. E. 1087.

[99] Hale v. Burlington &c. R. Co., 2 McCrary (U. S. C. C.), 558; Trustees of German &c. Congregation v. Heise, 44 Md. 453; Willison v. Douglas, 66 Md. 99, 6 Atl. 530; Barrows v. Baughman, 9 Mich. 213; Gorman v. Sagner, 22 Mo. 137; Picket v. Bullock, 52 N. H. 354; Davis v. Bowsher, 5 Durnf. & East, 488. A contractor's bond against subcontractors' liens is held not to waive the lien of the contractor himself. Maynard v. Lange, 71 Ore. 560, 143 Pac. 648.

[1] Gilcrest v. Gottschalk, 39 Iowa 311; Maryland &c. Co. v. Spillman, 76 Md. 337, 25 Atl. 297, 17 L. R. A. 599, 35 Am. St. 431; Kilpatrick v. Kansas City &c. R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. 741 and note; Union &c. Bank v. Baker, 42 Nebr. 880, 61 N. W. 91; Chapman v. Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. 779; Taliaferro v. Stevenson (N. J.), 33 Atl. 383. In Illinois the statute provides that the taking of additional security shall not waive any right to a lien unless made a waiver by agreement of parties. Alton &c. Assn. v. Glass, 186 Ill. App. 488.

[2] See authorities cited in note 98, supra; Barnard &c. Co. v. Gallo-

mere fact that a party's note is taken for the amount due does not operate as a waiver of the lien in the absence of any such intention.[3] Nor does the recovery of a personal judgment, which remains unpaid, merge or waive the lien.[4] It has also been held that giving credit beyond the time allowed for filing notice of the lien does not waive the lien where the notice is duly filed.[5] The doctrine of estoppel may, however, prevent a lienholder from enforcing his lien against innocent third persons whom he has misled. This is generally true where he purposely conceals the fact that he is entitled to take a lien and induces others to act, to their injury, upon the belief that he has no such right, or represents that he has been paid, or the like, so that the assertion of the lien upon his part would operate as a fraud upon innocent third persons.[6] So, it has

way, 5 S. Dak. 205, 58 N. W. 565; Kingsland &c. Co. v. Massey, 69 Miss. 296, 13 So. 269. See also review of authorities in note to Kilpatrick v. Kansas City &c. R. Co., 41 Am. St. 741.

[3] Wisconsin Trust Co. v. Robinson &c. Co., 68 Fed. 778, 781; Goble v. Gale, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219 and note; Smith &c. Co. v. Butts, 72 Miss. 269, 16 So. 242; Aiken v. Steamboat, 40 Mo. 257; Barnacle v. Henderson, 42 Nebr. 169, 60 N. W. 382; Delaware &c. Co. v. Oxford &c. Co., 33 N. J. Eq. 192; Linneman v. Bieber, 33 N. Y. S. 129; Hill v. Alliance &c. Co., 6 S. Dak. 160, 60 N. W. 752; Poland v. Lamoille Valley R. Co., 52 Vt. 144; note in 35 L. R. A. (N. S.) 93. But see authorities cited in next to last note to this section. And compare Teal v. Spangler, 72 Ind. 380.

[4] Marean v. Stanley, 5 Colo. App. 335, 38 Pac. 395; Germania &c. Asso. v. Wagner, 61 Cal. 349; Kirkwood v. Hoxie, 95 Mich. 62, 35 Am. St. 549; Erickson v. Russ, 21 N. Dak. 208, 129 N. W. 1025, 32 L. R. A. (N. S.) 1072; Holbrook v. Ives, 44 Ohio St. 516, United States &c. Co. v. Spencer, 40 W. Va. 698, 21 S. E. 769. See as to waiver of equitable preferential claim by filing mechanic's lien under statute. State Trust Co. v. Kansas City &c. R. Co., 129 Fed. 455.

[5] Chicago & Alton R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. ed. 1081; Chisholm v. Williams, 128 Ill. 115, 21 N. E. 215; Kaufman &c. Co. v. Christophel, 59 Mo. App. 80. But see Paul v. Frost, 40 Maine 293; Pryor v. White, 16 B. Mon. (Ky.) 605; Green v. Fox, 7 Allen (Mass.) 85; Ehlers' Adm. v. Elder, 51 Miss. 495; Jones v. Hurst, 67 Mo. 568; Dey v. Anderson, 39 N. J. L. 199.

[6] Chapman v. Hamilton, 19 Ala. 121; Scott v. Orbison, 21 Ark. 202; McGraw v. Bayard, 96 Ill. 146; Hinchley v. Greany, 118 Mass. 595; West v. Klotz, 37 Ohio St. 420; Howard v. Tucker, 1 B. & Ad. 712. See also Heidenbluth v. Rudolph,

been held that the acceptance for the debt of a promissory note which matures subsequent to the time fixed by statute for the commencement of an action to foreclose the mechanics' lien estops the creditor from enforcing such lien and destroys it, and that, in the absence of fraud or mistake, it cannot be revived, by subsequent delivery of materials under the same contract or the like.[7] But it has been held that a subcontractor is not estopped from enforcing his lien by the mere fact that a settlement is made in his presence between the owner and the contractor.[8]

152 Ill. 316, 38 N. E. 930; Goldman v. Brinton, 90 Md. 259, 44 Atl. 1029; Bristol &c. Co. v. Bristol &c. Co., 99 Tenn. 371, 42 S. W. 19; West v. Pinkston, 44 Utah 123, 138 Pac. 1152.

[7] Westinghouse &c. Co. v. Kansas City &c. R. Co., 137 Fed. 26. See also Harris v. Youngstown &c. Co., 90 Fed. 323, 326; Blakeley v. Moshier, 94 Mich. 299, 54 N. W. 54, 56; Flenniken v. Liscoe, 64 Minn. 269, 66 N. W. 979.

[8] Haveghart v. Lindberg, 67 Ill. 463. If, however, it had appeared that the owner had no knowledge of the subcontractor's claim, that it had never been filed or recorded, and that the subcontractor knew that the settlement was made in full, without deducting the amount due him, we think he would have been estopped. See Bailie v. Woodward Lumber Co., 141 Ga. 806, 82 S. E. 232 (estoppel where material man authorized owner to make a payment to contractor). But see also as holding that estoppel of contractor does not estop subcontractor. Green v. Williams, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478.

CHAPTER XLIV.

RAILROADS IN STREETS.

Sec.
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§ 1425 (1076). **Authority to use streets.**—The legislature of the state represents the public at large and has paramount authority over its public ways, including the streets in cities as well as country roads.[1] Municipal corporations have no inherent

[1] Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 244; Backus v. Fort St. Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. ed. 853; Perry v. New Orleans &c. Co., 28 Ala. 740, 55 Ala. 413; Duval County Comrs. v. Jacksonville, 36 Fla. 196, 18 So. 339, 29 L. R. A. 416; Chicago &c. R. Co. v. Dunbar, 100 Ill. 110; West Chicago Park Comrs. v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215n; Grand Trunk &c. Ry. Co. v. City of South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809; Council Bluffs v. Kansas City &c. R. Co., 45 Iowa 338, 24 Am. Rep. 773; Milbridge & C. Electric R. Co., In re, 96 Maine 110, 51 Atl. 818;

power to create other corporations or grant franchises, and they can not give a railroad company the right to lay its tracks and operate its road in their streets unless they are authorized, either expressly or impliedly, to do so by the legislature.[2] Authority to use highways in this way must come, either directly or indirectly, from the legislature; but it is customary for the legislature to confer upon the municipalities the power to very largely regulate and control the roads and streets within their jurisdiction, and street railways are usually required by the legislature to obtain the consent of the municipality before using its streets.[3] In the case of commercial rail-

Jersey City v. Jersey City &c. R. Co., 20 N. J. Eq. 360; Lennon v. Mayor, 55 N. Y. 365; Portland &c. R. Co. v. Portland, 14 Ore. 188, 12 Pac. 265, 58 Am. Rep. 299; O'Connor v. Pittsburgh, 18 Pa. St. 187; Elliott Roads and Streets (3d ed.) §§ 10, 509. As we shall hereafter show, however, the abutters have certain rights which cannot be taken away without compensation. See also McKeon v. New York &c. R. Co., 75 Conn. 343, 61 L. R. A. 730.

[2] Peoples Railroad v. Memphis R. Co., 10 Wall. (U. S.) 38, 51, 19 L. ed. 844; Saginaw &c. Co. v. Saginaw, 28 Fed. 529; Pittsburgh &c. R. Co., v. Hood, 94 Fed. 618; Perry v. New Orleans &c. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714; Metropolitan &c. R. Co. v. Chicago &c. R. Co., 87 Ill. 317; Eichels v. Evansville &c. Co., 78 Ind. 261, 41 Am. Rep. 561; Clinton v. Cedar Rapids &c. R. Co., 24 Iowa 455; Anhalt v. Waterloo &c. R. Co., 166 Iowa 479, 147 N. W. 928; Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186n; Potts v. Quaker City &c. R. Co., 161 Pa. St. 396, 29 Atl. 108; State v. Hilbert, 72 Wis. 184, 39 N. W. 326; Reg. v. Train, 2 B. & S. 640, 110 Eng. C. L. 640; Elliott Roads and Streets (3d ed.), §§ 1045, 1048. See also Daly v. Georgia &c. R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. 286.

[3] See State v. Jacksonville &c. St. R. Co., 29 Fla. 590, 10 So. 590, 593; Hickey v. Chicago &c. R. Co., 6 Bradw. (Ill.) 172; Atchison St. R. Co. v. Missouri &c. Co., 31 Kans. 661, 3 Pac. 284; Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800; People v. Thompson, 98 N. Y. 6; Indianola v. Gulf, Western &c. R. Co., 56 Tex. 594; Yates v. West Grafton, 34 W. Va. 783, 12 S. E. 1075; Elliott Roads and Streets (3d ed.), § 934. See also Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155; Illinois Cent R. Co. v. Chicago, 173 Ill. 471, 50 N. E. 1104, affirmed in 176 U. S. 646, 44 L. ed. 622; Keesville &c. R. Co., In re, 101 N. Y. S. 237. Power may be given by the legislature to the municipality to

roads, however, while cities and towns through which they run usually have power to make proper regulations for their operation therein, the interest of the general public is practically so much greater than in the case of street railways—which are used mostly by residents of the municipality—and the prohibition by the municipality of the right to use its streets might be so detrimental to the best interests of the public, that it is not unusual for the legislature to grant this right directly to railroad companies rather than to leave it solely to the municipalities to grant or withhold.[4] Where general authority over its highways is conferred upon a municipal corporation, and there is no statute authorizing their use by a railroad, they cannot be so used without the consent of the municipality.[5] Authority to so use municipal streets may sometimes, however, be inferred from the provisions of the charter or act of incorpora-

grant such a right to use its streets, or its unauthorized exercise of the power may be ratified by statute. Denver &c. Co. v. Londoner, 20 Colo. 150, 37 Pac. 723, 1 Am. & Eng. R. Cas. (N. S.) 124, and note; Chicago &c. R. Co. v. People, 91 Ill. 251; Cairo &c. R. Co. v. People, 92 Ill. 170; McCartney v. Evanston &c. R. Co., 112 Ill. 611; Brown v. Duplessis, 14 La. Ann. 842; Koch v. North Ave. &c. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377n, 50 Am. & Eng. R. Cas. 401; Clarke v. Blackmar, 47 N. Y. 150. See also Mobile v. Louisville &c. R. Co., 34 Ala. 115, 4 So. 106; Covington v. Louisville &c. R. Co., 158 Ky. 136, 164 S. W. 329; Moore Mfg. Co. v. Springfield &c. R. Co., 256 Mo. 167, 165 S. W. 305; Stockdale v. Rio Grande &c. R. Co., 28 Utah 201, 77 Pac. 849; State v. Superior Ct., 64 Wash. 594, 117 Pac. 487; Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462; State v. Superior Ct., 67 Wash. 10, 120 Pac. 514.

[4] See Ingraham v. Chicago &c. R. Co., 34 Iowa 249; Canton v. Canton &c. Co., 84 Miss. 268, 36 So. 266, 65 L. R. A. 561. In Illinois it may be located on street without municipal consent, but such consent must be obtained for construction. Chicago v. New York &c. R. Co., 216 Fed. 735.

[5] Savannah &c. R. Co. v. Savannah, 45 Ga. 602; Chicago &c. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907; Hine v. Keokuk &c. Co., 42 Iowa 636; St. Louis &c. R. Co. v. St. Louis, 92 Mo. 160, 4 S. W. 664; Asheville St. R. Co. v. West Asheville &c. Ry. Co., 114 N. Car. 725, 19 S. E. 697; Commonwealth v. Central &c. R. Co., 52 Pa. St. 506. Pennsylvania Company's Appeal, 116 Pa. St. 55, 8 Atl. 914. See also Louisville &c. R. Co. v. Mobile &c. R. Co., 124 Ala. 162, 26 So. 895; Delaware &c. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44.

tion;[6] but where the power is clearly delegated to the municipal corporation, mere general words in the charter or act for the incorporation of railroad companies will not be construed to confer a right to occupy the streets of the municipality without its consent, and a general grant of authority to construct a railroad from one point to another does not, in such a case, as a rule, at least, include the right to use such streets for railroad purposes without the license or consent of the local authorities.[7] As we have elsewhere stated, the right to cross streets and roads may be inferred from a general grant of authority from which no such inference could be drawn as to the right to take them longitudinally.[8] The right to place rails upon a road or street and use it in the operation of a railroad can only be granted expressly or by necessary implication,[9] and the use

[6] Denver &c. Co. v. Domke, 11 Colo. 247, 17 Pac. 777; St. Paul &c. Co. v. Minneapolis, 35 Minn. 141, 27 N. W. 500, 24 Am. & Eng. R. Cas. 309; Wheat v. Alexandria, 88 Va. 742, 14 S. E. 672; Canton v. Canton &c. Co., 84 Miss. 268, 36 So. 266, 65 L. R. A. 561. See also Hamline v. Southern R. Co., 76 Miss. 410, 25 So. 295; New Castle v. Lake Erie &c. R. Co., 155 Ind. 18, 57 N. E. 516; Southern Pac. R. Co. v. Ferris, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510n; Wayzata v. Great Northern R. Co., 67 Minn. 385, 69 N. W. 1073; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

[7] Chicago &c. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907; Pennsylvania Company's Appeal, 116 Pa. St. 55, 8 Atl. 914; Springfield v. Connecticut &c. R. Co., 4 Cush. (Mass.) 63; Ruttles v. Covington (Ky.), 10 S. W. 644; Clinton v. Cedar Rapids &c. R. Co., 24 Iowa 455. See also Delaware &c. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44.

[8] Burt v. Lima &c. Co., 21 N. Y. S. 482; Chicago &c. Co. v. Dunbar, 100 Ill. 110. Right to cross any public road or way includes right to cross city streets without consent of city. Canton v. Canton &c. Co., 84 Miss. 268, 36 So. 266, 65 L. R. A. 561, 566. But not to lay the track longitudinally along a street. New Castle v. Lake Erie &c. R. Co., 155 Ind. 18, 57 N. E. 516. See also Pittsburgh &c. R. Co. v. Hood, 94 Fed. 618; Western R. Co. v. Alabama &c. R. Co., 96 Ala. 272, 11 So. 483, 14 L. R. A. 474; Louisville &c. R. Co. v. Whitley County Ct., 95 Ky. 215, 24 S. W. 604, 44 Am. St. 220; State v. Superior Ct., 64 Wash. 594, 117 Pac. 487; Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462, 464. But compare Cook County v. Great Western R. Co., 119 Ill. 218, 10 N. E. 564. Ante, §§ 52, 1130.

[9] Columbus &c. R. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Daly v. Georgia &c. Co., 80 Ga. 793, 7 S. E. 196, 12 Am. St. 286, 36 Am. & Eng. R. Cas. 20; Chicago &c. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907;

must be reasonable and such as was clearly contemplated.[10] Thus, the right to construct a track along a street and run trains over it does not authorize an exclusive use of the street for a freight yard, or the like.[11] But it has been held that authority to construct and operate a railroad in a street includes the power to make a switch or turnout to a station on the street.[12] So it has been held that trains may be made up in the street, provided the street is so used only to a reasonable extent and with due regard to its use for ordinary highway purposes,[13]

Virginia &c. R. Co. v. Lynch, 13 Nev. 92; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339; State v. Vermont Cent. R. Co., 27 Vt. 103; Trustees v. Milwaukee &c. Co., 77 Wis. 158, 45 N. W. 1086.

[10] Long Branch Comrs. v. West End R. Co., 29 N. J. Eq. 566; Glick v. Baltimore &c. R. Co., 21 D. C. 363; Commonwealth v. Frankfort, 92 Ky. 149, 17 S. W. 287. See also Atlantic &c. R. Co. v. Montezuma, 122 Ga. 1, 49 S. E. 738. And compare Harrold Bros. v. Mayor, 142 Ga. 686, 83 S. E. 534.

[11] Atlantic &c. R. Co. v. Montezuma, 122 Ga. 1, 49 S. E. 738; Owensburgh &c. R. Co. v. Sutton (Ky.), 13 S. W. 1086; Gahagan v. Boston &c. R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724; Lackland v. North Missouri &c. R. Co., 31 Mo. 180; Corby v. Chicago &c. R. Co., 150 Mo. 457, 52 S. W. 282; Allegheny v. Ohio &c. R. Co., 26 Pa. St. 355; Chapman v. Oshkosh &c. R. Co., 33 Wis. 629. See also Hopkins v. Baltimore &c. R. Co., 6 Mackey (D. C.) 311; Chicago &c. R. Co. v. Jefferson, 14 Ill. App. 615; Louisville &c. R. Co. v. Downey, 18 Ind. App. 140, 47 N. E. 494; Stevenson v. Missouri Pac. R. Co. (Mo.), 31 S. W. 793; Thompson v. Pennsylvania R. Co., 45 N. J. Eq. 870, 14 Atl. 897, 19 Atl. 622; State v. Jersey City, 52 N. J. L. 65, 28 Am. & Eng. Corp. Cas. 182; State v. Superior Ct., 62 Wash. 96, 113 Pac. 576; Bussian v. Milwaukee &c. R. Co., 56 Wis. 325, 14 N. W. 452.

[12] New Orleans &c. R. Co. v. Second Municipality, 1 La. Ann. 128; Knight v. Carrollton R. Co., 9 La. Ann. 284; Black v. Philadelphia &c. Co., 58 Pa. St. 249. But see Concord v. Concord Horse R., 65 N. H. 30, 18 Atl. 87. In Chicago &c. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 759, it was held that an ordinance giving the company the right of way along a certain street gave it a right to construct an additional track when its business demanded it. See also Philadelphia v. River &c. R. Co., 133 Pa. St. 134; Romer v. St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. 455. So, it has been held that, unless limited to a particular part of the street, the company may, in good faith, place its track on such part of the street as its interest demands. Campbell v. Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078.

[13] Gahagan v. Boston &c. R. Co., 1 Allen (Mass.) 187; State v. Vermont Cent. R. Co., 27 Vt. 103.

and that cars may be stopped temporarily in the highway, in which the tracks are lawfully laid, for the purpose of loading and unloading freight as well as passengers.[14]

§ 1426 (1077). Implied authority of municipalities to grant right to use streets.—The power of municipalities to authorize railroads to use their streets may be derived either from an express grant or by necessary implication. It is a question of some doubt as to whether the general authority over streets which is usually given to them empowers them to grant to street railway companies the right to use their streets, but the better rule seems to be that it does.[15] It is believed, however, that the ordinary powers of municipal corporations to regulate and improve their streets and prevent their obstruction are not in themselves sufficient to enable municipalities to grant the right to use their streets to ordinary commercial railroads,[16] although it has been held that a city may grant such a

Compare Glick v. Baltimore &c. R. Co., 21 D. C. 363.

[14] Matthews v. Kelsey, 58 Maine 56. See State v. Morris &c. R. Co., 23 N. J. L. 360, 25 N. J. L. 437.

[15] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71; Moses v. Pittsburgh &c. R. Co., 21 Ill. 516; Chicago &c. R. Co. v. Quincy, 136 Ill. 489, 27 N. E. 232; State v. Corrigan &c. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361, 29 Am. & Eng. R. Cas. 591; Atchison St. R. Co. v. Missouri Pac. R. Co., 31 Kans. 66, 3 Pac. 284. See also Brown v. Duplessis, 14 La. Ann. 842; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Indianapolis &c. Co. v. Citizens' &c. Co., 127 Ind. 369, 389, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539n; Davis v. Mayor, 14 N. Y. 506, 67 Am. Dec. 186n. But compare State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Eichels v. Evansville &c. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Stillwater v. Lowrey, 83 Minn. 275, 86 N. W. 103; Newell v. Minneapolis &c. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Asheville St. R. Co. v. West Asheville &c. Ry. Co., 114 N. Car. 725, 19 S. E. 697. Much, of course, depends upon the language of the particular charter under consideration. See Schaper v. Long Island &c. R. Co., 124 N. Y. 630, 26 N. E. 311; Forman v. New Orleans &c. R. Co., 40 La. Ann. 446, 4 So. 246; Covington St. R. Co. v. Covington, 9 Bush. (Ky.) 127.

[16] Savannah &c. R. Co. v. Shiels, 33 Ga. 601; Daly v. Georgia &c. Railroad Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. 286; Stanley v. Davenport, 54 Iowa 463, 16 N. W. 706, 37 Am.

right where it is given sole and exclusive control of its streets.[17] It is clear that it cannot grant such a right where the railroad is for the mere private use of an individual.[18] It has also been held that it cannot devote a street entirely to the use of a railroad company,[19] and that, although the city is given authority to grant the right to use its streets to such companies, and to permit temporary and reasonable obstruction thereof, an ordinance giving the right to stand cars at the intersection of certain streets for not more than thirty minutes is unreasonable and invalid.[20]

Rep. 216; Ruttles v. Covington (Ky.), 10 S. W. 644; Newell v. Minneapolis &c. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; State v. Corrigan &c. St. R. Co., 85 Mo. 263, 55 Am. St. 361, 29 Am. & Eng. R. Cas. 591. See also Strasser v. New York &c. R. Co., 128 N. Y. 157, 623, 28 N. E. 640, 14 L. R. A. 133; Tallon v. Hoboken, 60 N. J. L. 212, 37 Atl. 895 (overhead trolley railway not authorized); State v. Green, 54 N. J. L. 92, 23 Atl. 281; Oglvees v. Quaker City Elevated R. Co. (Pa.), 29 Atl. 111 (elevated railroad not authorized). And compare McPhee &c. R. Co. v. Union Pac. R. Co., 158 Fed. 5.

[17] Kistner v. Indianapolis, 100 Ind. 210; Chicago &c. R. Co. v. Quincy, 136 Ill. 489, 27 N. E. 232; People v. Blocki, 203 Ill. 363, 67 N. E. 809. See also Griffin v. Southern R. Co., 150 N. Car. 312, 64 S. E. 16; Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462. But compare Eichels v. Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561.

[18] Marine &c. Ins. Co. v. St. Louis &c. R. Co., 41 Fed. 643; Heath v. Des Moines &c. R. Co., 61 Iowa 11, 15 N. W. 573, 10 Am. & Eng. R. Cas. 313; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Glaessner v. Anheuser-Bush &c. Assn., 100 Mo. 508, 13 S. W. 707, 33 Am. & Eng. Corp. Cas. 483; State v. Trenton, 36 N. J. L. 79; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 307; Butler v. F. R. Penn Tobacco Co., 152 N. Car. 416, 68 S. E. 12; Hartman &c. Co.'s Appeal (Pa.), 18 Atl. 553. See also Hibbard & Co. v. Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Ligare v. Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. 179; Swift v. Delaware &c. R. Co., 66 N. J. Eq. 34, 57 Atl. 456.

[19] Pittsburgh &c. R. Co. v. Warrum, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; Sherlock v. Kansas City &c. R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. 551. Compare Seaboard Air Line R. Co. v. Raleigh, 219 Fed. 573; Mobile &c. R. Co. v. Middleton, 139 Ala. 610, 36 So. 782.

[20] Gilcrest Co. v. Des Moines, 128 Iowa 49, 102 N. W. 831. So is an ordinance granting the right to construct tracks, spurs, sidings, and switches, and erect and maintain permanent buildings on a street, as the company may deem necessary. Chicago &c. Ry. Co. v. People, 222

§ 1427 (1078). How and by whom grant should be made or consent given.—The authority vested in a municipality to grant to a railroad company the right to use its streets must be exercised by the proper officers or body. Thus, where it is vested in the common council it cannot be delegated to a board or officer having mere ministerial powers.[21] So, where it was vested in the "mayor and assembly" it was held that it could only be exercised by an ordinance duly enacted for that purpose.[22] But it has also been held that the recognition by a city of the validity of such an ordinance for a long period of time raises a "sufficient presumption" of every fact necessary to its validity, "including approval by the mayor and publication."[23] In many states it is provided by constitution or statute that no street railway shall be constructed on any street without the consent of the "local authorities having control of the street or highway proposed to be occupied;" in others it is provided that consent must be given by ordinance, while in others the consent of the owner of a certain percentage of the abutting land must also be obtained.[24]

Ill. 427, 78 N. E. 790. See also Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223.

[21] Citizens' St. R. Co. v. Jones, 34 Fed. 579; State v. Bell, 34 Ohio St. 194. See also Schwede v. Hemrich Bros. Brew. Co., 29 Wash. 21, 69 Pac. 362.

[22] Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. 547, 1 Am. & Eng. R. Cas. (N. S.) 16. See McHale v. Easton &c. Co., 169 Pa. 416, 32 Atl. 461; Cereghino v. Oregon &c. R. Co., 26 Utah 467, 73 Pac. 634, 99 Am. St. 843, and compare Liverpool &c. R. Co. v. Liverpool, 33 Can. S. C. 180.

[23] Santa Rosa &c. R. Co. v. Central St. R. Co., 112 Cal. 486, 38 Pac. 986, 44 Pac. 733, 1 Am. & Eng. R. Cas. (N. S.) 105. See also Spokane St. R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072.

[24] In Nebraska the consent of the majority of the electors of the city is required. State v. Bechel, 22 Nebr. 158, 34 N. W. 342. See, as to the manner of giving consent by "local authorities" of township, Pennsylvania R. Co. v. Montgomery &c. R. Co., 167 Pa. St. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. 659, 1 Am. & Eng. R. Cas. (N. S.) 190; Pittsburgh Ry. Co. v. Carrick, 259 Pa. 333, 103 Atl. 106. As to consent of abutting owners see White v. Manhattan &c. R. Co., 139 N. Y. 19, 34 N. E. 887, 8 Am. R. & Corp. Rep. 739, and note; Wilkins v. Gaffrey City, 54 S. Car. 199, 32 S. E. 299; also notes in 7 L. R. A. (N. S.) 991; 23 L. R. A. (N. S.)

§ 1428 (1079). **Nature and effect of grant by municipality.**—Questions sometimes arise, at least in street railway cases, as to whether the grant is a franchise or more in the nature of a license. The right granted by a municipality to use its streets in such cases is frequently called a franchise, but it is a franchise in the secondary rather than the primary sense of that term. Indeed, it seems to us that it is more in the nature of a license which may be revoked at any time before its acceptance, and which vests no right in the licensee, until it is "accepted and used."[25] A valid grant of such a right by ordinance, however, upon an adequate consideration, when accepted and acted upon by the grantee becomes an irrevocable and binding contract.[26] Unless the right to repeal or amend is reserved, the city cannot revoke the ordinance, nor, by a subsequent ordinance, without the consent of the company, impose upon it further and additional burdens.[27] But the right to do so may

433; and 28 L. R. A. (N. S.) 1082, as to effect of consent of abutting owner and rights where they do not consent.

[25] Chicago &c. R. Co. v. People, 73 Ill. 541; Belleville v. Citizens' &c. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800n; Detroit v. Detroit City R. Co., 37 Mich. 558; Galveston City R. Co. v. Gulf City &c. R. Co., 63 Tex. 529, 26 Am. & Eng. R. Cas. 114; Gulf City &c. Co. v. Galveston &c. Co., 65 Tex. 502; Ante, § 77. But see State v. Madison St. R. Co., 72 Wis. 612, 40 N. W. 487. See post, § 1463.

[26] Grand Trunk &c. R. Co. v. South Peel, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. ed. 633, 44 L. R. A. (N. S.) 405; St. Louis v. Western U. Tel. Co., 63 Fed. 68, and authorities there cited; Baltimore &c. Co. v. Baltimore, 64 Fed. 153; Africa v. Board, 70 Fed. 729; Arcata v. Arcata &c. R. Co., 92 Cal. 639, 28 Pac. 676; Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584; People v. Chicago &c. R. Co., 18 Ill. App. 125; State v. Noyes, 47 Maine 189; Commonwealth v. Proprietors, 2 Gray (Mass.) 339; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. 684, 2 L. R. A. 255; Asheville St. R. Co. v. Asheville, 109 N. Car. 688, 14 S. E. 316; Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418, 420 (citing text). Compare Lake Roland &c. R. Co. v. Baltimore, 77 Md. 352, 26 Atl. 510, 7 Am. R. & Corp. Rep. 619, and see authorities cited by Mr. Lewis in note criticising that case.

[27] People v. Chicago &c. R. Co., 118 Ill. 113, 7 N. E. 116; Electric R. Co. v. Grand Rapids, 84 Mich. 257, 47 N. W. 567; Western Pav. & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. 462n; Coast Line R.

be reserved,[28] and, as we shall hereafter show, the city cannot thus surrender or alienate its governmental and police powers.[29] In a recent case it was held, under a statute providing that any street railway company might use the streets of any city with the consent of the corporate authorities given by ordinance, that "the power to consent is in and of itself the power to grant an easement. The 'consent' is an easement, and the act of consenting to the use of the streets for street railway purposes is the act of granting an easement in the streets."[30]

§ 1429 (1080). Construction of grant—Illustrative cases.—Grants by a municipality of the privilege or right to use its streets are strictly construed against the grantee.[31] But notwithstanding this rule, the construction should be reasonable with reference to the subject-matter and the purpose of the grant. A brief statement of the facts involved and the questions decided in some of the recent cases will serve to show the extent and limits of the rule. On the one hand it has been held that an ordinance authorizing a company to construct its tracks "on, over, and along" certain alleys does not authorize their construction on other land at the side of such alleys;[32] that a

Co. v. Savannah, 30 Fed. 646; Enid City R. Co. v. Enid, 43 Okla. 778, 144 Pac. 617; Easton &c. R. Co. v. Easton, 133 Pa. St. 505, 19 Atl. 486, 19 Am. St. 658. See also Cleveland v. Cleveland Elec. R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102.

[28] Medford &c. R. Co. v. Somerville, 111 Mass. 232. See Lake Roland El. R. Co. v. Baltimore, 77 Md. 352, 26 Atl. 510, 7 Am. R. & Corp. Rep. 619, and note; Sioux City St. R. Co. v. Sioux City, 138 U. S. 105, 11 Sup. Ct. 226, 34 L. ed. 898. But compare Owensboro v. Cumberland Tel. &c. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389 (general power of repeal held not to be such a reservation).

[29] See post, §1431.

[30] Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 643, 1 Am. & Eng. R. Cas. (N. S.) 71.

[31] Stein v. Bienville Water Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. ed. 622; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Chicago &c. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907; Indianapolis &c. St. R. Co. v. Citizens' &c. St. R. Co., 127 Ind. 369, 24 N. E. 1054; Heath v. Des Moines &c. R. Co., 61 Iowa 11, 15 N. W. 573; Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89; North Eastern R. Co. v. Payne, 8 Rich. (S. Car.) 177; Elliott Roads and Streets (3rd ed.) § 1052. Ante, § 49.

[32] Heath v. Des Moines St. R.

grant by a city to a railroad company of the right to construct its road "across, or along such streets as it might find expedient to use," and to occupy so much thereof as "may be necessary for the construction of its track, siding, and branches," does not give the company the right to the exclusive use of such streets.[33] On the other hand, it has been held that a grant of authority to construct a railroad or railroads upon any public road or highway in the city or extending therefrom does not limit such construction to one continuous and direct street or highway;[34] that authority to extend its lines on streets south of a specified street, west of another, north of another, and east of another, does not limit the company to the streets within the boundaries specified, but authorizes it to use streets beyond such boundaries;[35] that an ordinance granting the right to construct a track on a certain street does not limit the construction of the track to the roadway as distinguished from the sidewalk,[36] and that an electric street railway company, authorized to erect trolley wires, has a right to top the branches of trees along the way when reasonably necessary to its construction

Co., 61 Iowa 11, 15 N. W. 573. See also Alexandria v. Morgan's La. &c. R. Co., 109 La. 50, 33 So. 65; Galveston Wharf Co. v. Gulf &c. R. Co., 81 Tex. 494, 17 S. W. 57.

[33] Pennsylvania &c. R. Co. v. Philadelphia &c. R. Co., 157 Pa. St. 42, 27 Atl. 683. See also Dubach v. Hannibal &c. R. Co., 89 Mo. 483, 1 S. W. 86; Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. 547. Ante, § 50. Authority to construct a single track has been held to confer no right to construct a double track. Klosterman v. Chesapeake &c. R. Co., 114 Ky. 426, 71 S. W. 6; Stephens v. New York &c. R. Co., 175 N. Y. 72, 67 N. E. 119. But general authority to conduct and operate a railroad in the street without any such limitation is usually held to, include the right to construct a switch or a double track. Chicago &c. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 259; Hilman v. Chicago &c. R. Co., 113 Iowa 591, 85 N. W. 800; Newark v. New Jersey Cent. R. Co., 73 N. J. Eq. 469, 67 Atl. 1009; Houston v. Gulf &c. R. Co. (Tex. Civ. App.), 35 S. W. 74. Compare, however, City of Denison v. Denison &c. Ry. Co., 103 Tex. 344, 127 S. W. 804.

[34] West Jersey &c. Co. v. Camden &c. R. Co., 52 N. J. Eq. 452, 29 Atl. 333, 1 Am. & Eng. R. Cas. (N. S.) 132. See also Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

[35] Commonwealth v. Union &c. R. Co., 163 Pa. St. 22, 29 Atl. 711.

[36] Knapp &c. Co. v. St. Louis R. Co., 126 Mo. 26, 28 S. W. 627.

and operation.[37] Other illustrative cases will be found in the note below.[38]

§ 1430 (1081). Right of municipality to impose conditions.— When a municipal corporation has the power to grant or refuse a railroad company the right to use its streets as it sees fit, or when its consent is required before any company can so use them, it has, as we think, authority to prescribe the terms and conditions upon which the company shall have the right to construct and operate a railway in its streets.[39] Thus, it may require the company to repair, to pay a license fee for the use of the streets, or the like.[40] So, it may prescribe a reasonable rate

[37] Dodd v. Consolidated Traction Co., 57 N. J. L. 482, 31 Atl. 980. See also Southern &c. Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 31 L. R. A. 193, 55 Am. St. 930; Miller v. Detroit &c. R. Co., 125 Mich. 171, 84 N. W. 49, 51 L. R. A. 955, 84 Am. St. 569.

[38] Louisiana &c. R. Co. v. Behrman, 235 U. S. 164, 35 Sup. Ct. 62, 59 L. ed. 175; Los Angeles v. Southern Pac. R. Co., 157 Cal. 363, 108 Pac. 65; West End &c. R. Co. v. Atlanta St. R. Co., 49 Ga. 151; Chicago &c. R. Co. v. Joliet, 79 Ill. 25; Chicago v Chicago &c R Co., 105 Ill. 73; Bishop v. Union R. Co., 14 R. I. 314, 51 Am. Rep. 386; State v. Newport St. R. Co., 16 R. I. 533, 18 Atl. 161.

[39] Mager v. Grima, 8 How. (U. S.) 490, 494, 12 L. ed. 1168; Pacific R. Co. v. Leavenworth City, 1 Dill. (U. S.) 393, 398; Northern &c. Co. v. Mayor &c., 21 Md. 93; Ft. St. Union Depot Co. v. State R. &c. Board, 81 Mich. 248, 45 N. W. 973; St. Louis R. Co. v. Southern Co., 105 Mo. 562, 16 S. W. 960, 46 Am. & Eng. R. Cas. 1, citing Elliott Roads and Streets, 565; Union &c. Co. v. Southern Co., 105 Mo. 562, 16 S. W. 920; St. Louis v. Public Service Com., 276 Mo. 509, 207 S. W. 799, 801 (citing text); Allegheny v. Millville &c. Co., 159 Pa. St. 411, 28 Atl. 202. See also Kinsman St. R. Co. v. Broadway &c. R. Co., 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327; Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 116, 39 N. E. 433, 436, 27 L. R. A. 514, 49 Am. St. 183, citing Elliott Roads and Streets, p. 565; Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679, 6 Am. R. & Corp. Rep. 106; Plymouth Tp. v. Chestnut Hill &c. Co., 168 Pa. St. 181, 32 Atl. 19; St. Louis &c. R. Co. v. Kirkwood, 159 Mo. 239, 60 S. W. 110, 113, 53 L. R. A. 300, 304 (citing text); Blair v. Chicago &c. R. Co., 201 U. S. 400, 26 Sup. Ct. 427, 439, 50 L. ed. 801, (citing text and holding that the right to impose terms and conditions includes the right to limit and agree upon the period of the grant).

[40] New Orleans v. New Orleans &c. Co., 40 La. Ann. 587, 4 So. 512;

of fare for the carriage of passengers by a street railway company,[41] the location and character of its tracks, poles, and wires, and the like,[42] and, in general, it may impose any reasonable conditions as to the terms upon which its consent shall be given so long as they are not repugnant to the grant of the franchise to the company by the legislature, or to any constitutional or statutory provision upon the subject.[43] If the company accepts an ordinance granting the consent of the municipality upon certain conditions therein stated, it must, we think, take it "in its integrity," with its burdens as well as its privileges.[44] If the consent is clearly made to depend upon the

Newport v. South Covington &c. R. Co., 89 Ky. 29, 11 S. W. 954; Detroit v. Detroit City R. Co., 37 Mich. 558; Pittsburgh &c. R. Co. v. Birmingham, 51 Pa. St. 41. See also Venner v. Chicago City Ry. Co., 236 Ill. 349, 86 N. E. 266; Byrne v. Chicago General Ry. Co., 63 Ill. App. 438 (license fee); Kansas City v. Kansas City Belt R. Co., 187 Mo. 146, 89 S. W. 190 (paving or repair). But see Hodges v. Western Union Tel. Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770. See also Memphis v. Postal Tel. &c. Co., 145 Fed. 602.

[41] People v. Barnard, 110 N. Y. 548, 18 N. E. 354, 36 Am. & Eng. R. Cas. 70; Gaedeke v. Staten Island R. Co., 43 App. Div. 514, 60 N. Y. S. 598; Forman v. New Orleans &c. R. Co., 40 La. Ann. 446, 4 So. 246, 36 Am. & Eng. R. Cas. 38. And regulate the issuance of transfers, McGilvra v. Seattle Elec. Co., 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B, 1020.

[42] Electric R. Co. v. Grand Rapids, 84 Mich. 257, 47 N. W. 567; Detroit v. Detroit City R. Co., 37 Mich. 558. And regulate the routing McGilvra v. Seattle Elec. Co., 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B, 1020 and note.

[43] People v. Barnard, 110 N. Y. 548, 18 N. E. 354; Kings County El. R. Co., In re, 105 N. Y. 97, 13 N. E. 18; Harrisburgh &c. R. Co. v. Harrisburg, 149 Pa. St. 465, 24 Atl. 56. See also Reynolds v. Pacific Ry. Co., 146 Cal. 261, 80 Pac. 77; Mordhurst v. Ft. Wayne &c. Co., 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 268; Cain v. Chicago &c. R. Co., 54 Iowa 255, 6 N. W. 268; Owensboro v. Owensboro &c. R. Co. (Ky.), 40 S. W. 916; Hyde Park v. Old Colony R. Co., 188 Mass. 180, 74 N. E. 352; Grasse Point v. Detroit R. Co., 130 Mich. 363, 90 N. W. 42; Philadelphia v. Ridge Ave. R. Co., 143 Pa. St. 444, 22 Atl. 695; Providence v. Union R. Co., 12 R. I. 473. But see Kentucky &c. Bridge Co. v. Krieger, 93 Ky. 243, 19 S. W. 738.

[44] Allegheny v. Millville &c. Co., 159 Pa. St. 411, 28 Atl. 202, 2 Elliott Roads & Streets (3d ed.), § 951; Tudor v. Chicago &c. R. Co, 154 Ill. 129, 39 N. E. 136, 1 Am. & Eng. R. Cas. (N. S.) 340; Detroit v. Detroit City R. Co., 37 Mich. 558; St. Louis &c. R. Co. v. Kirkwood, 159

conditions the company cannot justly claim that it has such consent and at the same time repudiate the conditions,[45] and it has been held that if the consent of the municipality is not obtained the whole grant will fail.[46]

§ 1431 (1082). Municipal regulation and control.—A municipal corporation cannot, by contract, surrender or alienate its governmental and police powers, which the public welfare demands that it should exercise.[47] All rights granted by the

Mo. 239, 60 S. W. 110; Brooklyn &c. Ry. Co. v. Long Island Ry. Co., 72 App. Div. 496, 76 N. Y. S. 777. See also Philadelphia v. Lombard &c. Co., 3 Grant Cas. (Pa.) 403; Fort Worth &c. R. Co. v. Rosedale, 68 Tex. 163, 7 S. W. 381; Bristow v. Whitmore, 9 H. L. Cas. 391.

[45] Allegheny v. Millville &c. Co., 159 Pa. St. 411, 28 Atl. 202, 203; Peoples' Railroad v. Memphis Railroad, 10 Wall. (U. S.) 38, 19 L. ed. 844; Kansas City v. Kansas City Ry. Co., 187 Mo. 146, 86 S. W. 190; Long Island R. Co. v. Brooklyn, 8 N. Y. S. 805.

[46] Peoples' v. Memphis Railroad, 10 Wall. (U. S.) 38, 19 L. ed. 844; Oakland R. Co. v. Oakland &c. R. Co., 45 Cal. 365, 13 Am. Rep. 181; Rochester &c. R. Co., In re, 123 N. Y. 351, 25 N. E. 381, 46 Am. & Eng. R. Cas. 157; Larimer &c. R. Co. v. Larimer &c. Co., 137 Pa. St. 533, 20 Atl. 570; Peoples' &c. R. Co. v. Memphis (Tenn.), 16 S. W. 973; Musser v. Fairmount &c. R. Co., 7 Am. L. Reg. (O. S.) 284. See also Joy v. St Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843; Pittsburgh &c. R. Co. v. Hood, 94 Fed. 618; Tudor v. Chicago &c. R. Co., 154 Ill. 129, 39 N. E. 136; Chicago &c. R. Co. v. Chicago, 183 Ill. 341, 55 N. E. 648; Pennsylvania R. Co. v. Montgomery &c. R. Co., 167 Pa. St. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. 659; Elliott Roads and Streets, (3d ed.), § 804.

[47] New York &c. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269; Wabash R. Co. v. Defiance, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. ed. 87; Bulkley v. New York &c. Co., 27 Conn. 479; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368, 37 Am. & Eng. R. Cas. 446; Macon &c. R. Co. v. Macon, 112 Ga. 782, 38 S. E. 60; Indianapolis &c. Co. v. Kercheval, 16 Ind. 84; Louisville City R. Co. v. Louisville, 8 Bush (Ky.) 415; Chicago &c. R. Co. v. State, 47 Nebr. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. 557; Omaha &c. R. Co. v. Lincoln, 97 Nebr. 122, 149 N. W. 319; Horn v. Atlantic &c. Co., 35 N. H. 169; Pennsylvania Co. v. Riblet, 66 Pa. St. 164, 5 Am. Rep. 360; Thorpe v. Rutland &c. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Elliott Roads and Streets (3d ed.), § 805. It is also held in a recent case that a municipality cannot contract with a railroad company for a viaduct to be maintained wholly by the city for all time. Vandalia R. Co. v. State, 166 Ind. 219, 76 N. E. 980. See also State

municipality or contracts made by it with reference to the use of its streets are subject to its exercise of such powers, and a railroad company which secures the right to use the streets of a city takes such right subject to all reasonable regulations and ordinances enacted by the city in the exercise of its police power.[48] Thus, it has been held that a municipality may enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its tracks;[49] that it may, by ordinance, require the company to have some employe or agent on each car in addition to the driver,[50] or to remove snow

v. Minnesota &c. R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State v. St. Paul &c. R. Co., 98 Minn. 380, 108 N. W. 261.

[48] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; Atlantic &c. R. Co. v. Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. ed. 721; San Jose v. San Jose &c. R. Co., 53 Cal. 475; St. Helena v. San Francisco &c. Ry., 24 Cal. App. 71, 140 Pac. 600, 605; Colorado &c. R. Co. v. Fort Collins, 52 Colo. 281, 121 Pac. 747, Ann. Cas. 1913D, 646; Macon &c. R. Co. v. Macon, 112 Ga. 782, 38 S. E. 60 (citing text); Pittsburgh &c. R. Co. v. Chicago, 159 Ill. 369, 42 N. E 781; Clinton v. Clinton &c. R. Co., 37 Iowa 61; Detroit v. Fort Wayne &c. R. Co., 90 Mich. 646, 51 N. W. 688; Omaha &c. R. Co. v. Lincoln, 97 Nebr. 122, 149 N. W. 319; State v. Hoboken, 41 N. J. L. 71; State v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; People v. Geneva &c. Tract. Co. (N. Y.), 78 N. E. 1109; Frankford &c. Co. v. Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; New Castle v. Lake Erie &c. R. Co., 155 Ind. 18, 20, 57 N. E. 516 (citing text); Chicago &c. R. Co. v. Johnson, 45 Ind. App. 162, 90 N. E. 507, 510 (citing text). But where the powers of a municipality are expressly specified in the statute it has been held that the municipality, where no such power is specified, cannot compel a railroad company at its own expense to erect and maintain safety gates at street crossings. Pennsylvania R. Co., In re, 213 Pa. St. 373, 62 Atl. 986.

[49] City &c. R. Co. v. Savannah, 77 Ga. 731, 4 Am. St. 106; State v. Canal &c. R. Co., 50 La. Ann. 1189, 24 So. 265, 56 L. R. A. 287.

[50] State v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410. See also South Covington &c. St. R. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026, 40 Am. St. 161; Baltimore &c. Co. v. Mali, 66 Md. 53, 5 Atl. 87. But see Brooklyn &c. R. Co. v. Brooklyn, 37 Hun (N. Y.) 413; Toronto v. Toronto &c. R. Co., 15 Ont. App. 30, 36 Am. &. Eng. R. Cas. 44. Air or electric brakes may be required. People v. Detroit &c. R., 134 Mich. 682, 97 N. W. 36, 63 L. R. A. 746, 104 Am. St. 626. In State v. Heidinhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. 388, it was held that the city might pass

thrown up by the snowplows of the company;[51] that it may temporarily remove the tracks of a street railway company, when necessary, in order to construct a sewer or culvert,[52] or even require a change of the track from one part of a street to another,[53] or a bridge to be removed,[54] or a tunnel to be lowered,[55] and that such a company may be enjoined from digging into the street and rebuilding without the consent of the city authorities where the city has authority to prescribe the manner in which corporations shall exercise any privileges

an ordinance prohibiting smoking in street cars, and in St. Louis v. St Louis &c. R. Co., 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82, it was held that the city might limit the number of passengers to be carried in each car.

[51] Broadway &c. R. Co. v. New York, 49 Hun 126, 1 N. Y. S. 646. See also Wallace v. Detroit City R. Co., 58 Mich. 231, 24 N. W. 870; Bowen v. Detroit City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822. So, it has been held that the city may change the grade of street and compel the company to make its tracks conform thereto. Ashland St. R. Co. v. Ashland, 78 Wis. 271, 47 N. W. 619; North Chicago &c. R. Co. v. Lake View, 105 Ill. 183. See also Albany v. Watervliet &c. Co., 108 N. Y. 14, 15 N. E. 370; Indianapolis &c. R. Co. v. State, 37 Ind. 489; Water Comrs. of Jersey City v. Hudson, 13 N. J. Eq. 420.

[52] Kirby v. Citizens' R. Co., 48 Md. 168, 30 Am. Rep. 455; North Pennsylvania R. Co. v. Stone, 3 Phila. (Pa.) 421. See also Middlesex R. Co. v. Wakefield, 103 Mass. 261; National &c. Co. v. City of Kansas, 28 Fed. 921. But see Eddy v. Ottawa &c. Co., 31 Upper C. Q. B. 569; Des Moines City R. Co. v. Des Moines, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767. In Detroit v. Fort Wayne &c. R. Co., 90 Mich. 646, 51 N. W. 688, 50 Am. & Eng. R. Cas. 447, a writ of mandamus was awarded to compel the company to remove the projecting ends of its ties in order to enable the city to properly improve the street.

[53] Macon &c. R. Co. v. Macon, 112 Ga. 782, 38 S. E. 60; West Philadelphia &c. R. Co. v. Philadelphia, 10 Phila. (Pa.) 70. See also Moffatt v. Denver, 57 Colo. 473, 143 Pac. 577 and cases there cited; City of Antonio v. Antonio St. Ry. Co., 15 Tex. Civ. App. 1, 39 S. W. 136.

[54] Wabash R. Co. v. Defiance, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. ed. 87. So it is held that an electric railway company may be required to move its wires to permit a house to pass. Indiana Ry. Co. v. Calvert, 168 Ind. 321, 80 N. E. 961, 10 L. R. A. (N. S.) 780.

[55] West Chicago St. R. Co. v. Illinois, 214 Ill. 9, 73 N. E. 393, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. ed. 845.

granted them in the use of its streets.[56] So, as we have elsewhere shown, a municipal corporation may enact reasonable ordinances limiting the rate of speed at which trains shall be run,[57] and prohibiting the obstruction of its streets by either commercial or street railway companies.[58] It is a well-established general rule, however, that where an ordinance is based upon a general power and its provisions are more specific than the expression of the power granted, the courts will inquire into its reasonableness and hold it invalid if clearly unreasonable;[59] but the presumption is that such an ordinance is reason-

[56] Trenton v. Trenton &c. R. Co. (N. J.), 27 Atl. 483. But see State v. Latrobe, 81 Md. 222, 31 Atl. 788.

[57] Richmond &c. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734; Chicago &c. R. Co. v. Haggerty, 67 Ill. 113; Whitson v. Franklin, 34 Ind. 392; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426, 30 N. E. 37, 49 Am. & Eng. R. Cas. 358; Crowley v. Burlington &c. Railroad Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918; Weyl v. Chicago &c. R. Co., 40 Minn. 350, 42 N. W. 24; Merz v. Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382; State v. Wisconsin Cent. Ry. Co., 128 Wis. 79, 107 N. W. 295.

[58] Birmingham v. Alabama &c. R. Co., 98 Ala. 134, 13 So. 141, 46 Am. & Eng. Corp. Cas. 631; Colorado &c. R. Co. v. Ft. Collins, 52 Colo. 281, 121 Pac. 747, Ann. Cas. 1913D, 646; Duluth v. Mallett, 43 Minn. 204, 45 N. W. 154; State v. Jersey City, 27 N. J. L. 493. So, it may require a flagman at a grade crossing. State v. East Orange, 41 N. J. L. 127; Toledo &c. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611. See also Hayes v. Michigan &c. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410; St. Louis &c. R. Co. v. Belleville, 122 Ill. 376, 12 N. E. 680. But compare Red Wing v. Chicago &c. R. Co., 72 Minn. 240, 75 N. W. 223, 71 Am. St. 482. And under the police power or under the powers usually granted it may make other similar regulations. See Pittsburgh &c. R. Co. v. Robson, 204 Ill. 254, 68 N. E. 468; Seibert v. Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72; State v. Atlantic &c. R. Co., 141 N. Car. 756, 53 S. E. 290; In re Milwaukee &c. R. Co., 124 Wis. 990, 102 N. W. 401; Atlantic &c. R. Co. v. Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. ed. 721. But compare West Jersey &c. R. Co. v. Bridgeton, 64 N. J. L. 189, 44 Atl. 848; Penna. Co.'s Appeal, 213 Pa. St. 373, 63 Atl. 986, 3 L. R. A. (N. S.) 140. See also as to compelling company to light streets, Shelbyville v. Cleveland &c. R. Co., 146 Ind. 66, 44 N. E. 929; Cleveland &c. R. Co. v. Connersville, 147 Ind. 277, 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. 418; Louisville &c. R. Co. v. Bessemer, 108 Ala. 238, 18 So. 880.

[59] Ah You, In re, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408, 22 Am.

able.[60] Where part of the ordinance is reasonable and valid

St. 280; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359, 17 Am. & Eng. Encyc. of L. 248, and authorities there cited; People v. Ericson, 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D, 607; Pittsburgh &c. R. Co. v. Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; Southern Ind. R. Co. v. Bedford, 165 Ind. 272, 75 N. E. 268; Des Moines City R. Co. v. Des Moines, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767, 1 Am. & Eng. R. Cas. (N. S.) 215 and note; State v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; 1 Elliott Gen. Pr. § 436;. In Evison v. Chicago &c. R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434, an ordinance limiting the rate of speed to four miles an hour was held to be unreasonable and void under the circumstances of the case. So, in Burg v. Chicago &c. R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419. And see also Plattsburgh v. Hagenbush, 98 Mo. App. 669, 73 S. W. 725; White v. St. Louis &c. R. Co., 44 Mo. App. 540. And see Southern Ind. R. Co. v. Bedford, 165 Ind. 272, 75 N. E. 268, holding an ordinance invalid which required a flagman at a switch during hours when it was never used. It may be unreasonable for making an unjust discrimination between different companies where the circumstances are the same. Lake View v. Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. ed. 1145. In some cities street cars and automobiles, which are not confined to any track, and are more dangerous to ordinary travelers on that account, are not limited as to speed or are allowed by ordinance to run from ten to twenty miles an hour, while commercial railroad trains, though they carry perishable freight, passengers, or even the United States mail are limited by ordinance to six, and even four miles an hour. Ordinances limiting the speed to four miles an hour have been upheld, but such an ordinance would require an hour or more for the train to get outside of the limits of some of our cities, and might interfere very seriously with interstate commerce. So there seems to us to be no just foundation for the discrimination made against commercial railroads in many instances, and, under modern conditions, we doubt whether the courts will continue to go as far in upholding such ordinances under all circumstances as most of the courts have done in the past. But see Chicago &c. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 93 Am. St. 190; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426, 30 N. E. 37.

[60] Birmingham v. Alabama &c. R. Co., 98 Ala. 134, 13 So. 141, 46 Am. & Eng. Corp. Cas. 631; Indianapolis v. Bieler, 138 Ind. 30. See also People v. Detroit &c. R., 134 Mich. 682, 97 N. W. 36, 104 Am. St. 626n; St. Louis v. Western Union Tel. Co., 63 Fed. 68; Illinois Cent R. Co. v. Chicago, 169 Ill. 329, 48 N. E. 492; Larkin v. Burlington &c. R. Co., 85 Iowa 492, 52 N. W. 480. Doubt resolved in favor of the ordinance: Stafford v. Chippewa &c. R. Co., 110 Wis. 331, 85 N. W. 1036. See generally to the effect

and part unreasonable, if that part which is reasonable can be separated from that which is unreasonable,[61] so as to be capable of enforcement as complete in itself, it may be upheld and enforced, although the unreasonable part is held invalid.

§ 1432 (1082a). Conformity to grade—Change of grade.—Cities when their consent is required may, as a condition, impose upon the company the duty not only of making its track conform to the existing grade, but also of making it conform, in a proper case, to a change of grade. So, under the police power and authority usually given cities, it has been held that they may require a change of grade when reasonable and proper.[62] But an ordinance requiring such a change may be

that this is usually a question of law for the court. Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, Ann. Cas. 1914B, 199, and other cases there cited in note; and as to validity of such ordinances generally see note to Cincinnati &c. Ry. Co. v. Commonwealth, 126 Ky. 712, 104 S. W. 771, in 17 L. R. A. (N. S.) 561.

[61] Paxson v. Sweet, 13 N. J. L. 196; Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85; New York v. Dry Docks, etc., R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. 609. See also Detroit v. Ft. Wayne &c. R. Co., 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79, 35 Am. St. 580; St. Louis v. St. Louis R. Co., 89 Mo. 44, 58 Am. Rep. 82. But not if indivisible and incapable of severance. Southern Ind. R. Co. v. Bedford, 165 Ind. 272, 75 N. E. 268. Where an ordinance limited the speed until safety gates should be erected and signal bells operated at street crossing, it was held that the speed limitation ceased to be in force when such things were done and that it was not revived by failure of the company subsequently to operate the gates. Hecker v. Illinois Cent R. Co., 231 Ill. 574, 83 N. E. 456.

[62] Houston &c. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850. See also Macon &c. R. Co. v. Macon, 112 Ga. 782, 38 S. E. 60; Snouffer v. Cedar Rapids &c. R. Co., 118 Iowa 287, 92 N. W. 79; Mayor v. Baltimore &c. R. Co., 80 Md. 535, 31 Atl. 420; Karst v. St. Paul &c. R. Co., 22 Minn. 118; State v. Minneapolis &c. R. Co., 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, and cases there cited in note (aff'd in 214 U. S. 497, 29 Sup. Ct. 698, 53 L. ed. 1059); Reading v. United Tract. Co., 202 Pa. St. 571, 52 Atl. 106; Harriman v. Southern R. Co., 111 Tenn. 538, 82 S. W. 213; Ashland St. R. Co. v. Ashland, 78 Wis. 271, 47 N. W. 619. See also as to right to compel bridge or elevation of tracks as against property owners. Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462.

held invalid when unreasonable and oppressive.[63] Such changes are often required at crossings, and the law applicable thereto will be considered in another section. It may be said here, however, that it has been held that, although a change of grade to conform to streets which the track crosses necessitates a change of the grade between crossings, this is not of itself sufficient to prevent the municipality from requiring such change;[64] but it might be reasonable to require a change at one or more particular crossings, and wholly unreasonable to require a general change in the entire city trackage, at least where the circumstances vary, and the safety and welfare of the public do not require such an extensive change.[65]

§ 1433 (1083). **Rights of rival companies in streets.**—The effect of a grant to use a designated part of a street is to license or give a right to the company first in point of time to occupy and use the designated space.[66] This may, in a sense, create a monopoly of the portion of the street occupied, but it does not create a monopoly of the business, for competing companies may be granted the right to use other parts of the same street.[67]

[63] See Seattle v. Columbia &c. R. Co., 6 Wash. 379, 33 Pac. 1048; Houston &c. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850, and note; Des Moines City R. Co. v. Des Moines, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767; Oxanna v. Allen, 90 Ala. 468, 8 So. 79.

[64] Houston &c. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850. And it would take a very strong and unusual case to make an ordinance for change of grade passed under power authorizing it, invalid because unreasonable and oppressive. Omaha &c. R. Co. v. Lincoln, 97 Nebr. 122, 149 N. W. 319.

[65] State v. Indianapolis Union R. Co., 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831.

[66] Elliott Roads and Streets (3d ed.), §§ 943, 947. See also West Jersey &c. Co. v. Camden &c. R. Co., 52 N. J. Eq. 452, 29 Atl. 333, 1 Am. & Eng. R. Cas. (N. S.) 132; Indianapolis Cable &c. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539n; Hamilton Tract. Co. v. Hamilton &c. Co., 69 Ohio St. 402, 69 N. E. 991.

[67] North Baltimore &c. R. Co. v. Baltimore, 75 Md. 247, 23 Atl. 470, 471, 36 N. E. 857; Indianapolis Cable &c. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 389, 391, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539n, citing Elliott Roads and Streets (3d ed.), § 943. To the same effect are Fort Worth St. R. Co. v. Rosedale &c. R. Co., 68 Tex. 169, 4 S. W. 534; New Orleans &c. R. Co. v.

If the company having the first grant actually occupies the streets it is authorized to use, its right to the part so occupied and used is, of necessity, paramount and exclusive; but it cannot obtain such an exclusive right by a mere colorable possession for the purpose of keeping out rival companies without taking any steps to provide accommodation for the public or to carry out the purpose for which the grant was made, and where each of two or more companies has the right to lay tracks in a street, the company which first, in good faith, takes possession and enters upon the construction of its system, although it may not have manual possession of all the streets embraced in the system, acquires a right to occupy each and all of such streets superior to that of the other companies which have not yet occupied any of such streets or made their location therein.[68] Notwithstanding the general rule that the grant to one company of the right to lay its track in certain streets does not prevent a grant to other companies to use the same streets, where the street is too narrow for more than one company it would seem that the company first in point of time must, of

Crescent City R. Co., 12 Fed. 308; Jackson &c. Horse R. Co. v. Interstate &c. Co., 24 Fed. 306; Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Henderson v. Ogden City R. Co., 7 Utah 199, 26 Pac. 286.

[68] This is substantially the rule laid down in Elliott Roads and Streets, 570 (3d ed., § 949), which is quoted with approval in Indianapolis &c. St. R. Co. v. Citizens St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539, 43 Am. & Eng. R. Cas. 234; and in Africa v. Board, 70 Fed. 729; and in Newport News &c. Co. v. Jones, 105 Va. 503, 54 S. E. 314, 316, 6 L. R. A. (N. S.) 247. See also Railway Co. v. Alling, 99 U. S. 463, 25 L. ed. 438; Fidelity Trust &c. Co. v. Mobile St. R. Co., 53 Fed. 657; Omnibus R. Co. v. Baldwin, 57 Cal. 160; Morris &c. R. Co. v. Blair, 9 N. J. Eq. 635; Waterbury v. Dry Dock &c. Co., 54 Barb (N. Y.) 388; Hamilton &c. Tract. Co. v. Hamilton &c. Co., 69 Ohio St. 402, 69 N. E. 991, 994; Norristown &c. R. Co. v. Citizens' &c. R. Co., 3 Montg. (Pa.) 119; Titusville &c. R. Co. v. Warren &c. R. Co., 12 Phila. (Pa.) 642. In Homestead St. R. Co. v. Pittsburgh &c. Co., 166 Pa. St. 162, 27 L. R. A. 383, it was held, under the Pennsylvania statute, that the consent of a municipality given to one company before its incorporation was of no effect as against a company which was already incorporated and which, within a reasonable time thereafter, proceeded to obtain consent to occupy the same street.

necessity, have a "physical monopoly" of the street as against other companies, and the second company, in any case, will not be allowed to so construct and operate its road as to impair the vested rights of the prior company without being held responsible therefor.[69] So, it has been said that a city "cannot so multiply street railway tracks in a particular street as to interfere with the rights of the public in the street."[70]

§ 1434 (1084). Right of one company to use another's track. —Although, as we shall hereafter show, the tracks of a street railway company may be used by the general public for ordinary travel with vehicles in common with the rest of the street, without compensation,[71] yet a rival company cannot, without authority and without paying compensation, run its own cars up and along such tracks[72] and it has even been held that a rival omnibus line could not so run its vehicles.[73] Under its

[69] See Fort Worth St. R. Co. v. Rosedale St. R. Co., 68 Tex. 169, 4 S. W. 534, 32 Am. & Eng. R. Cas. 283; Omaha Horse R. Co. v. Cable &c. Co., 32 Fed. 727; Union Pass. R. Co. v. Continental R. Co., 11 Phila. (Pa.) 321.

[70] Grand Rapids St. R. Co. v. West Side St. R. Co., 48 Mich. 433, 12 N. W. 643. To the same effect is Canal &c. St. R. Co. v. Crescent City R. Co., 41 La. Ann. 561, 6 So. 849, 40 Am. & Eng. R. Cas. 329. See also Dooly Block v. Salt Lake &c. Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610, 8 Am. R. & Corp. Rep. 327. A street railway company having a franchise to operate cars in a certain street, although not exclusive, may enjoin the unlawful operation of jitney busses thereon. Memphis Street R. Co. v. Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 1045, and notes; Puget Sound Tract. &c. Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 469, L. R. A. 1918F, 469, and note.

[71] Pacific R. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. 201; Smedis v. Brooklyn &c. R. Co., 88 N. Y. 13; Elliott Roads and Streets (3d ed.), § 965. This is subject, however, to the company's superior right of passage.

[72] Evansville &c. Trac. Co. v. Henderson Bridge Co., 134 Fed. 973, 978 (citing text). It may be enjoined from so doing. Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Louisville &c. R. Co. v. Central &c. R. Co., 87 Ky. 223, 8 S. W. 329, 36 Am. & Eng. R. Cas. 463; Brooklyn &c. R. Co. v. Brooklyn City R. Co., 33 Barb. (N. Y.) 420; Central &c. R. Co. v. Fort Clark &c. R. Co., 81 Ill. 523; Cottam v. Guest, L. R. 6 Q. B. Div. 70; 1 Am. & Eng. R. Cas. 474, note.

[73] Citizens' Coach Co. v. Camden &c. R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542. See also ante, § 1433n, 70.

reserved power to amend or repeal, the legislature, or, when empowered to do so, the municipality may authorize one company to make a joint use of the tracks of another.[74] So, it has been held that one company may acquire the right to use the tracks of another by the exercise of the power of eminent domain.[75] But compensation must be made to the company whose tracks are so used or condemned.[76] The entire matter, however, including the procedure and method of ascertaining the compensation, is largely regulated by express statutory provisions in most of the states.[77]

§ 1435 (1085). Rights of abutters—Generally.—The owner of land abutting upon a highway has, in addition to such rights to

[74] Canal &c. St. R. Co. v. Crescent &c. R. Co., 41 La. Ann. 561, 6 So. 849, 40 Am. & Eng. R. Cas. 329; North Baltimore &c. R. Co. v. Baltimore, 75 Md. 247, 23 Atl. 470; Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290; South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485; New Bedford &c. R. Co. v. Aclushnet St. R. Co., 143 Mass. 200, 9 N. E. 536; Sixth Ave. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; Kinsman &c. R. Co. v. Broadway &c. R. Co., 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 227; Toledo &c. R. Co. v. Toledo &c. R. Co., 50 Ohio St. 603, 36 N. E. 312, 1 Am. & Eng. R. Cas. (N. S.) 230. See also Los Angeles Tract. Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086; Union Depot Co. v. Southern R. Co., 105 Mo. 562, 16 S. W. 920 (upheld as an exercise of the police power). But compare Philadelphia St. Ry. Co's. Appeal, 203 Pa. St. 354, 53 Atl. 191.

[75] Metropolitan &c. R. Co. v. Chicago &c. R. Co., 87 Ill. 317; Canal &c. R. Co. v. Orleans &c. R. Co., 44 La. Ann. 54, 10 So. 389, 50 Am. & Eng. R. Cas. 369; Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; Metropolitan &c. R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Toledo &c. R. Co. v. Toledo &c. R. Co., 50 Ohio 603, 36 N. E. 312, 1 Am. & Eng. R. Cas. (N. S.) 230; Covington R. Co. v. Covington &c. R. Co., 19 Am L. Reg. (N. S.) 765.

[76] Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290; Second &c. St. R. Co. v. Green &c. R. Co., 3 Phila. (Pa.) 430; Louisville &c. R. Co. v. Central &c. R. Co., 87 Ky. 223; Pacific R. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. Rep. 201; Jersey City &c. R. Co. v. Jersey City &c. R. Co., 20 N. J. Eq. 61.

[77] See Orleans &c. R. Co. v. Jefferson &c. R. Co., 51 La. Ann. 1605, 26 So. 278; Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 263; Lexington &c. R. Co. v. Fitchburgh &c. R. Co., 14 Gray (Mass.) 266; Concord &c. R. Co. v. Boston &c. R. Co., 68 N. H. 519, 39 Atl. 1073.

its use as belong to the members of the public generally, certain peculiar rights which belong only to abutters.[78] Where he owns the fee—which he is always presumed to own, in the absence of anything to the contrary, to the center of the street upon the side upon which his land abuts—he has in general, subject only to the public easement, all the rights and remedies of the owner of a freehold.[79] He also has, whether he owns the fee or not, a right of ingress and egress, or, as it is sometimes called, an "easement of access" to his premises.[80] This is so far in the

[78] O'Brien v. Central &c. Co., 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508, 92 Am. St. 305; Long v. Wilson, 119 Iowa 267, 93 N. W. 282, 60 L. R. A. 720, 97 Am. St. 315; Willamette Iron Works v. Oregon R. Co., 26 Ore. 224, 37 Pac. 1016, 29 L. R. A. 88, 46 Am. St. 620; South Bound R. Co. v. Burton, 46 S. Car. 340, 46 S. E. 340; notes to Commonwealth v. Morrison, 197 Mass. 199, in 125 Am. St. 338, 344, et seq.; and to Rosch v. Nassau Elec. R. Co., 198 N. Y. 385, in 36 L. R. A. (N. S.) 645, 731, et seq; Elliott Roads and Streets (3d. ed.), § 876.

[79] Stevenson v. Mayor, 20 Fed. 586, 4 Am. & Eng. Corp. Cas. 503; Cox v. Louisville &c. R. Co., 48 Ind. 178; Overman v. May, 35 Iowa 89; Perley v. Chandler, 6 Mass. 453, 4 Am. Dec. 159; Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Pemberton v. Dooley, 43 Mo. App. 176; Jackson v. Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; State v. Laverack, 34 N. J. L. 201; Robert v. Sadler, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498n; Kellogg v. Cincinnati Tract. &c. Co., 80 Ohio St. 331, 88 N. E. 822, 23 L. R. A. (N. S.) 158; Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363; Western Un. Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 10o, 8 L. R. A. 429n, 19 Am. St. 908; Goodtitle v. Alker, 1 Burr. 133. But see Paquet v. Mt. Tabor &c. Railway Co., 18 Ore. 233, 22 Pac. 906; McQuaid v. Portland &c. Railway Co., 18 Ore. 237, 22 Pac. 899; Chicago &c. R. Co. v. Milwaukee &c. R. Co., 95 Wis. 561, 70 N. W. 678, 680, 37 L. R. A. 856, 60 Am. St. 137 (citing text). See also note to Wright v. Austin, 101 Am. St. 102.

[80] Railroad Co. v. Schurmeir, 7 Wall. (U. S.) 272, 19 L. ed. 74; Grafton v. Baltimore &c. R. Co., 21 Fed. 309; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 Pac. 330; Rigney v. Chicago, 102 Ill. 64; Rensselaer v. Leopold, 106 Ind. 29, 5 N. E. 761; Decker v. Evansville &c. R. Co., 133 Ind. 493, 33 N. E. 349; Elizabethtown &c. R. Co. v. Combs, 73 Ky. 382, 19 Am. Rep. 67, and authorities cited in the following notes; Everett v. Marquette, 53 Mich. 450, 19 N. W. 140; New York El. R. Co., In re, 36 Hun (N. Y.) 427; Hussner v. Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. 679; Branahan v. Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457. See also Elliott Roads and Streets (3d ed.), § 882.

nature of private property that it cannot be taken away or materially impaired, even by the legislature, without compensation.[81] So, the New York courts, and others, following the decisions in that state, have justly recognized an easement of light and air in the abutter, and have held that "above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner."[82] The right

[81] Macon v. Wing, 113 Ga. 90, 38 S. E. 392; Common Council v. Croas, 7 Ind. 9; Haynes v. Thomas, 7 Ind. 38; Ross v. Thompson, 78 Ind. 90, 94; Indianapolis v. Kingsbury, 101 Ind. 200, 211, 51 Am. Rep. 749; Kincaid v. Indianapolis &c. Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. 113; Transylvania University v. Lexington, 3 B. Mon. (Ky.) 25, 38 Am. Dec. 173; Brakken v. Minneapolis &c. R. Co., 29 Minn. 41; Adams v. Chicago &c. R. Co., 39 Minn. 286, 39 N. W. 529, 1 L. R. A. 493n, 12 Am. St. 644; Theobold v. Louisville &c. R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. 564; Farrar v. Midland Elec. R. Co., 101 Mo. App. 140, 74 S. W. 500; Burlington &c. R. Co. v. Reinhackle, 15 Nebr. 279, 18 N. W. 69, 48 Am. Rep. 342; Broome v. New York &c. Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851; McCraffrey v. Smith, 41 Hun (N. Y.) 117; Abendroth v. Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. 461; Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. 278; Buffalo v. Pratt, 131 N. Y. 293, 30 N. E. 233, 27 Am. St. 592; Moose v. Carson, 104 N. Car. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. 681; Crawford v. Delaware, 7 Ohio St. 459; Davis v. Spragg, 72 W. Va. 672, 79 S. E. 652, 48 L. R. A. (N. S.) 173. But see Textor v. Baltimore &c. R. Co., 59 Md. 63, 43 Am. Rep. 540.

[82] New York Elevated R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 440, 10 Sup. Ct. 743, 34 L. ed. 231; First Nat. Bank. v. Tyson, 144 Ala. 457, 39 So. 560; Henderson &c. R. Co. v. De Champ, 95 Ky. 219, 24 S. W. 605; Adams v. Chicago &c. R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. 644; De Geofroy v. Merchants' &c. R. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. 524; Dill v. Camden Board, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276, and note; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Story v. New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Metropoliton &c. R. Co., 104 N. Y. 268, 288, 10 N. E. 528; Dolan v. New York &c. R. Co., 175 N. Y. 367, 67 N. E. 612; Willamette Iron Works v. Oregon R. &c. Co., 26 Ore. 224, 37 Pac. 1016, 46 Am. St. 620. Citing Elliott Roads & Streets, (3d ed.), § 882; Davis v. Spragg, 72 W. Va. 672, 79 S. E. 652, 48 L. R. A. (N. S.) 173, Hobart v. Milwaukee &c. R. Co., 27 Wis. 194, 9 Am. Rep. 461; notes in 41 Am. St. 325, 25 Am. St. 479, 101 Am. St. 102, and in 36 L. R. A. (N. S.) 736. In the recent case of Muhlker v. New York &c. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872, the Supreme

to occupy a street does not extend beyond such a reasonable occupancy and use as shall not unnecessarily interfere with its use as a highway. And for an injurious interference arising from improper construction[83] or operation[84] of the road, an abutting owner who suffers special damage may recover.[85]

Court of the United States (several members of the court, however, dissenting) not only seemed to approve this doctrine on principle, but also held that an abutter who had acquired his right when the state court had decided that he had an easement of light and air which could not be taken from him without compensation, is entitled to be protected against the impairment of such easement notwithstanding the railroad company had thereafter built an elevated structure at the command of the state in place of its surface roadbed, and the judgment of the state court holding the contrary and attempting to distinguish the "Elevated Railroad Cases" was held unsound and reversed. But compare Sauer v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. ed. 1176. See also McKeon v. New York &c. R. Co., 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730, 733; Cullen v. New York &c. R. Co., 66 Conn. 211, 33 Atl. 910, to the effect that compulsion does not prevent liability from attaching. Also Dolan v. New York &c. R. Co., 175 N. Y. 376, 67 N. E. 612. Contra Garrett v. Lake Roland &c. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396.

[83] Cadle v. Muscatine Western R. Co., 44 Iowa 11; Brewer v. Boston &c. R. Co., 113 Mass. 52; Jeffersonville &c. R. Co. v. Esterle, 13 Bush (Ky.) 667; ante, § 1384 See also Beseman v. Pennsylvania R. Co., 50 N. J. L. 235, 13 Atl. 164; Cogswell v. New York &c. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Ellich v. Mason City &c. R. Co., 75 Iowa 443, 39 N. W. 700.

[84] Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739; Chicago &c. R. Co. v. First Methodist Church, 102 Fed. 85, 50 L. R. A. 488; Union Pacific R. Co. v. Foley, 19 Colo. 280, 35 Pac. 542; White v. Chicago &c. R. Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Frith v. Dubuque, 45 Iowa 406; Atchison &c. R. Co. v. Garside, 10 Kans. 552; Central &c. R. Co. v. Twine, 23 Kans. 585, 33 Am. Rep. 203; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; Louisville &c. Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

[85] Authority to lay a railroad track in a street does not authorize the erection of a passenger depot or other structure therein by which adjoining property is especially damaged. Barney v. Keokuk, 4 Dill. (U. S.) 593, affirmed 94 U. S. 324, 24 L. ed. 224; Maysville &c. R. Co. v. Ingram (Ky.), 30 S. W. 8; Tate v. Missouri &c. R. Co., 64 Mo. 149; Higbee v. Camden &c. R. Co., 19 N. J. Eq. 276, 20 N. J. Eq. 435; Chicago &c. R. Co. v. O'Connor, 42 Nebr. 90, 60 N. W. 326, 1 Am. & Eng. R. Cas. (N. S.) 51. See also Louis-

§ 1436 (1086). Rights of land-owners other than abutters.—Although there are many authorities which hold that one who purchases property with reference to a map or plat showing certain streets, has a right as against the donor or grantor to have all such streets kept open, we suppose no such extensive right exists as against the general public, and that the land-owner has special rights, under ordinary circumstances, only in the street upon which his property abuts. Whether that right extends, in any way, to other portions of the street than that upon which his property directly abuts is a disputed question. The vacation of a street in such a manner as to prevent access to the property of an abutting owner is held in many jurisdictions, in accordance with what we regard as the better rule, to be a taking within the rule requiring compensation; but there are authorities to the contrary, and in New York it is held that the closing of one public way to his property is no such taking as requires compensation, provided another way is left open.[86] It seems clear to us, however, that, upon principle, the land-owner's easement of access must, as a general rule, include the right to have so much of the street kept open, at least, as will give him an outlet to some connecting street, and it follows, therefore, that where a railroad is built across the mouth of a cul de sac so as to deprive him of his only means of access, he is

ville &c. R. Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881; 1 L. R. A. (N. S.) 49, and note. This branch of the subject has already been considered in the chapters on Rights and Remedies of Landowners and the chapter on Construction and Construction Contracts.

[86] This subject is considered and the conflicting authorities are cited in Elliott Roads and Streets (3rd ed), §§ 1180, 1181; and in note in 2 L. R. A. (N. S.) 637, and note to Newark v. Hatt, 79 N. J. 548, 77 Atl. 47, in 30 L. R. A. (N. S.) 637. See also Davis v. County Comrs. 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750, 55 Am. & Eng. R. Cas. 52; Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953, 2 L. R. A. (N. S.) 269; Sioux City Seed Co. v. Detroit &c. Ry. Co., 184 Mich. 181, 150 N. W. 841; Cram v. Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282; Smith v. St. Paul &c. R. Co., 39 Wash. 355, 81 Pac. 84, 70 L. R. A. 1018, 109 Am. St. 889n. Compare Long v. Wilson, 119 Iowa 267, 93 N. W. 282, 66 L. R. A. 720, 97 Am. St. 315, and Ridgeway v. Osceola, 139 Iowa 590, 117 N. W. 974 with McKinney v. Baker, 100 Iowa 362, 69 N. W. 683, and Tomlin v. Cedar Rapids &c. Co., 141 Iowa 599, 120 N. W. 93.

entitled to damages, although his property does not abut upon that portion of the street where the railroad is constructed.[87] It would seem also, upon principle, that where the easement of access is seriously impaired, although not destroyed, and a material depreciation in value of the property is caused by the permanent obstruction of a street, the owner suffers a special injury and is entitled to damages, even though his property does not abut directly upon that portion of the street.[88] The weight of authority, however, is to the effect that the owner of property abutting on the street at a distance from the point obstructed, ordinarily at least, suffers no special or peculiar damage, and cannot recover for any depreciation in the value of his property caused thereby, even where the railroad company is required by law to compensate the owner for all property damaged.[89] But in some jurisdictions, in most of which con-

[87] Brakken v. Minneapolis &c. R. Co., 29 Minn. 41, 11 N. W. 124; Braken v. Minneapolis &c. R. Co., 32 Minn. 425, 21 N. W. 414; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288. See also Jackson v. Kiel, 13 Colo. 378, 22 Pac. 504, 6 L. R. A. 254n, 16 Am. St. 207; Putnam v. Boston &c. R. Co, 182 Mass. 351, 65 N. E. 790; Sandstrom v. Oregon &c. R. Co., 75 Ore. 159, 146 Pac. 803; Johnston v. Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. 800; Smith v. Centralia, 55 Wash. 573, 104 Pac. 797; Johnston v. Lonstorf, 128 Wis. 17, 107 N. W. 459.

[88] Rude v. St. Louis 93 Mo. 408, 6 S. W. 257. See also Fritz v. Hobson, 19 Am. L. Reg. (N. S.) 615, and note; Chicago v. Baker, 98 Fed. 830; Idaho &c. R. Co. v. Nagle, 184 Fed. 398; South & N. Ala. R. Co. v. Schauffler, 189 Ala. 58, 66 So. 502; Chicago v. Bureky, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568, 49 Am. St. 142; Long v. Wilson, 119 Iowa 267, 93 N. W. 282, 60 L. R. A. 720, 97 Am. St. 315; Dairy v. Iowa C. R. Co., 113 Iowa 716, 84 N. W. 668; Baltimore &c. R. Co. v. Strauss, 37 Md. 237; Illinois Cent. R. Co. v. Elliott, 129 Ky. 121, 110 S. W. 817; Husband v. Cotton, 171 Ky. 177, 188 S. W. 380, L. R. A. 1917A, 1150 and note; Lake Roland Elev. R. Co. v. Webster, 81 Md. 529, 32 Atl. 186; Fitzer v. St. Paul &c. R. Co., 105 Minn. 221, 117 N. W. 434, 18 L. R. A. (N. S.) 268, 127 Am. St. 557; Melon St., In re, 182 Pa. St. 397, 38 Atl. 482, 38 L. R. A. 275; Powell v. Texas &c. R. Co., 104 Tex. 219, 135 S. W. 1153, 46 L. R. A. (N. S.) 615.

[89] Meyer v. Richmond, 172 U. S. 82, 19 Sup. Ct. 106, 43 L. ed. 374; Little Rock &c. R. Co. v. Newman, 73 Ark. 1, 83 S. W. 653, 108 Am. St. 17, 9 Am. Rep. & Corp. Rep. 173; Polack v. Trustees, 48 Cal. 490; Whitsett v. Union &c. R. Co., 10 Colo. 243, 15 Pac. 339; Jacksonville &c. R. Co. v. Thompson, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410; East

stitutional or statutory provisions exist requiring compensation where property is "injured" or "damaged," it has been held that a property-owner may be entitled to damages, although the obstruction is not directly in front of his premises, and, in some instances, even though his property may not directly abut upon the street.[90]

St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795; Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. 343, 11 Am. R. & Corp. Rep. 249; Barr v. Oskaloosa, 45 Iowa 275; Morgan v. Des Moines &c. R. Co., 64 Iowa 589, 21 N. W. 96, 52 Am. Rep. 462; Heller v. Atchison &c. R. Co., 28 Kans. 625; Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Smith v. Boston, 7 Cush. (Mass.) 254; Stanwood v. Malden, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; Shaw v. Boston &c. R. Co., 159 Mass. 597, 35 N. E. 92; Sioux City Seed Co. v. Detroit &c. Ry. Co., 184 Mich. 181, 150 N. W. 841; Buhl v. Ft. St. &c. Co., 98 Mich. 596, 57 N. W. 829, 23 L. R. A. 292; Shaubut v. St. Paul &c. R. Co., 21 Minn. 502; Rochette v. Chicago &c. R. Co., 32 Minn. 201, 20 N. W. 140; Rude v. St. Louis, 93 Mo. 408, 6 S. W. 257; Glasglow v. St. Louis, 107 Mo. 198, 17 S. W. 743; Coster v. Mayor &c., 43 N. Y. 399; Kings Co. &c. Insurance Co. v. Stevens, 101 N. Y. 411, 5 N. E. 353; State v. Elizabeth, 54 N. J. L. 462, 24 Atl. 495; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341, 345, 87 Am. St. 600 (citing text); Scrutchfield v. Choctaw &c. R. Co., 18 Okla. 308, 88 Pac. 1048, 9 L. R. A. (N. S.) 496; McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Gerhard v. Seekonk &c. Comrs., 15 R. I. 334, 5 Atl. 199; Houston &c. R. Co. v. Powell (Tex. Civ. App.), 125 S. W. 330 (reversed, however, in 104 Tex. 219, 135 S. W. 1153). See also Austin v. Augusta &c. R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; Smith v. St. Paul &c. R. Co., 39 Wash. 335, 81 Pac. 840, 70 L. R. A. 1018, 109 Am. St. 889. See generally Louisville &c. Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. (N. S.) 49, and note; Atchison &c. R. Co. v. Armstrong, 71 Kans. 366, 80 Pac. 978, 1 L. R. A. (N. S.) 113.

[90] See Rigney v. Chicago, 102 Ill. 64; Chicago &c. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750; Lake Erie &c. R. Co. v. Scott, 132 Ill. 429, 24 N. E. 78. But see Jackson v. Kiel, 13 Colo. 378, 22 Pac. 504, 6 L. R. A. 254, 16 Am. St. 207; Chicago v. Union &c. Assn., 102 Ill. 379, 40 Am. Rep. 598; Aldrich v. Metropolitan &c. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; Morgan v. Des Moines &c. R. Co., 64 Iowa 589, 21 N. W. 96, 52 Am. Rep. 462; Lake Roland &c. R. Co. v. Webster, 81 Md. 529, 32 Atl. 186, 1 Am. & Eng. R. Cas. (N. S.) 360; Atchison &c. R. Co. v. Boerner, 34 Nebr. 240, 51 N. W. 842, 33 Am. St. 637; Mooney v. New York &c. R. Co., 16 Daly 145, 9 N. Y. S. 522; Kearney v. Metropolitan &c. R. Co., 13 N. Y. 608; Columbus &c. R. Co. v.

§ 1437 (1087). Commercial railroad is an additional burden. —It is generally conceded that the use of a street by an ordinary commercial railroad may, under certain circumstances, constitute an additional servitude or burden for which the abutters are entitled to compensation. But the courts differ widely as to when it should be so considered. Some of them regard the ownership of the fee as the test, and seem to hold that the abutter is not entitled to compensation when the fee of the street is in the public;[91] but this is in conflict with the

Gardner, 45 Ohio St. 309, 13 N. E. 69; Powell v. Houston &c. R. Co., 104 Tex. 219, 135 S. W. 1153, 46 L. R. A. (N. S.) 615, and note reviewing cases on both sides. And in many cases where the provision for the payment of damages is not limited to those arising solely from the construction of the road, injuries from smoke, vibration, noise and the like, have been held proper elements of damage. Omaha &c. R. Co. v. Janecek, 30 Nebr. 276, 46 N. W. 478, 27 Am. St. 399; Gainesville &c. R. Co. v. Hall, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. 42n; Henderson &c. R. Co. v. Dechamp, 95 Ky. 219, 24 S. W. 605; Chicago &c. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341n. See also Richards v. Washington Terminal Co., 233 U. S. 546, 34 Sup. Ct. 654, 58 L. ed. 1088; Pennsylvania &c. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl 186, 10 Am. St. 611, distinguishing Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. 618; Abendroth v. Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634, 1 Am. St. 461, and other New York elevated railway cases therein cited. But see Pennsylvania Co. v. Pennsylvania &c. R. Co., 151 Pa. St. 334, 25 Atl. 107, 31 Am. St. 762.

[91] Garnett v. Jacksonville &c. R. Co., 20 Fla. 889; Harrison v. New Orleans &c. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438; Sweet v. Buffalo &c. R. Co., 13 Hun (N. Y.) 643; Railroad v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622n; Houston &c. R. Co. v. Odum, 53 Tex. 343; Hatch v. Vermont Cent. R. Co., 28 Vt. 142. Other cases are reviewed in Spencer v. Point Pleasant &c. R. Co., 23 W. Va. 407, 20 Am. & Eng. R. Cas. 125. In many of the states where this doctrine was once held it is now overruled. Carson v. Central R. Co., 35 Cal. 325, overruled in Southern Pac. R. Co. v. Reed, 41 Cal. 256; Savannah &c. R. Co. v. Shiels, 33 Ga. 601, overruled in South Carolina R. Co. v. Steiner, 44 Ga. 546; Moses v. Pittsburgh &c. R. Co., 21 Ill. 516, apparently overruled in Indianapolis &c. R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624, and Chicago &c. R. Co. v. Ayres, 106 Ill. 511. (But see Illinois Cent. R. Co. v. Turner, 194 Ill. 575, 63 N. E. 798.) Atchison &c. R. Co. v. Garside, 10 Kans. 552, apparently overruled in Central Branch Union Pac. R. Co. v. Twine, 23 Kans. 585, 33 Am. Rep. 203;

rules laid down in the preceding section, and when the "easement of access" is destroyed or materially impaired, the abutter, as correctly held in most of the more recent cases, is entitled to compensation, whether he owns the fee or not.[92] A few of the other courts seem to hold that a railroad is not, in either case, an additional burden, for which the abutters are entitled to compensation.[93] It is held in still another line of decisions

Houston & T. R. Co. v. Odum, 53 Tex. 343, overruled in Gulf &c. R. Co. v. Eddins, 60 Tex. 656; Milburn v. Cedar Rapids, 12 Iowa 246, no longer expresses the law in Iowa. See Kucheman v. Chicago &c. R. Co., 46 Iowa 366, and Pratt v. Des Moines &c. R. Co., 72 Iowa 249, 33 N. W. 666. In some cases under constitutions providing that compensation must be made when property is taken or damaged, and must be paid in advance when property is taken, it is held that the property is taken, so as to require compensation in advance, only where the abutter owns the fee in the street, but that compensation or damages may be recovered in either event. McCammon &c. Lumber Co. v. Trinity &c. R. Co., 104 Tex. 81, 33 S. W. 247, Ann. Cas. 1913E. 870, 36 L. R. A. (N. S.) 662, so it has been held that an abutter may have his action for damages sustained where he does not own the fee but cannot maintain injunction. Seaboard Air Line Ry. v. Southern Investment Co., 53 Fla. 832, 13 Ann. Cas. 18, and note.

[92] Hot Springs R. Co. v. Williamson, 136 U. S. 121, 10 Sup. Ct. 955, 34 L. ed. 355; Western R. Co. v. Alabama &c. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288; Atchison &c. R. Co. v. Davidson, 52 Kans. 739, 35 Pac. 787; Fulton v. Short Route &c. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. 619; Lamm v. Chicago &c. R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268, 46 Am. & Eng. R. Cas. 42; Reining v. New York &c. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133; Egerer v. New York &c. R. Co., 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381n; McQuaid v. Portland &c. R. Co., 18 Ore. 237, 22 Pac. 899, 1 Am. R. & Corp. Rep. 34 and note; Dooly Block v. Salt Lake &c. Co., 9 Utah 31, 33 Pac. 229; Kaufman v. Tacoma &c. R. Co., 11 Wash. 632, 40 Pac. 137. Other authorities are cited in the notes to the preceding section. Elliott Roads & Streets (3rd ed.), § 884.

[93] Perry v. New Orleans &c. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Montgomery v. Santa Ana &c. R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. 89; Nottingham v. Baltimore &c. R. Co., 3 McAr. (D. C.) 517; Peddicord v. Baltimore &c. R. Co., 34 Md. 463; O'Brien v. Baltimore &c. R. Co., 74 Md. 363, 22 Atl. 141; Gaus &c. Co. v. St. Louis &c. R. Co., 113 Mo. 308, 20 S. W. 658, 18 L. R A. 339, 35 Am. St. 706; Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698,

that the use of streets by a commercial railroad is not an ordinary street use, and that the abutters are entitled to compensation regardless of the ownership of the fee.[94] This, we are

24 L. R. A. 516, 43 Am. St. 547, 1 Am. & Eng. R. Cas. (N. S.) 16; Seibel-Suessdorf &c. Co. v. Manufacturer's Ry. Co., 230 Mo. 59, 130 S. W. 289; Morris &c. R. Co. v. Newark, 10 N. J. Eq. 352; Philadelphia &c. R. Co., In re, 6 Whart. (Pa.) 25; Struthers v. Dunkirk &c. R. Co., 87 Pa. St. 282. See also Fobes v. Rome &c. R. Co., 121 N. Y. 505, 24 N. E. 919; People v Kerr, 27 N. Y. 188. But compare Pennsylvania R. Co. v. Walsh, 124 Pa. St. 544, 10 Am. St. 611, as to the present rule in Pennsylvania. In Missouri, notwithstanding this rule, an elevated railroad structure in a street was held an additional burden in a comparatively recent case. De Geofrey v. Merchants' Bridge &c. Ry. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. 524.

[94] St. Paul &c. Co. v. Schurmeir, 7 Wall. (U. S.) 272, 19 L. ed. 74; Reichert v. St. Louis &c. R. Co., 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183n, 38 Am. & Eng. R. Cas. 453; Denver v. Bayer, 7 Colo. 113, 2 Pac. 6, 2 Am. & Eng. Corp. Cas. 465; South Carolina R. Co. v. Steiner, 44 Ga. 546; Burlington &c. R. Co. v. Reinhackle, 15 Nebr. 279, 18 N. W. 69, 48 Am. Rep. 342; Omaha &c. R. Co. v. Rogers, 16 Nebr. 117, 19 N. W. 603, 20 Am. & Eng. R. Cas. 79; White v. Northwestern &c. R. Co., 113 N. Car. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. 639; Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 63; Schurmeier v. St. Paul &c. R. Co., 10 Minn. 82, 88 Am. Dec. 59; Theobald v. Louisville &c. R. Co., 66 Miss. 279, 6 So. 230, 4 L. R. A. 735, 14 Am. St. 564; Railway Co. v. Lawrence, 38 Ohio St. 41, 43 Am. Rep. 419; South Bound R. v. Burton, 67 S. Car. 515, 46 S. E. 340; Rische v. Texas &c. Co., 27 Tex. Civ. App. 33, 66 S. W. 324; Stewart v. Ohio River &c. R. Co., 38 W. Va. 438, 18 S. E. 604; Chicago &c. R. Co. v. Milwaukee &c. R. Co., 95 Wis. 561, 70 N. W. 678, 682, 37 L. R. A. 856, 60 Am. St. 137 (citing text). See also New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; Southern Pac. R. Co. v. Reed, 41 Cal. 256; Weyl v. Sonoma Valley &c. Co., 69 Cal. 202; Nicholson v. New York &c. R. Co., 22 Conn. 74, 56 Am. Rep. 390; Imlay v. Union &c. R. Co., 26 Conn. 249, 68 Am. Dec. 392, and note; Indianapolis &c. R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; Cox v. Louisville &c. R. Co., 48 Ind. 178; Kucheman v. Chicago &c. R. Co., 46 Iowa 366; Enos v. Chicago &c. R. Co., 78 Iowa 28, 42 N. W. 575; Central Branch Union Pac. v. Andrews, 30 Kans. 590, 2 Pac. 677; Phipps v. Western M. Co., 66 Md. 319, 7 Atl. 556; Grand Rapids &c. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Harrington v. St. Paul &c. R. Co., 17 Minn. 215; Hartz v. St. Paul &c. R. Co., 21 Minn. 358; Chamberlain v. Elizabethport &c. Co., 41 N. J. Eq. 43, 2 Atl. 775; Starr v. Camden &c. R. Co., 24 N. J. L. 592; Bork v. United

inclined to regard as the better rule. The use of a street by a commercial railroad, upon which freight is carried, and which is not for the local use of those living or having occasion to travel upon the street, is certainly not in furtherance of the ordinary use of the street, for which compensation may be presumed to have been made, but is necessarily a detriment to ordinary local travel and the use and value of property along the street.

N. J. R. &c. Co., 70 N. J. L. 268, 57 Atl. 412, 103 Am. St. 808; Fanning v. Osborne & Co., 34 Hun (N. Y.) 121; Williams v. New York &c. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Wager v. Troy Union R. Co., 25 N. Y. 526; Henderson v. New York Cent. R. Co., 78 N. Y. 423; Parrott v. Cincinnati &c. R. Co., 10 Ohio St. 624; Lawrence R. Co. v. Williams, 35 Ohio St. 168; Gulf &c. R. Co. v. Eddins, 60 Tex. 656; Carl v. Sheboygan &c. R. Co., 46 Wis. 625; Hanlin v. Chicago &c. R. Co., 61 Wis. 515, 21 N. W. 623; note in 1 Am. R. Corp. Rep. 48, et seq.; note in 6 Am. R. Corp. Rep. 315, et seq. The opposite view seems to be still held in some of the states, at least under some circumstances. Garnett v. Jacksonville &c. R. Co., 20 Fla. 889; Parry v. New Orleans &c. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Elizabethtown &c. R. Co. v. Thompson, 79 Ky. 52; Hill v. Chicago &c. R. Co., 38 La. Ann. 599; Cross v. St. Louis &c. R. Co., 77 Mo. 312; Snyder v. Pennsylvania R. Co., 55 Pa. St. 340; Struthers v. Dunkirk &c. R. Co., 87 Pa. St. 282; McLauchlin v. Charlotte &c. Railroad Co., 5 Rich. (S. Car.) 583. But see Pennsylvania &c. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. 186, 10 Am. St. 611; De Geofroy v. Merchants' &c. R. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 659, 101 Am. St. 524. The rule stated in the text is certainly the better rule where the "easement of access" is destroyed or materially impaired, but several of the courts have held that when it is not taken, as, for instance, where the road is constructed on the opposite side of the street, the abutter is not entitled to compensation. Indiana &c. R. Co. v. Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; Florida Southern R. Co. v. Brown, 23 Fla. 104, 1 So. 512; Terre Haute &c. R. Co. v. Bissell, 108 Ind. 113, 9 N. E. 144; Haslett v. New Albany &c. R. Co., 7 Ind. App. 603, 34 N. E. 845; Kansas &c. R. Co. v. Cuykendall, 42 Kans. 234, 21 Pac. 1051, 16 Am. St. 479; Atchison &c. R. Co. v. Leuning, 52 Kans. 732, 35 Pac. 801; Cosby v. Owensboro &c. R. Co., 10 Bush. (Ky.) 288; Elizabethtown &c. R. Co. v. Thompson, 79 Ky. 52; Lexington &c. R. Co. v. Applegate, 38 Ky. 289, 302, 33 Am. Dec. 497; Stein v. Chesapeake &c. Ry. Co., 132 Ky. 322, 116 S. W. 733; Fogg v. Nevada &c. R. Co., 20 Nev. 429, 23 Pac. 840, 43 Am. & Eng. R. Cas. 105; Trustees First Con. Church v. Milwaukee &c. R. Co., 77 Wis. 158, 45 N. W. 1086, 43 Am. & Eng. R. Cas. 182.

§ 1438 (1088). Change of tracks or use—Additional use.[95]—There is apparently some difference of opinion as to whether the laying of an additional track, a change from a narrow gauge to a standard gauge, the grant of the right to another company also to run trains over the road, or the like, constitutes an additional servitude, but we think most of the decisions can be reconciled. It has been held, on the one hand, that the laying of additional tracks will constitute an additional servitude,[96] and, on the other hand, that it will not.[97] This, however, must depend upon the circumstances of the particular case, such as the extent of the right originally acquired for which the abutter was compensated, or deemed to have been compensated, or, in some instances, the location of the tracks and effect on abutting property, so that there is not, necessarily, any real conflict among the decisions upon this question. It has also been held that a change from a narrow to a standard gauge does not entitle the abutter to further damages;[98] that the grant by one

[95] This section has been substituted for the original section bearing the same number, and that section has been transferred to the chapter on Street Railways.

[96] Birmingham Belt R. Co. v. Lockwood, 150 Ala. 10, 43 So. 819; Bond v. Pennsylvania Co., 171 Ill. 508, 49 N. E. 545; Rock Island &c. Co. v. Johnson, 204 Ill. 488, 68 N. E. 549; Henry v. Mason City &c. R. Co., 140 Iowa 201, 118 N. W. 310; Chesapeake &c. R. Co. v. Gross (Ky.), 43 S. W. 203; Stephens v. New York &c. R. Co., 175 N. Y. 72, 67 N. E. 119; Dooly Block v. Salt Lake &c. Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610. See also Noblesville v. Lake Erie &c. R. Co., 130 Ind. 1, 29 N. E. 484; Workman v. Southern Pac. R. Co., 129 Cal. 536, 62 Pac. 185, 316.

[97] Davis v. Chicago &c. R. Co., 46 Iowa 389; White v. Chicago &c. R. Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Chicago &c. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. 759; Indianapolis &c. R. Co. v. Calvert, 110 Ind. 555, 11 N. E. 476; Chicago &c. R. Co. v. O'Connor, 42 Nebr. 90, 60 N. W. 326. See also Gerken v. Interborough Rapid Transit Co., 68 Misc. 389, 125 N. Y. S. 32. As to when additional tracks can not be laid, see Savannah &c. R. Co. v. Woodruff, 86 Ga. 94, 13 S. E. 156; Pennsylvania &c. R. Co. v. Philadelphia &c. R. Co., 157 Pa. St. 42, 27 Atl. 683. See also Hileman v. Chicago &c. R. Co., 113 Iowa 591, 85 N. W. 800.

[98] Kakeldy v. Columbia &c. Co., 37 Wash. 675, 80 Pac. 205. See also Denver &c. R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777; Gerken v. Interborough Rapid Transit Co., 68 Misc. 389, 125 N. Y. S. 32.

company to another of the right to use its tracks,[99] or the laying of a double track instead of a single track,[1] does not create an additional servitude. But we think the use of the right of way of one company by another might, under exceptional circumstances, constitute an additional burden,[2] and so as to the laying of a double track in place of a single track. It has, indeed, been held that the laying of an additional track by another company will entitle the abutter to additional damages, notwithstanding he was compensated by the first company.[3]

§ 1439 (1089). **Railroads in narrow streets.**—Where a street is too narrow to admit of more than one track, it would seem that the company which lawfully constructs and operates its road therein has, of necessity, a practical monopoly as against other companies, unless some valid provision exists for the use of the same track by more than one company. The width of the street may also be of importance, in some cases, in determining the rights of the company as against the abutters or the public. Thus, in a recent case decided by a court which has steadily refused to consider a commercial railroad in a street an additional burden under ordinary circumstances, it was held that a city could not legally authorize the construction and operation of such a road in a street so narrow that its use as a public thoroughfare would thereby be destroyed, and that an abutting owner whose easement of access was thus impaired might enjoin the railroad company from making such unlawful use of the street.[4] So, in our opinion, neither a com-

[99] Miller v. Green Bay &c. R. Co., 59 Minn. 169, 60 N. W. 1006, 26 L. R. A. 443.

[1] Reid v. Norfolk &c. R. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. 708. See also Ransom v. Citizens' R. Co., 104 Mo. 375, 16 S. W. 416.

[2] See Ft. Worth &c. Co. v. Jennings, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180; Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420. And see note in 25 Am. St. 477.

[3] Southern Pac. R. Co. v. Reed, 41 Cal. 256. See also Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420. But see Griffith v. Atchison &c. Ry. Co., 102 Kans. 23, 169 Pac. 546.

[4] Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. 547, 1 Am. & Eng. R. Cas. (N. S.) 16; Schulenburgh &c. Co. v. St. Louis &c. R. Co., 129 Mo. 455, 31 S. W. 796. See also Kansas &c. R. Co. v. Cuykendall, 42

mercial railroad nor a street railway can lawfully be constructed and operated in a street so narrow as not to admit of the passage of cars and other vehicles at the same time, without compensation to the abutting property-owners.[5] As every municipality, even if it owns the fee, holds its streets in trust for the public, it is questionable, indeed, if it has any authority or power to authorize the construction and operation of a railroad of any kind in a street so narrow that the general public could not use it at the same time, as the effect would be to

Kans. 234, 21 Pac. 1051, 16 Am. St. 479; Commonwealth v. Frankfort, 92 Ky. 149, 17 S. W. 287; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Nichols v. Ann Arbor &c. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Dubach v. Hannibal &c. R. Co., 89 Mo. 483, 1 S. W. 86; Dooly Block v. Salt Lake &c. Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610, 8 Am. R. & Corp. Rep. 327.

[5] See Mobile &c. R. Co. v. Middleton, 139 Ala. 610, 36 So. 782; Campbell v. Metropolitan R. Co., 82 Ga. 320, 9 S. E. 1078; Detroit City R. Co. v. Mills, 85 Mich. 634, 659, 48 N. W. 1007; Carli v. Union Depot St. R. Co., 32 Minn. 101, 20 N. W. 89; McQuaid v. Portland &c. R. Co., 18 Ore. 237, 22 Pac. 899, 1 Am. R. & Corp. Rep. 34; Limburger v. San Antonio &c. St. R. Co. (Tex. Civ. App.), 27 S. W. 198; Ross v. Montreal St. R. Co. (Can.), 24 L. C. Jur. 60. But see San Antonio &c. St. R. Co. v. Limburger, 88 Tex. 79, 30 S. W. 795, 53 Am. St. 730; Wagner v. Bristol Belt R. Co., 108 Va. 594, 62 S. E. 391, 25 L. R. A. (N. S.) 1278. Contra Kellinger v. Forty-Second St. &c. Co., 50 N. Y. 206. And see authorities cited in note 4, supra. We remember to have noticed a suggestion in one case that the abutter could not be materially injured, because, if he had driven up in front of his premises first, the car would be compelled to wait a reasonable time for his to load or unload and get out of the way. See Rafferty v. Central Trac. Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. 763, 772, 773. See also San Antonio &c. St. R. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. 730. But the general rule is that the cars have the right of way on the track, and the suggestion made is in many respects both contrary to principle and impracticable. Under the circumstances referred to in the text an abutter could not safely drive on the street at all, for he might meet a car at any time, nor could he leave his horse hitched, or get in and out of his vehicle, or load or unload goods without interruption and danger. It seems to us that his easement of access would be seriously impaired, and that, in many cases, the value of his property might be greatly lessened, especially in a wholesale or other great business locality.

practically devote the street to the exclusive use of the railroad company.[6] But where there is room for other vehicles to pass at the same time, so that the abutter's easement of access is not materially impaired, the construction and operation of a street railway will not be enjoined merely because the track is so close to the curb that drays, express wagons and the like cannot be placed at right angles with the sidewalk while being loaded and unloaded.[7]

§ 1440 (1090). **Obstruction of highways—Nuisance.**—The construction of a railroad upon a street, without authority, is a nuisance.[8] So, if the authority be exceeded and the railroad is so constructed or operated as to obstruct travel or cause an abutter special injury.[9] And a temporary obstruction, as else-

[6] See Detroit City R. Co. v. Mills, 85 Mich. 634, 659, 48 N. W. 1007. Ante, § 1433, and supra, first note to this section.

[7] Louisville &c. Co. v. Central &c. Co., 95 Ky. 50, 23 S. W. 592, 44 Am. St. 203; Hogencamp v. Paterson &c. R. Co., 17 N. J. Eq. 83; Hobart v. Milwaukee &c. R. Co., 27 Wis. 194, 9 Am. Rep. 461; Taylor v. Bay City St. R. Co., 101 Mich. 140, 59 N. W. 447, 1 Am. & Eng. R. Cas. (N. S.) 165. (Abutter not entitled to damages.) See also Louisville &c. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Cosby v. Owensboro &c. Co., 10 Bush. (Ky.) 288. In People v. Fort Wayne &c. R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752, it was held by a divided bench that eight feet seven and one-half inches was sufficient space. See also Birmingham Ry. &c. Co. v. Smyer, 181 Ala. 121, 61 So. 354, 47 L. R. A. (N. S.) 597; Austin v. Detroit &c. R. Co., 134 Mich. 149, 96 N. W. 35; Seibel-Suessdorf &c. Co. v. Manufacturers' Ry. Co., 230 Mo. 59, 130 S. W. 288.

[8] Hart v. Buckner, 54 Fed. 925; Pittsburgh &c. R. Co. v. Hood, 94 Fed. 618; Louisville &c. R. Co. v. Mobile &c. R. Co., 124 Ala. 162, 26 So. 895; Pittsburgh &c. R. Co. v. Reich, 101 Ill. 157; Chicago &c. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Commonwealth v. Old Colony R. Co., 14 Gray (Mass.) 93; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 307; Attorney-General v. Lombard &c. R. Co., 10 Phila. (Pa.) 352; State v. Troy &c. R. Co., 57 Vt. 144. See also Illinois Cent. R. Co. v. Commonwealth (Ky.), 96 S. W. 467. Ante, §§ 850, 852, 1380.

[9] Union Pacific R. Co. v. Foley, 19 Colo. 280, 35 Pac. 542; Stamford v. Stamford &c. Co., 56 Conn. 381, 15 Atl. 749; Attorney-General v. Chicago &c. R. Co., 112 Ill. 520; Welcome v. Leeds, 51 Maine 313; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054; Alabama &c. R. Co. v. Bloom, 71 Miss. 247, 15 So. 72; Randle v. Pacific R. Co., 65 Mo. 325; Brown v. Cayuga &c. R. Co., 12 N.

where shown,[10] by leaving cars in or across a street for an unreasonable time, may constitute a nuisance.[11] The unauthorized use of steam as a motor has also been held to be a nuisance.[12] So, as held in many of the authorities already cited, and as elsewhere shown, the nuisance or obstruction of a highway, when caused by the negligence of the company, will generally support an action by an abutter who is specially injured, even though it may not constitute a taking of his property.[13]

Y. 486; Cogswell v. New York &c. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Hussner v. Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. 679; Northern Central R. Co. v. Commonwealth, 90 Pa. St. 300; State v. Louisville &c. R. Co., 91 Tenn. 445, 19 S. W. 229, 50 Am. & Eng. R. Cas. 161; Evans v. Chicago &c. R. Co., 86 Wis. 597, 57 N. W. 354, 39 Am. St. 908; Regina v. Great Northern &c. R. Co., 9 Q. B. 315; Regina v. Toronto St. R. Co. 24 Up. Can. Q. B. 454. See also Cleveland &c. R. Co. v. Pattison, 67 Ill. App. 351; Frankle v. Jackson, 30 Fed. 398; Louisville &c. Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. (N. S.) 49 and note. And in an action by the landowner for damages where a railroad company obstructs his only means of getting into and out of his garage by the operation of its cars on a track in the alley and permitting its cars to stand therein, it is no defense that the track itself was properly constructed under authority from the city. Hawks v. Atchison &c. R. Co., 103 Kans. 390, 173 Pac. 922, L. R. A. 1918F, 671. Notes in 17 Am. & Eng. R. Cas. 172, and 19 Am. & Eng. R. Cas. 433.

[10] Ante, §§ 850, 852.

[11] Marine Ins. Co. v. St. Louis &c. R. Co., 41 Fed. 643, 650; Cleveland &c. R. Co. v. Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. 644; Rauch v. Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747; Murray v. South Carolina R. Co., 10 Rich. (S. Car.) 227, 70 Am. Dec. 219; State v. Vermont Cent. R. Co., 27 Vt. 103; Brownell v. Troy &c. R. Co., 55 Vt. 218; note to Callahan v. Gilman, 1 Am. St. 843. See also Brumit v. Virginia &c. Co., 106 Tenn. 124, 60 S. W. 505. And as to liability and damages in such cases, see Terry v. Great Northern R. Co., 103 Miss. 679, 60 So. 729, 44 L. R. A. (N. S.) 1069, where many cases are reviewed in note.

[12] North Chicago &c. R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788, 2 Am. & Eng. Corp. Cas. 6, Commonwealth v. Allen, 148 Pa. St. 358, 23 Atl. 1115, 16 L. R. A. 148, 33 Am. St. 830; State v. Tupper, Dud. (S. Car.), 135; Smith v. Stokes, 4 B. & S. 84; Reg. v. Chittenden, 15 Cox C. C. 725, 49 J. P. 503; Jones v. Festiniog R. Co., L. R. 3 Q. B. 733. But see Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Wabash &c. R. Co. v. Farver, 111 Ind. 195, 12 N. E. 296.

[13] Ante, § 1435, and post, § 1447. See as to when it does and does not give a right of action to a traveler,

§ 1441 (1091). **Bridges, viaducts and approaches**—The subject of crossings is elsewhere treated, and the right and duties of railroad companies in regard to highway crossings are there fully considered.[14] But we propose in this section to treat briefly of the rights of abutters and the rights and liabilities of a company which constructs a bridge or viaduct in a street. It may be stated as a general rule that "any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made.[15] Applying this rule to the facts before the court, it was held in the case referred to that the construction by a railroad company of a bridge approach thirty feet wide in a street sixty-six feet wide, although under legislative and municipal authority, imposed a servitude for which the abutters were entitled to compensation, and that its continuance might be enjoined. So, in another case, it was held that a city was liable in damages for an injury to abutting property caused by a viaduct which it had built in a street over a railroad so as to obstruct access to the premises.[16] But in some other jurisdictions it has been held that the

note to Denton v. Missouri &c. R. Co., 90 Kans. 51, in 47 L. R. A. (N. S.) 820.

[14] Post, chapters XLV, XLVIII.

[15] Willamette Iron Works v. Oregon &c. R. Co., 26 Ore. 224, 37 Pac. 1016, 1 Am. & Eng. R. Cas. (N. S.) 36, citing Elliott Roads & Streets, (3d ed.), § 889; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224 (but see Sauer v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. ed. 1176; De Lucca v. North Little Rock, 142 Fed. 597); State v. Jersey City, 52 N. J. L. 65, 18 Atl. 586, 696; Corning v. Lowerre, 6 Johns. Ch. (N. Y.) 439 (but see Lewis v. New York &c. R. Co., 162 N. Y. 202, 56 N. E. 540); Story v. New York R. Co., 90 N. Y. 122, 43 Am. Rep. 146, 7 Am. & Eng. R. Cas. 596; Lahr v. Metropolitan &c. R. Co., 104 N. Y. 268, 10 N. E. 528; Kane v. New York &c. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Reining v. New York &c. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133; McQuird v. Portland &c. R. Co., 18 Ore. 237, 22 Pac. 899, 40 Am. & Eng. R. Cas. 308. See also Jones v. Erie &c. R. Co., 151 Pa. St. 30, 25 Atl. 134, 17 L. R. A. 758, 31 Am. St. 722; Jones v. Erie &c. R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 910; but compare Hartman v. Pittsburgh &c. Co., 159 Pa. St. 442, 28 Atl. 145; Brand v. Multnomah County, 38 Ore. 79, 60 Pac. 290, 50 L. R. A. 389, 84 Am. St. 772. See post, § 1581.

[16] Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789, 46 Am. St. 273. The con-

construction by a city of a viaduct or an approach to a bridge, occupying the full width of the street, is in effect a mere change of grade, for which the abutters are not entitled to damages or compensation as for a taking of property.[17] So, it has been held that the construction by a railroad company of a causeway, to carry its track over another railroad, within ten feet of the curb, does not constitute a taking of the abutter's property.[18] The plaintiff in the case last referred to did not own the fee of the street, but it was apparently conceded that the access to his premises was seriously interfered with, as well as the light

stitution, however, provided that property should not be taken or damaged without just compensation. To the same effect are Ribney v. Chicago, 102 Ill. 64; Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. ed. 638; Chicago v. Burcky, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568, 49 Am. St. 142; Schrader v. Cleveland &c. R. Co., 242 Ill. 227, 89 N. E. 997; Walters v. Baltimore &c. R. Co., 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128; Ransom v. Sault Ste. Marie, 143 Mich. 661, 107 N. W. 439, 15 L. R. A. (N. S.) 4, and note; Cohen v. Cleveland, 43 Ohio St. 190, 1 N. E. 589. See also Wead v. St. Johnsbury &c. Co., 64 Vt. 52, 24 Atl. 361; Lund v. Idaho &c. R. Co., 50 Wash. 574, 97 Pac. 665; Harrington v. Iowa Cent. R. Co., 126 Iowa 388, 102 N. W. 139. But see Selden v. Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370, 29 Am. St. 278. Street railway company held liable in Spencer v. Metropolitan &c. Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668.

[17] Colclough v. Milwaukee, 92 Wis. 182, 65 N. W. 1039, and authorities there cited (with which compare Pabst Brew. Co. v. Milwaukee, 157 Wis. 158, 147 N. W. 46). See also Selden v. Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370, 29 Am. St. 278; Hurt v. Atlanta, 100 Ga. 274, 28 S. E. 65; Village of Winnetka v. Chicago &c. Elec. Ry. Co., 204 Ill. 297, 68 N. E. 407; Willis v. Winona, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142; Gates v. Kansas City &c. Ry. Co., 111 Mo. 28, 19 S. W. 957; Brand v. Multnomah County, 38 Ore. 79, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389, 84 Am. St. 772; Home &c. Co. v. Roanoke, 91 Va. 52, 27 L. R. A. 551; Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462. Compare Lewis v. New York &c. R. Co., 162 N. Y. 202, 56 N. E. 540, and Bennett v. Long Island R. Co., 181 N. Y. 431, 74 N. E. 418; Sauer v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. ed. 1176; Mead v. Portland, 45 Ore. 1, 76 Pac. 347, aff'd in 200 U. S. 148, 26 Sup. Ct. 171, 50 L. ed. 413, note in L. R. A. 1915A, 382.

[18] Garrett v. Lake Roland &c. R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396, 10 Am. Rep. & Corp. Rep. 39.

and air, and it seems to us that the decision is of doubtful soundness, to say the least.[19]

§ 1442 (1092). **Duty of company to restore and repair street.** —It is generally provided by statute that railroad companies which cross a highway or lay their tracks therein must restore it as far as may be to its former condition of usefulness and safety, and it is held that this duty rests upon them even in the absence of any express statutory requirement.[20] This rule applies to street railways as well as to commercial railroads.[21] Unless otherwise provided, however, it seems that, although there may be a duty to restore or repair, there is no duty to repave and improve that portion of the street occupied by the company, at its own expense, although this admits of some doubt.[22]

[19] It is difficult to reconcile the case above cited not only with several of those already cited but also with the following cases, in which the company was held liable where it built a viaduct, approach, or the like. Walters v. Baltimore &c. R. Co., 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128; Baltimore &c. R. Co. v. Kans., 124 Md. 231, 92 Atl. 532, L. R. A. 1916C, 433; Robinson v. Springfield &c. R. Co., 143 Mo. App. 270, 126 S. W. 994; Bennett v. Winston-Salem &c. R. Co., 170 N. Car. 389, 87 S. E. 133, L. R. A. 1916D, 1074. See also Pittsburgh &c. R. Co. v. Atchison, 51 Ind. App. 315, 97 N. E. 353. But compare Regney v. New York &c. R. Co., 217 N. Y. 31, 111 N. E. 226; Muller v. Great Northern R. Co., 75 Wash. 631, 135 Pac. 631.

[20] Northern R. Co. v. Baltimore, 46 Md. 425; People v. Chicago &c. R. Co., 67 Ill. 118; Indianapolis &c. R. Co. v. State, 37 Ind. 489, 502. See also Kyne v. Wilmington &c. R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Palatka &c. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. 395; State v. Lake Koen Nav. &c. Co., 63 Kans. 395, 65 Pac. 681; Fash v. Third Ave. R. Co., 1 Daly (N. Y.) 148; Worster v. Forty-Second St. &c. R. Co., 50 N. Y. 203; State v. Dayton &c. R. Co., 36 Ohio St. 434; Zanesville v. Fannan, 53 Ohio St. 605, 42 N. E. 703, 705, citing Elliott Roads and Streets, 600 (3rd ed., § 1056), which is also cited in Minneapolis, etc., T. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 610; Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418, 420, 421 (both citing text); post, § 1572.

[21] Memphis &c. R. Co. v. State, 87 Tenn. 746, 11 S. W. 946; Harrisburg v. Harrisburg &c. R. Co., 1 Pears. (Pa.) 298; Cline v. Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851; Elliott Roads & Streets, (3d ed.), § 1056.

[22] See Western Pav. &c. Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. 462, 46 Am. & Eng.

The duty to repair is usually imposed by statute or by the municipality, as a condition annexed to the right to use its streets,[23] and this is not performed by merely restoring the street to the condition in which it was at the time the track was laid, for it is a continuing duty to keep such portion of the street in repair, so as not to unlawfully obstruct or endanger travel.[24] It is generally held that this duty may be enforced

R. Cas. 176; Indianapolis &c. R. Co. v. Newcastle, 43 Ind. App. 467, 87 N. E. 1067; State v. Jacksonville &c. R. Co., 29 Fla. 590, 10 So. 590, 595 (citing Elliott Roads & Streets, 594, 595, (3d ed.), §§ 988, 989, where the subject is carefully considered). Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594; Baltimore v. Scharf, 54 Md. 499; State v. Corrigan &c. R. Co., 85 Mo. 263, 55 Am. Rep. 361, 29 Am. & Eng. R. Cas. 591, 64 Hun (N. Y.) 635; New York v. New York &c. R. Co., 19 N. Y. S. 67; Pittsburgh &c. R. Co. v. Birmingham, 51 Pa. St. 41. But see New York v. Harlem &c. R. Co., 186 N. Y. 304, 78 N. E. 1072.

[23] See as to the right to impose such conditions and their construction, State v. Hoboken, 41 N. J. L. 71; Robbins v. Omnibus R. Co., 32 Cal. 472; Western Pav. &c. Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. 462, 46 Am. & Eng. Cas. 176; Sioux City St. R. Co. v. Sioux City, 78 Iowa 367, 742, 43 N. W. 224, 36 Am. & Eng. R. Cas. 143, affirmed 138 U. S. 98, 11 Sup. Ct. 226, 34 L. ed. 898; Louisville &c. R. Co. v. Louisville, 8 Bush (Ky.) 415; State v. Canal &c. R. Co., 44 La. Ann. 526, 10 So. 940; Fort Wayne &c. R. Co. v. Detroit, 39 Mich. 543, 34 Mich. 78; People v. Fort St. &c. R. Co., 41 Mich. 413, 2 N. W. 188; Duluth v. Duluth St. R. Co., 60 Minn. 178, 62 N. W. 267; Baumgartner v. Mankato, 60 Minn. 244, 62 N. W. 127; McMahon v. Second Ave. R. Co., 75 N. Y. 231; New York v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839, 26 Am. & Eng. R. Cas. 546; Philadelphia v. Empire Pass. R. Co., 3 Brews. (Pa.) 570; Pittsburgh &c. Pass. R. Co. v. Pittsburgh, 80 Pa. St. 72; Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695; McKeesport v. McKeesport R. Co., 158 Pa. 447, 27 Atl. 1006; Philadelphia v. Spring Garden &c. Co., 161 Pa. St. 522, 29 Atl. 286; Lehigh &c. Co. v. Intercounty St. R. Co., 167 Pa. 126, 31 Atl. 471; Memphis &c. R. Co. v. State, 87 Tenn. 746, 11 S. W. 946, 38 Am. & Eng. R. Cas. 429; Gulf City &c. Co. v. Galveston, 69 Tex. 660, 7 S. W. 520, 32 Am. & Eng. R. Cas. 300; Fort Worth v. Allen, 10 Tex. Civ. App. 488, 31 S. W. 235, 1 Am. & Eng. R. Cas. (N. S.) 282. Railroad tracks in a cut in street protected by a wall and fence, are not premises within the meaning of a statute requiring the owner of premises to lay sidewalks in street when directed by city. New York &c. R. Co. v. Buffalo, 218 N. Y. 259, 112 N. E. 721, L. R. A. 1917A, 472.

[24] Burritt v. New Haven, 42 Conn.

by mandamus,[25] and the neglect of the company to properly perform it will render the company liable in damages to one who, without fault on his part, is injured thereby while properly using the highway.[26] This city may also be held liable, in such a case, if it negligently suffers the defect or obstruction to remain in its street.[27] But it may have its remedy over

174; Chicago &c. R. Co. v. Moffitt, 75 Ill. 524, and authorities cited in following notes; Wellcome v. Leeds, 51 Maine 313; Cooke v. Boston &c. R. Co., 133 Mass. 185; Baumgartner v. Mankato, 60 Minn. 244, 62 N. W. 127; Little Miami R. Co. v. Commissioners, 31 Ohio St. 338; Lake Shore &c. R. Co. v. Wiley, 193 Pa. St. 496, 44 Atl. 583; Reading v. United Trac. Co., 215 Pa. St. 250, 64 Atl. 446 (citing Elliott Roads & Streets, 591, 3d ed., § 987); Fitts v. Cream City R. Co., 59 Wis. 323, 18 N. W. 186. See also Mayer v. Harlem Bridge &c. Co., 186 N. Y. 304, 78 N. E. 1072; Fair Haven &c. R. Co. v. New Haven, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. ed. 237. For a reference to various statutory provisions and decisions thereunder and as to duty of company as to restored or substituted highway, see note to County Court v. Baltimore &c. R. Co., 77 W. Va. 538, 87 S. E. 884, in L. R. A. 1917C, 967.

[25] State v. Jacksonville &c. R. Co., 29 Fla. 590, 10 So. 590; People v. Chicago &c. R. Co., 67 Ill. 118; Indianapolis &c. R. Co. v. State, 37 Ind. 489; Cummins v. Evansville &c. R. Co., 115 Ind. 417, 18 N. E. 6; State v. St. Paul &c. R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; People v. Dutchess &c. R. Co., 58 N. Y. 152; Oshkosh v. Milwaukee &c. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. 175; Halifax City v. R. Co., 1 Russ. Eq. (Nova Scotia) 319. Mandatory injunction in Buchholz v. New York &c. R. Co., 148 N. Y. 640, 43 N. E. 76; and in City of Oshkosh v. Milwaukee &c. R. Co., 74 Wis. 534, 43 N. W. 489. But see State v. New Orleans &c. R. Co., 37 La. Ann. 589; Benton Harbor v. St. Joseph &c. St. R. Co., 102 Mich. 386, 60 N. W. 758, 26 L. R. A. 245, 47 Am. St. 553.

[26] Atlanta St. R. Co. v. Walker, 93 Ga. 462, 21 S. E. 48; Louisville &c. R. Co. v. Smith, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608 and note; Evansville &c. R. Co. v. Carvener, 113 Ind. 51, 14 N. E. 738; Evansville &c. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. 865; Veazie v. Penobscot R. Co., 49 Maine 119; Brookhouse v. Union R. Co., 132 Mass. 178; O'Connor v. Boston &c. R. Co., 135 Mass. 352; McMahon v. Second Ave. R. Co., 75 N. Y. 231; Wasmer v. Delaware &c. R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Masterton v. New York Cent. R. Co., 84 N. Y. 247, 38 Am. Rep. 510; Gudger v. Western &c. R. Co., 87 N. Car. 325; Oakland R. Co. v. Fielding, 48 Pa. St. 320; Kraut v. Frankford &c. R. Co., 160 Pa. St. 327, 28 Atl. 783; post, § 1673.

[27] Davis v. Leominster, 1 Allen (Mass.) 182; Hawks v. Northampton, 116 Mass. 420; Campbell

against the company.[28] If the company, after due notice, fails to repair, the city may cause the necessary repairs to be made and recover the cost from the company.[29]

§ 1443 (1093). Respective rights of the company and of the public.—As a general rule, a railroad company has the exclusive right to use its own track, and one who goes upon it, without an invitation or license from the company, is a trespasser. But this rule does not apply at highway crossings, nor, under ordinary circumstances, where the track is laid longitudinally upon the surface of a street, whether it be that of a commercial or street railroad company.[30] The public,

v. Stillwater, 32 Minn. 308, 50 Am. Rep. 567; Fink v. St. Louis, 71 Mo. 52; Sides v. Portsmouth, 59 N. H. 24; Wilson v. Watertown, 3 Hun (N. Y.) 508; Zanesville v. Fannan, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. 664; Norristown v. Moyer, 67 Pa. St. 355; Watson v. Tripp, 11 R. I. 98, 23 Am. Rep. 420; Batty v. Duxbury, 24 Vt. 155; Elliott Roads & Streets (3d ed.), § 986.

[28] Chicago City v. Robbins, 2 Black (U. S.) 418, 17 L. ed. 732; Portland v. Atlantic &c. Co., 66 Maine 485; Eyler v. County Commissioners, 49 Md. 257, 33 Am. Rep. 249; Woburn v. Boston &c. R. Co., 109 Mass. 283; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. St. 469; Fort Worth v. Allen, 10 Tex. Civ. App. 488, 31 S. W. 235, 1 Am. & Eng. R. Cas. (N. S.) 282; Carty v. London, 18 Ont. R. 122, 43 Am. & Eng. R. Cas. 279.

[29] Fair Haven &c. R. Co. v. New Haven, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. ed. 237; Chesapeake &c. R. Co. v. Dyer Co., 38 Am. & Eng. R. Cas. 676; New Haven v. Fair Haven &c. R. Co., 38 Conn. 422, 9 Am. Rep. 399; District of Columbia v. Washington &c. R. Co., 4 Mackey (D. C.) 214; Columbus v. Columbus Street R. Co., 45 Ohio St. 98, 32 Am. & Eng. R. Cas. 292; Philadelphia &c. R. Co. v. Philadelphia, 11 Phila. (Pa.) 358; Pennsylvania R. Co. v. Duquesne Borough, 46 Pa. St. 223. But compare Farmers' &c. Co. v. Ansonia, 61 Conn. 76, 23 Atl. 705; New York v. Second Ave. &c. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839, 26 Am. & Eng. R. Cas. 546. (City can not recover for extravagant and unreasonable repairs.) As to the necessity for notice, see Reading v. United Tract. Co., 215 Pa. St. 250, 64 Atl. 446.

[30] Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155. (Commercial railroad extending longitudinally upon the street.) Thatcher v. Central Traction Co., 166 Pa. St. 66, 30 Atl. 1048, 45 Am. St. 645. (Electric street railway running along the street.) Bennett v. Railroad Co., 102 U. S. 577, 26 L. ed. 235; Baltimore &c. R. Co. v. Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. ed. 447; Bryson

exercising due care, still have a right to use the street. And so, the railroad company, likewise exercising due care, has also the right to use that portion of the street upon which its track is laid. Their rights are, in most respects, mutual, reciprocal and equal, neither being superior or paramount to the other, except that, as the company cannot so readily stop its trains or cars and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it and give way until the train or car has passed.[31] Where the track is laid along a street, a traveler, although a pedestrian, in the exercise of due care, may cross it at any point and is not confined to the regular crossings.[32] But an

v. Chicago &c. R. Co., 89 Iowa 677, 57 N. W. 430, 60 Am. & Eng. R. Cas. 50; Kansas Pac. R. Co. v. Pointer, 9 Kans. 620; Southern Ry. Co. v. Caplinger, 151 Ky. 749, 152 S. W. 947, 49 L. R. A. (N. S.) 660, and note citing and reviewing other cases; Rascher v. East Detroit &c. R. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. 447; Byrne v. New York &c. R. Co., 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; Adolph v. Central Park R. Co., 76 N. Y. 530; Oberstock v. United Rys. Co., 68 Ore. 197, 137 Pac. 195, 198 (quoting text); Missouri Pac. R. Co. v. Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. 856; Davis v. Chicago &c. R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667.

[31] Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Chicago &c. R. Co. v. Lee, 87 Ill. 454; Ohio &c. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. 638; Pittsburgh &c. R. Co. v. Warrum, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; Black v. Burlington &c. R. Co., 38 Iowa 515; Commonwealth v. Temple, 14 Gray (Mass.) 69; Moore v. Kansas City &c. R. Co., 126 Mo. 265, 29 S. W. 9, 11, quoting Elliott Roads & Streets, p. 577; Omaha St. R. Co. v. Duvall, 40 Nebr. 29, 58 N. W. 531; Hegan v. Eighth Ave. R. Co., 15 N. Y. 380; Adolph v. Central Park &c. R. Co., 65 N. Y. 554; Warner v. People's St. R. Co., 141 Pa. St. 615; Baltimore &c. R. Co. v. Sherman, 30 Grat. (Va.) 602. The text is quoted with approval in St. Louis &c. R. Co. v. Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616. But it is held that a street railway company has no superior right of passage at another street crossing. O'Neil v. Dry Dock &c. R. Co., 129 N. Y. 125, 29 N. E. 84. See also Zimmerman v. Hannibal &c. R. Co., 71 Mo. 476; Omaha St. R. Co. v. Cameron, 43 Nebr. 297, 61 N. W 606.

[32] Mitchell v. Tacoma &c. R. Co., 9 Wash. 120, 37 Pac. 341; Louisville &c. R. Co. v. Head, 80 Ind. 117, 4 Am. & Eng. R. Cas. 619; Smedis v. Brooklyn &c. R. Co., 88 N. Y. 13; Oberstock v. United Rys. Co., 68 Ore. 197, 137 Pac. 196, 198 (quot-

extraordinary and improper use of the track by a member of the general public may subject him to an action for damages for an injury so caused. Thus, where a person engaged in moving a house negligently injured the track, he was held liable in damages at the suit of the company.[33] This rule does not, however, prevent the ordinary use of the street, in a proper manner, even by heavy vehicles.[34]

§ 1444 (1094). Duty to travelers upon the street.—Where a railroad runs along the surface of a street, the rights of the company and of travelers must each be exercised with a due regard to the rights of the other, in a reasonable and duly careful manner.[35] The general rule in all such cases is that reasonable care must be exercised, but this usually depends very largely upon the peculiar circumstances of each particular case, and, in order to constitute reasonable care under the circumstances, greater care would be required of a railroad company where its cars run along a street which is continually used by travelers than where it has the exclusive use of its track.[36] Thus, it has been held gross negligence to run

ing entire section to here); Baltimore &c. R. Co. v. Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. ed. 447; Frick v. St. Louis &c. R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280.

[33] Toronto &c. Co. v. Dollery, 12 Ont. App. 679. Such a use may also be restrained by injunction where it would stop the cars an unreasonable time and destroy the wires of an electric railway company. Williams v. Citizens' &c. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. 201. See also Day v. Green, 4 Cush. (Mass.) 433. One who carelessly drives against a car properly moving upon the track is liable for resulting damages. Chicago &c. R. Co. v. Rend, 6 Bradw. (Ill. App.) 243.

[34] Second &c. St. R. Co. v. Morris, 8 Phila. (Pa.) 304.

[35] Southern R. Co. v. Crenshaw, 136 Ala. 573, 34 So. 913; St. Louis &c. R. Co. v. Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616 (citing text); Shea v. Portrero &c. R. Co., 44 Cal. 414; Lynam v. Union R. Co., 114 Mass. 83; Omaha St. R. Co. v. Cameron, 43 Nebr. 297, 61 N. W. 606; Connelly v. Trenton &c. Co., 56 N. J. L. 700, 44 Am. St. 424; Unger v. Forty-Second St. R. Co., 51 N. Y. 497; O'Neil v. Dry Dock &c. R. Co., 129 N. Y. 125, 130, 29 N. E. 84, 26 Am. St. 512; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1.

[36] Lott v. Frankford &c. R. Co., 159 Pa. St. 471, 28 Atl. 299; Oberstocks v. United Rys. Co., 68 Ore.

electric cars around the corners of streets in a populous city at a high rate of speed.[37] It is also said in the same case that greater care is required in the operation of cable and electric cars than in the operation of cars drawn by horses, because the danger is greater.[38] In another recent case a commercial railroad company was held liable to one who, in walking along the track in a street, but not at a crossing, had his foot fastened between a rail of the track and a plank inside the track, and was run over by a train.[39] The court held that he was not a trespasser, and that the company was negligent both in failing to properly construct and maintain the track and in the management of the train.

§ 1445 (1095). Liability for negligence.—The violation on the part of a railroad company of any of the duties to travelers to which we have referred will render it liable in damages for any injury proximately caused thereby to a traveler who is free from contributory negligence. So, although the person injured is himself guilty of negligence, yet if those in charge of the car discover his negligence and danger in time to avoid

197, 137 Pac. 196, 198 (citing text); Gilmore v. Federal St. &c. R. Co., 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. 682. See also Florida &c. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. 149; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534; Scullin v. Wabash R. Co., 184 Mo. 695, 83 S. W. 760 (greater care required on street); Schreanenfeldt v. Chicago &c. R. Co., 80 Nebr. 790, 115 N. W. 285 (must exercise greater care on public street than when running on its own right of way); Norfolk &c. R. Co. v. Burge, 84 Va. 63, 4 S. E. 21 (greater care required than in less frequented places); Heucke v. Milwaukee &c. R. Co., 69 Wis. 401, 34 N. W. 243. But it must exercise reasonable care even where its tracks run through a city on an embankment, which is its own property. McGuire v. Vicksburg &c. R. Co., 46 La. 1543, 16 So. 457.

[37] Cooke v. Baltimore Traction Co., 80 Md. 551, 31 Atl. 329. See also Sundmaker v. Yazoo &c. R. Co., 106 La. Ann. 111, 30 So. 285. Ordinarily, however, when not controlled by statute or ordinance, the question is for the jury as to whether the rate of speed was negligent. Haley v. Missouri &c. R. Co., 197 Mo. 15, 114 Am. St. 743, 93 So. 1120.

[38] See also Cincinnati &c. R. Co. v. Whitcomb, 66 Fed. 915.

[39] Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155. See also Gulf &c. R. Co. v. Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. 582, note in 49 L. R. A. (N. S.) 660.

it by the exercise of reasonable care, but fail to exercise such care, the company may be held liable.[40] Under ordinary circumstances, however, unless it appears that he is an infant or infirm, or that for some reason he cannot get out of the way, they may assume that he will do so.[41] The violation of an ordinance or statute requiring a "lookout" or limiting the speed, or the like, is at least prima facie, if not conclusive, evidence of negligence.[42] And so an excessive rate of speed,

[40] Cincinnati &c. R. Co. v. Whitcomb, 66 Fed. 915; Garrett v. People's Ry. Co., 6 Del. 29, 64 Atl. 254; Indianapolis Tract. &c. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347; Manson v. Lake Erie &c. R. Co., 40 Ind. App. 569, 80 N. E. 166; Orr v. Cedar Rapids &c. R. Co., 94 Iowa 423, 62 N. W. 851, 1 Am. & Eng. R. Cas. (N. S.) 239; Lake Roland &c. R. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; Laethem v. Ft. Wayne &c. R. Co., 100 Mich. 297, 59 N. W. 247; Montgomery v. Lansing &c. R. Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; Rawitzer v. St. Paul &c. Co., 98 Minn. 294, 108 N. W. 271; Little v. Superior &c. R. Co., 88 Wis. 402, 60 N. W. 705. As some of these cases hold, the last clear chance doctrine may be particularly applicable to such cases and may make the company liable where the parties have equal rights in the streets even though the injured party was not actually discovered to be in peril. This, however, will be considered in another connection. There is conflict on the question as to whether the company is liable where, after discovery of the peril the car could have been stopped in time to have avoided injury except for a defective brake or the like. See British Columbia Elec. R. Co. v. Loach, (1916) A. C. 719, Ann. Cas. 1916D, 497, where cases on both sides are reviewed.

[41] Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401, 21 L. ed. 114; Louisville &c. R. Co. v. Lewis, 141 Ala. 466, 37 So. 587; Louisville &c. R. Co. v. Cronbach, 12 Ind. App. 666, 41 N. E. 15; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Daly v. Detroit &c. R. Co., 105 Mich. 193, 63 N. W. 73; Bunyan v. Citizens' St. R. Co., 127 Mo. 12, 29 S. W. 842, 1 Am. & Eng. R. Cas. (N. S.) 246, and note.

[42] Citizens' St. R. Co. v. Steen, 42 Ark. 321, 19 Am. & Eng. R. Cas. 30; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534; Hanlon v. South Boston &c. R. Co., 129 Mass. 310, 2 Am. & Eng. R. Cas. 18; Fath v. Tower Grove &c. R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; Omaha St. R. Co. v. Duvall, 40 Nebr. 29, 58 N. W. 531; Hays v. Gainesville &c. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. 624; Riley v. Salt Lake &c. R. Co., 10 Utah 428, 37 Pac. 681; Stafford v. Chippewa &c. R. Co., 110 Wis. 331, 85 N. W. 1036, 1045 (citing text). We think the better rule is that it is prima facie evidence of negligence and if unexplained, may be negligence per se, but when it is said to be negli-

or the failure of the driver or motorman to pay attention to his duties or give notice or warning when due care requires it, may constitute negligence even in the absence of any ordinance or statutory provision upon the subject.[43] But, while it is the duty of the driver or motorman to exercise a reasonable degree of watchfulness and care, he is not necessarily negligent because he is not looking at any particular moment directly at the track in front of him.[44] Much necessarily depends upon the peculiar circumstances of each particular case, and the question is usually one of fact for the jury to determine under proper instructions.[45] It is not negligence

gence per se, it does not necessarily follow that it is actionable negligence and conclusive in the particular case, for the element of proximate cause must also be present and there certainly are cases in which there may be a good excuse for failing to comply with a statute or ordinance at the particular time or under the particular circumstances. Many recent cases, however, as shown in a subsequent chapter, hold it negligence per se. See Colorado Midland R. Co. v. Robbins, 30 Colo. 449, 71 Pac. 371; Beck v. Vancouver R. Co., 25 Ore. 32, 34 Pac. 753.

[43] Barksdull v. New Orleans &c. R. Co., 23 La. Ann. 180; Collins v. South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; Anderson v. Minneapolis St. R. Co., 42 Minn. 490, 493, 18 Am. St. 525; Brooks v. Lincoln St. R. Co., 22 Nebr. 816, 36 N. W. 529; Sheets v. Connolly St. R. Co., 54 N. J. L. 518, 24 Atl. 483; Johnson v. Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375; Mangam v. Brooklyn R. Co., 38 N. Y. 455, 98 Am. Dec. 66; Stone v. Dry Dock &c. R. Co., 115 N. Y. 104, 21 N. E. 712; Citizens' Pass R. Co. v. Foxley, 107 Pa. St. 537; Thoresen v. LaCrosse &c. R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. 64. See also Chesapeake &c. R. Co. v. Booth, 149 Ky. 245, 148 S. W. 61; Southern R. Co. v. Coplinger, 151 Ky. 749, 152 S. W. 947, 49 L. R. A. (N. S.) 660, and note.

[44] Citizens' St. R. Co. v. Carey, 56 Ind. 396; Gallaher v. Crescent City R. Co., 37 La. Ann. 288; Kennedy v. St. Louis &c. R. Co., 43 Mo. App. 1; Bulger v. Albany R. Co., 42 N. Y. 459; Thomas v. Citizens' Pass R. Co., 132 Pa. St. 504, 19 Atl. 286; Johnson v. Reading &c. R. Co., 160 Pa. St. 647, 28 Atl. 1001, 40 Am. St. 752.

[45] Hearn v. St. Charles &c. Co., 34 La. Ann. 160; McMahon v. Northern Cent. R. Co., 39 Md. 438; Doyle v. West End St. R. Co., 161 Mass. 533, 37 N. E. 741; O'Flaherty v. Union R. Co., 45 Mo. 70, 100 Am. Dec. 343; Bunyan v. Citizens' R. Co., 127 Mo. 12, 29 S. W. 842, 1 Am. & Eng. R. Cas. (N. S.) 247, and note; Oldfield v. New York &c. R. Co., 14 N. Y. 310; Weil v. Dry Dock &c. R. Co., 119 N. Y. 147, 23 N. E. 487; Hedin v. City &c. Co., 26 Ore. 155,

per se for a cable car to follow a buggy on the track at a reasonable distance, and the question as to the reasonableness of the distance and the rate of speed is usually for the jury.[46] Where the driver of a wagon is unable to escape from an electric or cable car coming at a high rate of speed, because impeded by the efforts of the driver of a vehicle coming in the same direction just ahead of the car, the company is not absolved from liability to the driver of the approaching wagon by the conduct of the driver of the second vehicle, at least in the absence of malice or negligence on his part.[47] So, it has been held that the negligent stopping of a street car in front of a funeral procession, so as to cause the carriages to stop so suddenly that the pole of the second carriage runs into and injures the first one, is the proximate cause of such injury, and the company is liable therefor.[48] It was also held in the same case that the violation of a penal ordinance against obstructing the street was sufficient proof of the negligence of the company.[49]

§ 1446. **Contributory negligence.**—If the negligence of the plaintiff proximately contributes to his own injury, he cannot, of course, recover where the injury is not wilfully inflicted. It is the tendency of the modern decisions to hold that it is the duty of a traveler at a regular commercial railroad crossing, as a rule of law, to look and listen, and this rule has been applied in some jurisdictions to those who cross the tracks of a street railway at any place in a street.[50] The care required of one who goes

37 Pac. 540; Erie City &c. R. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. 269, 57 Am. Rep. 471; Shenners v. West Side R. Co., 78 Wis. 382, 47 N. W. 622.

[46] Hicks v. Citizens' &c. R. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508 and note.

[47] Thatcher v. Central &c. Co., 166 Pa. St. 66, 30 Atl. 1048, 45 Am. St. 645.

[48] Mueller v. Milwaukee &c. R. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721.

[49] See also Pittsburgh &c. R. Co. v. Hood, 94 Fed. 618.

[50] Murray v. Ponchartrain &c. R. Co., 31 La. Ann. 490; Schulte v. New Orleans &c. R. Co., 44 La. Ann. 509, 10 So. 811; Kelly v. Hendrie, 26 Mich. 255; Bunyan v. Citizens' &c. Co., 127 Mo. 12, 29 S. W. 842, 1 Am. & Eng. R. Cas. (N. S.) 246; Scott v. Third Ave. R. Co., 61 Hun

upon the track of a horse railway is not, perhaps, so great as that required of one who goes upon the track of a commercial railroad, because the danger is not so great;[51] but, after all, reasonable care is required in either case,[52] and one cannot recklessly use the tracks of any kind of a railroad company, or pass in front of a rapidly moving car upon "a nice calculation of the chances," without doing so at his peril.[53] It was

627, 16 N. Y. S. 350; Ward v. Rochester &c. R. Co., 63 Hun 624, 17 N. Y. S. 427; Davenport v. Brooklyn City R. Co., 100 N. Y. 632, 3 N. E. 305; Carson v. Federal &c. R. Co., 147 Pa. St. 219, 23 Atl. 369, 15 L. R. A. 257, 30 Am. St. 727; Buzby v. Philadelphia &c. R. Co., 126 Pa. St. 559, 17 Atl. 895, 12 Am. St. 919; Follett v. Toronto R. Co., 15 Ont. App. 346. See also Hickey v. St. Paul &c. R. Co., 60 Minn. 119, 61 N. W. 893. But compare Chicago City R. Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 11 Am. St. 87; Shea v. St. Paul &c. R. Co., 50 Minn. 395, 52 N. W. 902; Lynam v. Railroad Co., 114 Mass. 83; post, § 1516. They are not obliged to stop, before crossing, as a matter of law, unless the circumstances require it in the exercise of reasonable care. Cincinnati &c. R. Co. v. Whitcomb, 66 Fed. 915. A fuller consideration of this subject will be found in the chapter on "Street Railway Negligence." One crossing behind a train must keep a vigilant watch and can not assume that it will not move backward. Bryson v. Chicago &c. R. Co., 89 Iowa 677, 57 N. W. 430, 60 Am. & Eng. R. Cas. 50.

[51] Mentz v. Second Ave. R. Co., 3 Abb. App. Dec. (N. Y.) 274; Lynam v. Union &c. R. Co., 114 Mass. 83.

[52] Text quoted in Marchal v. Indianapolis St. R. Co., 28 Ind. App. 133, 62 N. E. 286, 288.

[53] Baltimore &c. R. Co. v. Mali, 66 Md. 53, 5 Atl. 87; Bunyan v. Citizens' St. R. Co., 127 Mo. 12, 29 S. W. 842, 1 Am. & Eng. R. Cas. (N. S.) 246 and note; Sheets v. Connolly St. R. Co., 54 N. J. L. 518, 24 Atl. 483; Barker v. Savage, 45 N. Y. 191, 6 Am. Rep. 66; McClain v. Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062; Fenton v. Second Ave. R. Co., 126 N. Y. 625, 26 N. E. 967. See also for other cases in which the plaintiff was held guilty of contributory negligence. McGrath v. City &c. R. Co., 93 Ga. 312, 20 S. E. 317; Mercier v. New Orleans &c. R. Co., 23 La. Ann. 264; Wood v. Detroit &c. R. Co., 52 Mich. 402, 18 N. W. 124, 50 Am. Rep. 259; Miller v. St. Paul &c. R. Co., 42 Minn. 454, 44 N. W. 533; Vogg v. Missouri Pac. R. Co., 138 Mo. 172, 36 S. W. 646; Mockowik v. Kansas City &c. R. Co., 196 Mo. 550, 94 S. W. 256; Brown v. Broadway &c. R. Co., 50 N. Y. S. 106; Thomas v. Citizens' &c. Co., 132 Pa. St. 504, 19 Atl. 286; Warner v. People's &c. Co., 141 Pa. St. 615, 21 Atl. 737; Boerth v. West Side R. Co., 87 Wis. 288, 58 N. W. 376. But compare Cross v. California &c. R. Co., 102 Cal. 313, 36 Pac. 673; Patterson v.

also held in a recent case that one who rode a bicycle along the track of an electric railway without looking or listening for the approach of the cars behind him was guilty of contributory negligence as a matter of law.[54] We have simply given an outline of the general subject considered in this section, and it will be treated with special reference to street railways and electric railways in another chapter. It may be well, however, to state further in this connection that, notwithstanding the rule that a pedestrian has a right to cross a railroad track in a street at other places than the regular crossing, it is held in a number of cases that if he voluntarily and unnecessarily walks on and along a commercial railroad track in a street he assumes the risk and may be held guilty of contributory negligence.[55]

§ 1447 (1096). Remedies for unlawful use of street.—As we have elsewhere shown, mandamus will lie, in a proper case, to

Townsend, 91 Iowa 725, 59 N. W. 205; Reilly v. Third Ave. R. Co., 16 Misc. 11, 37 N. Y. S. 593; Mills v. Brooklyn &c. Railroad Co., 10 Misc. 1, 30 N. Y. S. 532; Houston &c. R. Co. v. Larkowski (Tex. Civ. App.), 47 S. W. 59 (not contributory negligence as matter of law to cross in front of an approaching train). Additional cases on the general subject are reviewed and the facts as well as the decision in each briefly stated in the note in 49 L. R. A. (N. S.) 682-686. As to the care required of children see note in 1 Am. & Eng. R. Cas. (N. S.) 264, where nearly all the cases are collected and reviewed, and note in 49 L. R. A. (N. S.) 686.

[54] Everett v. Los Angeles &c. Co., 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, 42 Cent. L. J. 242. See also Nein v. LaCrosse &c. R. Co., 92 Fed. 85; Bennett v. Detroit Citizens' St. R. Co., 123 Mich. 692, 82 N. W. 518; Medcalf v. St. Paul City Ry. Co., 82 Minn. 18, 84 N. W. 633; Adolph v. Central Park &c. Co., 76 N. Y. 530; Taylor v. Union Tract. Co., 184 Pa. St. 465, 40 Atl. 159, 47 L. R. A. 289. But compare Louisville R. Co. v. Blaydes (Ky.), 51 S. W. 820; Chesapeake &c. R. Co. v. Booth, 149 Ky. 245, 148 S. W. 61.

[55] Illinois Central R. Co. v. Hall, 72 Ill. 222; Atchison &c. R. Co. v. Schwindt, 67 Kans. 8, 72 Pac. 573; Loughrey v. Penna. R. Co., 201 Pa. St. 297, 50 Atl. 972. See also Beck v. Vancouver R. Co., 25 Ore. 32, 34 Pac. 753. But see contra, Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155; Chesapeake &c. R. Co. v. Booth, 149 Ky. 245, 148 S. W. 61, Rio Grande &c. R. Co. v. Martinez, 39 Tex. Civ. App. 460, 87 S. W. 853; Missouri &c. R. Co. v. Milburn (Tex. Civ. App.), 142 S. W. 626.

compel a railroad company to perform its duty to restore and repair a crossing or other portion of a street which it has rendered unsafe, and to construct and maintain its road upon or across a highway in the manner required by statute.[56] So, if it unlawfully constructs and maintains its road in a highway without authority, or in an unauthorized manner, it may be indicted as for a nuisance,[57] or enjoined, in a proper case, at the suit of one who is specially damaged thereby.[58] But when an abutter has an adequate remedy at law by an action for damages, as, for instance, where there is merely negligence in the construction or operation of the road, by which he is

[56] Ante, § 1442; post, §§ 1574, 1579.

[57] Palatka &c. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. 395; Cincinnati Southern R. Co. v. Commonwealth, 80 Ky. 137; Commonwealth v. Old Colony R. Co., 14 Gray (Mass.) 93; Central R. Co. v. State, 32 N. J. L. 220; Northern Cent. R. Co. v. Commonwealth, 90 Pa. St. 300; Regina v. Great North &c. R. Co., 9 Q. B. 315; Ante, §§ 850, 852. See also Louisville &c. R. Co. v. Mobile &c. R. Co., 124 Ala. 162, 26 So. 895; Kavanagh v. Mobile &c. R. Co., 78 Ga. 271, 2 S. E. 636.

[58] Georgia &c. R. Co. v. Ray, 84 Ga. 376, 11 S. E. 352; Pettis v. Johnson, 56 Ind. 139; Harbach v. Des Moines &c. R. Co., 80 Iowa 593, 44 N. W. 348, 43 Am. & Eng. R. Cas. 115; Brainard v. Connecticut River R. Co., 7 Cush. (Mass.) 506; Taylor v. Bay City St. R. Co., 80 Mich. 77, 45 N. W. 335; Harrington v. St. Paul &c. R. Co., 17 Minn. 215; Lewis v. Pennsylvania R. Co. (N. J.), 33 Atl. 932; Davis v. New York, 14 N. Y. 506; Williams v. New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Clarke v. Blackmar, 47 N. Y. 150; Willamette Iron Works v. Oregon &c. Co., 26 Ore. 224, 37 Pac. 1016, 29 L. R. A. 88, 46 Am. St. 620, 1 Am. & Eng. R. Cas. (N. S.) 36. But see Clemens v. Connecticut &c. Ins. Co., 184 Mo. 46, 82 S. W. 1, 67 L. R. A. 362, 105 Am. St. 526. A mandatory injunction was granted in Buchholz v. New York &c. R. Co., 148 N. Y. 640, 43 N. E. 76. As to when the municipality may maintain injunction, see Springfield v. Connecticut &c. R. Co., 4 Cush. (Mass.) 63; Town Council of Johnston v. Providence &c. R. Co., 10 R. I. 365; Inhabitants of Greenwich v. Easton &c. R. Co., 26 N. J. Eq. 217; Rio Grande R. Co. v. Brownsville, 45 Tex. 88. As to the right of an abutter to enjoin the taking of property without compensation see the following note, and ante, § 1351. See also Athens Terminal Co. v. Athens Foundry Co., 129 Ga. 393, 58 S. E. 891; Harrold Bros. v. Mayor &c., 142 Ga. 686, 83 S. E. 534; Clemens v. Connecticut &c. Ins. Co., 184 Mo. 46, 82 S. W. 1, 67 L. R. A. 362, 105 Am. St. 526, and note; and note in 36 L. R. A. (N. S.) 808, 823 et seq.

injured, he cannot maintain injunction. The rule is thus stated by the Supreme Court of the United States: "Equitable jurisdiction may be invoked, in view of the inadequacy of the legal remedy, where the injury is destructive, or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded ex debito justitiae. But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere.[59] An abutter may also maintain ejectment where a railroad is constructed, without authority, upon a highway of which he owns the fee.[60] But he may waive his right to main-

[59] Osborne v. Missouri &c. Railroad Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. ed. 155; Lorie v. North Chicago &c. R. Co., 32 Fed. 270; Columbus &c. R. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Union Pac. R. Co. v. Foley, 19 Colo. 280, 35 Pac. 542; Kavanagh v. Mobile &c. R. Co., 78 Ga. 271, 2 S. E. 636; Stetson v. Chicago &c. R. Co., 75 Ill. 74; Truesdale v. Peoria &c. Co., 101 Ill. 561; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Heath v. Des Moines &c. R. Co., 61 Iowa 11, 15 N. W. 573; Clemens v. Connecticut &c. Ins. Co., 184 Mo. 46, 82 S. W. 1, 67 L. R. A. 362, 105 Am. St. 536 and note; Fogg v. Nevada &c. R. Co., 20 Nev. 429, 23 Pac. 840; Morris &c. Railroad Co. v. Prudden, 20 N. J. Eq. 530; Story v. New York &c. Railroad Co., 90 N. Y. 122, 179, 7 Am. & Eng. R. Cas. 596; Lahr v. Metropolitan &c. R. Co., 104 N. Y. 268, 10 N. E. 528; Norfolk &c. R. Co. v. Smoot, 81 Va. 495. See as to whether one can recover damages who purchases knowing the railroad is already in operation on the street, Galt v. Chicago &c. R. Co., 157 Ill. 125, 41 N. E. 643; Conabeer v. New York &c. R. Co., 156 N. Y. 474, 51 N. E. 402; Staton v. Atlantic Coast Line R. Co., 147 N. Car. 428, 61 S. E. 455, 17 L. R. A. (N. S.) 949 (can not enjoin).

[60] Perry v. New Orleans &c. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Weyl v. Sonoma &c. R. Co., 69 Cal. 202, 10 Pac. 510; Mitchell v. Chicago &c. Ry. Co., 264 Ill. 344, 106 N. E. 833, 837; Cox v. Louisville

tain injunction or ejectment or lose it by delay under such circumstances as to create an estoppel.[61] Many of the cases cited in the note to the last preceding proposition illustrate and show the application of the doctrine.

&c. R. Co., 48 Ind. 178; Terre Haute &c. R. Co. v. Rodel, 89 Ind. 128, 46 Am. Rep. 164; Louisville &c. R. Co. v. Liebfried, 92 Ky. 407, 17 S. W. 870; Proprietors &c. v. Nashua &c. R. Co., 104 Mass. 1, 6 Am. Rep. 181; Bork v. United N. J. R. &c. Co., 70 N. J. L. 268, 57 Atl. 412, 103 Am. St. 108; Carpenter v. Oswego &c. R. Co., 24 N. Y. 655; Phillips v. Dunkirk &c. R. Co., 78 Pa. St. 177; Weisbrod v. Chicago &c. R. Co., 21 Wis. 602. But see Edwardsville R. Co. v. Sawyer, 92 Ill. 377; Montgomery v. Santa Ana &c. R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. 89.

[61] Roberts v. Northern Pac. R. Co., 158 U. S. 1, 15 Sup. Ct. 756, 758, 39 L. ed. 873; Reichert v. St. Louis &c. R. Co., 51 Ark. 491, 5 L. R. A. 183, 38 Am. & Eng. R. Cas. 453; Denver &c. R. Co. v. Barsaloux, 15 Colo. 290, 25 Pac. 165, 10 L. R. A. 89; Midland R. Co. v. Smith, 113 Ind. 233, 15 N. E. 256; Burkam v. Ohio &c. R. Co., 122 Ind. 344, 23 N. E. 799; Porter v. Midland R. Co., 125 Ind. 476, 25 N. E. 556, 46 Am. & Eng. R. Cas. 70; Merchants &c. Co. v. Chicago &c. R. Co., 79 Iowa 613, 44 N. W. 900; Klosterman v. Chesapeake &c. R. Co., 114 Ky. 426, 71 S. W. 6; Baltimore &c. R. Co. v. Strauss, 37 Md. 237; Haskell v. New Bedford, 108 Mass. 208; State v. Atlantic City, 34 N. J. L. 99; Wolfard v. Fisher, 48 Ore. 479, 84 Pac. 850, 851 (citing text); Hanlin v. Chicago &c. R. Co., 61 Wis. 515, 21 N. W. 623, 20 Am. & Eng. R. Cas. 70. See generally note in 1 L. R. A. (N. S.) 49, and notes in 17 L. R. A. (N. S.) 949, 36 L. R. A. (N. S.) 833, and L. R. A. 1917C, 967.

CHAPTER XLV.

STREET RAILWAYS.

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§ 1450 (1096a). Definition and characteristics.—A definition of street railways has already been given, and their distinguishing features and characteristics have already been pointed out.[1] The term is usually applied to railways laid upon the surface of streets, or roads and streets, for the purpose of facilitating travel or local use thereof rather than through travel across the country and through various cities and towns, and for the purpose of carrying passengers, or passengers and baggage, rather than heavy freight,[2] but interurban railroads are sometimes classed as street railways, and light freight or express matter is sometimes carried,[3] and it has been held that they may be constructed in part through lands acquired by purchase and outside the limits of streets or roads,[4] and that either an

[1] See ante, Vol. I, § 7.

[2] See section cited in last preceding note; also Bentler v. Cincinnati &c. R. Co., 180 Ky. 497, 203 S. W. 199, L. R. A. 1918E, 315; Chicago &c. R. Co. v. Milwaukee &c. El. R. Co., 93 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. 136. But compare Montgomery v. Santa Ana &c. R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. 89. The distinctive features of a street railway have already been pointed out in the section referred to, and they are further considered in the recent case of O'Malley v. Board of Co. Comrs., 86 Kans. 752, 121 Pac. 1108, Ann. Cas. 1913C, 576, and note, where a commercial railroad is distinguished from a street railway and an interurban electric railway. See also Michigan Cent. R. Co. v. Hammond &c. Elec. R. Co., 42 Ind. App. 66, 83 N. E. 650.

[3] See De Grauw v. Long Island Elec. R. Co., 60 N. Y. S. 163, affirmed in 163 N. Y. 597, 57 N. E. 1108; Cedar Rapids &c. R. Co. v. Cedar Rapids, 106 Iowa 476, 76 N. W. 728. See also Michigan Cent. R. Co. v. Hammond &c. Elec. R. Co., 42 Ind. App. 66, 83 N. E. 650; Fayetteville &c. St. Ry. v. Aberdeen &c. R. Co., 142 N. Car. 423, 55 S. E. 345; post, § 1502.

[4] Pennsylvania R. Co. v. Greensburg &c. St. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839. See also Farnum v. Haverhill &c. St. R. Co. (Mass.), 39 N. E. 755; Syracuse &c. R. Co., Matter of, 68 N. Y. S. 881; Cincinnati &c. Elec. St. R. Co. v. Cincinnati &c. R. Co., 12 Ohio Circ. Dec. 113. But compare Baltimore v. Baltimore &c. R. Co., 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503; Hanna v. Metropolitan St. R. Co., 81 Mo. App. 78.

underground or an elevated may be, in a sense at least, a street railway where it is for the accommodation of local travel and subserves or facilitates ordinary street use.[5] In a recent case it is also held that "an electric railway, operating beyond the limits of a city, and into a town incorporated for the mere maintenance of a park adjacent to the city, was a street railway, within a power reserved in the lease of the land used for the park, reserving to the lessors the right to grant a right of way through the land 'for street railway purposes.'"[6] The term "street railway" is neither as definite nor as expressive as is desirable, but it is the term now generally used, and it seems to be the best and most appropriate at command. It will not do to designate a street railroad as a "horse railroad," as is often done, for the power by which the cars are drawn along the tracks is frequently mechanical, and, indeed, there are now comparatively few "horse railroads:" nor will it do to designate a street railway as a "tramway," for that term is not ordinarily used in this country, and a tramway is said to be "a railroad laid along the roads or streets of a town or city on which cars for carriage of goods or passengers are drawn by horses or by some mechanical means," and this definition shows that tramways possess an essential feature that street railways do not ordinarily possess. The term "street" is, perhaps, too restrictive, for it seems that street railways may be operated, in part at least, upon suburban roads. With all its shortcomings and imperfections, however, the term "street railways" seems to be the best that can be used.

[5] New York Dist. R. Co., Matter of, 107 N. Y. 42, 14 N. E. 187. See also Barsalow v. Chicago, 245 Ill. 598, 92 N. E. 525, 19 Ann. Cas. 255; Fayetteville St. Ry. v. Aberdeen &c. R. Co., 142 N. Car. 423, 55 S. E. 345; Commonwealth v. Northeastern El. R. Co., 3 Pa. Dist. 593; Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. 265; People's Rapid Transit Co., Matter of, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728; Sears v. Crocker, 184 Mass. 586, 69 N. E. 329, 100 Am. St. 577 (subway for rapid passenger transportation not an additional burden.) But compare New York &c. R. Co. v. O'Brien, 121 App. Div. 819, 106 N. Y. S. 909, aff'd in 192 N. Y. 558, 85 N. E. 1113.

[6] Montgomery Amusement Co. v. Montgomery Trac. Co., 139 Fed. 353. But compare Philadelphia v. McManes, 175 Pa. St. 28, 34 Atl. 331.

§ 1451 (1096b). Incorporation—Charter—Powers.—The rules elsewhere stated as to the incorporation, charter and powers of ordinary commercial railroads apply in general to street railways, except in so far as the statutory provisions differ in the particular jurisdiction, or the different nature and purposes of the corporation may make such rules inapplicable. It has been held that, in the absence of any constitutional provision to the contrary, the legislature may grant to individuals and their assigns the right to construct and operate such a road.[7] But individuals cannot exercise franchises granted only to corporations,[8] although it has been held that they may be a conduit for transmitting them to a corporation as provided by law, and may bid at a foreclosure sale and transmit the franchises, as well as ordinary property, to a corporation authorized to exercise them.[9] It has been said that street railway companies "are usually organized under the same laws applicable to railroads generally,"[10] but we think it will be found that in many, if not most, jurisdictions, there are statutes specifically providing for street railways, and it is often a question of some difficulty to determine whether they can be organized under or are governed by statutes relating to railroads generally.[11] In

[7] New York &c. R. Co. v. Forty-second St. &c. Co., 50 Barb. (N. Y.) 309; Kerr, Matter of, 42 Barb. (N. Y.) 119. See also Budd v. Multnomah St. R. Co., 15 Ore. 404, 15 Pac. 654, 3 Am. St. 169; Henderson v. Ogden City R. Co., 7 Utah 199, 26 Pac. 286.

[8] Wilder v. Aurora &c. Tract. Co., 216 Ill. 493, 75 N. E. 194; Goddard v. Chicago &c. R. Co., 202 Ill. 362, 66 N. E. 1066.

[9] Parker v. Elmira &c. R. Co., 165 N. Y. 274, 59 N. E. 81. See also Birmingham R. &c. Co. v. Birmingham Tract. Co., 128 Ala. 110, 29 So. 187.

[10] See Wilmington City R. Co. v. People's R. Co. (Del.), 47 Atl. 245. And the fact that a commercial steam railroad will be only three miles in length and almost wholly within the limits of a city does not prevent it from falling within the purview of the general law for the incorporation of railroads. Bridwell v. Gate City &c. Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. (N. S.) 909. See also State v. Superior Ct., 54 Wash. 365, 103 Pac. 469, 54 Wash. 375, 104 Pac. 175.

[11] See ante, Vol. I, § 5. As to presumption that company was organized under general act for incorporation of street railways, see Smith v. Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849. As to curative acts and validating attempt to incorporate, see Brown v. Atlanta &c. R. Co., 113 Ga. 462, 39 S. E. 71;

a recent case it is held that a grant by a city to a company organized under the Michigan Train Railway Act, of the right to construct and operate a street railway with all necessary tracks and connections, all tracks to be constructed under the supervision and with the approval of the common council, does not authorize the company to make a connection in the streets of the city with the tracks of a company organized and operating under the general railroad laws, and having no franchise from the city, though in the ordinances granting franchises to such train railway company, and to another company organized under the general railroad laws, a connection between them, and transfers from the one to the other, were required; and that such Train Railway Act, providing that companies organized thereunder may make connection with any other railroad, and that when the road of such a company is intersected by any new road it shall unite with such road in making a connection, and grant running and business facilities, does not authorize such a company to make connection, as it pleases, in the streets of a city, with the road of a company organized under the general railroad act, other sections of the act allowing construction of a railroad in the streets of a city only with the consent of, and subject to the conditions imposed by, the city authorities.[12] But although a town was incorporated merely for park purposes, had never been platted, was without streets, and its entire territory had been surrendered to a private corporation as a park, it was still held to be a town which might be legally made the terminus of a street railway; and as the building of such railway into the town not being ultra vires, it was held that the railway had a right to acquire a right of way over private property within the town by purchase or lease from the owners, no matter whether it had power to condemn a right of way over property in the town or not.[13] The charter constitutes a contract in the same sense as in the case

Kittinger v. Buffalo Tract. Co., 160 N. Y. 377, 54 N. E. 1081; Louisville Trust Co. v. Cincinnati, 76 Fed. 296; McCartney v. Chicago &c. R. Co., 112 Ill. 611.

[12] Monroe v. Detroit &c. R. Co., 143 Mich. 315, 106 N. W. 704.

[13] Montgomery Amusement Co. v. Montgomery Tract. Co., 139 Fed. 353.

of an ordinary railroad company,[14] and the rules as to impairing its obligation, as to when it may be amended, repealed or forfeited, and the like, are the same, in general, as those already stated in regard to commercial railroad companies. The subject will also be further considered with special reference to regulation of fare, municipal control, and the exercise of the police power as to street railway companies, in subsequent sections.

§ 1452 (1096c). Street railway not ordinarily an additional burden.—As a street railway facilitates local travel and is regarded as a street use, unlike an ordinary through commercial railroad, it does not constitute an additional burden for which abutting property-owners are entitled to compensation, at least as ordinarily constructed upon the surface of the street. This general rule is well settled, with comparatively slight dissent, by the overwhelming weight of authority.[15] And

[14] But in the case of a street railway many of the rights of the company are usually acquired by contract with the municipality, ordinarily made by ordinance and its acceptance and such a contract is within the constitutional provision against impairing the obligation of contracts, but the privilege or franchise may be lost and revoked in a proper case because of misuser or nonuser. New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 35 Sup. Ct. 72, 59 L. ed. 184, L. R. A. 1918E. 874; Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. ed. 912, L. R. A. 1918E, 882, and note. But it has been held that the legislature may modify or annul a city's grant of location of a street railway to maintain tracks on a bridge without violation of any constitutional provision. Fall River v. Public Service Com., 228 Mass. 575, 117 N. E. 915.

[15] Birmingham Tract. Co. v. Electric Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; Elliott v. Fair Haven &c. R. Co., 32 Conn. 579; Randall v. Jacksonville St. R Co., 19 Fla. 409, 17 Am. & Eng. R. Cas. 184; State v. Jacksonville &c. R. Co., 29 Fla. 590, 10 So. 590; Savannah &c. R. Co. v. Mayor, 45 Ga. 602; Chicago &c. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; Eichels v. Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Chicago &c. R. Co. v. Whiting St. R. Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. 264; Louisville R. Co. v. Foster (Ky.), 45 S. W. 235, 236, 50 L. R. A. 815 (citing text); Brown v. Duplessis, 14 La. Ann. 842; Taylor v. Portsmouth &c. St. R., 91 Maine 193, 39 Atl. 560, 64 Am. St. 216; Parsons v. Waterville &c. St. R. Co., 101 Maine 173, 63 Atl. 728; Hiss v. Baltimore &c. R.

the mere fact alone that the motive power is electricity,[16]

Co., 52 Md. 242, 36 Am. Rep. 371; Attorney-General v. Metropolitan R. Co., 125 Mass. 515, 28 Am. Rep. 264; Smith v. Jackson &c. Traction Co., 137 Mich. 20, 100 N. W. 121; Elfelt v. Stillwater St. R. Co., 53 Minn. 68, 55 N. W. 116; Ransom v. Citizens St. R. Co., 104 Mo. 375, 16 S. W. 416; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; Jersey City &c. R. Co. v. Jersey City Horse R. Co., 20 N. J. Eq. 61; Newark &c. R. Co. v. Block, 55 N. J. L. 605, 22 L. R. A. 374, 27 Atl. 1067; Cincinnati &c. St. R. Co. v. Cumminsville, 14 Ohio St. 523; Rafferty v. Central &c. Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. 763; Texas &c. R. Co. v. Rosedale &c. R. Co., 64 Tex. 80, 53 Am. Rep. 739, 22 Am. & Eng. R. Cas. 160. Contra Craig v. Rochester &c. R. Co., 39 N. Y. 404; People v. Kerr, 27 N. Y. 188; Rasch v. Nesson Elec. R. Co., 198 N. Y. 385, 91 N. E. 785, 36 L. R. A. (N. S.) 645. See also Slaughter v. Meridian Light &c. R. Co., 95 Miss. 251, 48 So. 6, 1040, 25 L. R. A. (N. S.) 1265. In New York no distinction seems to be made between commercial and ordinary street railroads, but the right of the abutter to compensation in either case is made to depend upon the effect of the construction and operation of the road, and the ownership of the fee is an important consideration. See Fobes v. Rome &c. R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453 and note; Peck v. Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357. Mr. Lewis also takes the position that on principle, the distinction between commercial and street railways is unsound, and is inclined to think that both ought to be considered additional burdens.

[16] Ante, § 10. See also Green v. City R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. 288 and note; Birmingham Tract. Co. v. Electric Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Philadelphia &c. Co. v. Wilmington City R. (Del.), 38 Atl. 1067; Southern R. v. Atlanta &c. Ry., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; General Elec. R. v. Chicago &c. R., 184 Ill. 588, 56 N. E. 963; Snyder v. Ft. Madison &c. R. Co., 105 Iowa 284, 75 N. W. 179, 41 L. R. A. 345; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50, 23 S. W. 592, 44 Am. St. 203; Georgetown &c. Traction Co. v. Mulholland, 25 Ky. L. 578, 76 E. W. 148; Taylor v. Portsmouth &c. Co., 91 Maine 193, 39 Atl. 560, 64 Am. St. 216; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 386; State v. Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; Younkin v. Milwaukee Tract. Co., 120 Wis. 477, 98 N. W. 215, also note in 2 Am. L. Reg. & Rev. (N. S.) 38, and note in 106 Am. St. 244, 245. But it has been held an additional burden on a country road. Pennsylvania R. v. Montgomery &c. Ry., 167 Pa. St. 62, 31 Atl. 562, 27 L. R. A. 766, 46 Am. St. 659. See also Western R. Co. v. Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474. But see Heilman v. Lebanon &c. R. Co.,

cable,[17] or the like, usually makes no difference. Thus, in a recent case, it is said: "In determining whether a street railroad is an additional burden upon the land already set aside for public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road be so constructed and operated as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross-wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street, belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question."[18]

145 Pa. St. 23, 23 Atl. 389; Austin v. Detroit &c. R. Co., 134 Mich. 149, 96 N. W. 35, 2 A. & E. Ann. Cas. 530.

[17] Ante, § 11. See also Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 844, 30 Am. St. 763. Even though the motive power is steam it has been held that it may not be an additional burden. Newell v. Minneapolis &c. R. Co., 35 Minn. 112, 27 N. W. 837, 59 Am. Rep. 303.

[18] LaCrosse City R. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923. See also Eustis v. Milton St. R., 183 Mass. 586, 67 N. E. 663; Briggs v. Lewiston &c. R., 79 Maine 363, 10 Atl. 47, 1 Am. St. 316 (steam may be used); Nichols v. Ann Arbor &c. St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Dean v. Ann Arbor St. R. Co., 93 Mich. 330, 53 N. W. 396; Placke v. Union Depot R. Co., 140 Mo. 634, 41 S. W. 915; Roebling v. Trenton Pass. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129; Budd v. Camden Horse R. Co., 70 N. J. L. 782, 59 Atl. 229; Merrick v. Intramontaine R. Co., 118 N. Car. 1081, 24 S. E. 667; Heilman v. Lebanon &c. Co., 145 Pa. St. 23, 3 Atl. 389; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; Cumberland Tel. &c. Co. v. United Elec. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; Reid v. Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. 708. See also to the effect that property owners are not ordinarily entitled to enjoin the construction of the road, General Elec. R. Co. v. Chicago &c. R. Co., 184 Ill. 588, 56 N. E. 963; People v. Ft. Wayne &c. R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752.

§ 1453 (1096d). When street railway is an additional burden.[19]—While an ordinary street railway constructed in the usual mode, and so as not to materially impair the easement of access, is not an additional burden yet, where it is so constructed as to materially impair the rights of the abutter, it seems to us that it should be treated as an additional burden entitling the owner to compensation,[20] or as entitling him in some case to damages

[19] This and several subsequent sections in this chapter are taken, in the main, from "Roads and Streets."

[20] Nichols v. Ann Arbor &c. St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; McQuaid v. Portland &c. R. Co., 18 Ore. 237, 22 Pac. 899; Craig v. Rochester, 39 N. Y. 404; Story v. New York &c. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Reinnig v. New York &c. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133. See also Carolina Cent. R. Co. v. Wilmington St. R. Co., 120 N. Car. 520, 26 S. E. 914, 919 (citing text); Onset St. R. Co. v. Plymouth Co. Comrs., 154 Mass. 395, 28 N. E. 286. For a collection of the New York cases see 3 Abbott's New Cases, 306 et seq. Upon the general subject the following cases are interesting and instructive: Barnett v. Johnson, 15 N. J. Eq. 481; Bell v. Gough, 3 Zabr. (N. J.) 624; Carolina Cent. R. Co. v. Wilmington St. R. Co., 120 N. Car. 520, 26 S. E. 914, 919 (citing text); Holst v. Savannah Elec. Co., 131 Fed. 931; Thurston v. St. Joseph, 51 Mo. 511, 514; Codman v. Evans, 5 Allen (Mass.) 308, 81 Am. Dec. 748. In the case of Ottentot v. New York &c. Co., 119 N. Y. 603, 23 N. E. 169, 41 Alb. L. J. 194, the New York court of appeals seems to somewhat limit some of its former decisions. In that case it was held that the city might empower a street railway company to construct an embankment in the street, and that an abutter could not recover damages, no matter how much his property was injured. The reasoning of the court is, that the city had discretionary authority to change the grade, "and it must be immaterial what the causes were which made the change of grade necessary or useful." See also Selden v. Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370, 29 Am. St. 278; Lewis v. New York &c. R. Co., 162 N. Y. 202, 56 N. E. 540; Ketcham v. New York &c. R. Co., 177 N. Y. 247, 69 N. E. 533. But compare Muhlker v. New York &c. H. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872. The rule that municipal corporations may change the grades of streets at pleasure is, at best, not easily defended, and to so extend it as to make it work for the benefit of a private corporation at the expense of a property owner, is giving a harsh rule an application that it should never receive. We do not believe that the discretionary power to change the grades of streets exists where the change is solely for the benefit of a private corporation or an individual. We can not

as for a nuisance. If, for instance, embankments are raised in the street for the purpose of accommodating the railway company, and not as part of the system for the improvement of the streets, and the access to the abutting property is thus shut off, the owner is entitled to reimbursement for the loss he actually sustains. This doctrine is, as we believe, within the principle asserted in the elevated railway cases and in a number of other kindred cases, and it has a foundation in solid principle.[21] It seems to be a sacrifice of substantial right to an imaginary logical deduction to hold that, because the use is for a street railway, therefore no recoverable loss is sustained

avoid the conviction that the courts may inquire whether the change is for municipal purposes or exclusively for the benefit of a private corporation, and if they find that it is solely for the benefit of such a corporation they may rightfully interfere. (Quoted with approval in Zehren v. Milwaukee &c. R. Co., 99 Wis. 83, 74 N. W. 538, 541, 41 L. R. A. 575, 67 Am. St. 844. See also Eachus v. Los Angeles &c. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. 149. The general subject is considered and many additional authorities are cited, ante, § 1452, and in the notes in 43 L. R. A. 554, and 34 Am. Law Reg. (N. S.) 47-51; and 36 L. R. A. (N. S.) 673; also in Birmingham R. &c. Co. v. Smyer, 181 Ala. 121, 61 So. 354, Ann. Cas. 1913C, 862, 870 and note.

[21] But where a street railway company was authorized to make connections with its power house and car barns it was held that it had power to lay switches and curves upon any of the streets adjoining its barns and was not confined to the streets specified, that they were not an additional burden, and that the maintenance of the barn in the city, with the loud and disagreeable noises incident to its use and the switching of cars was not an actionable nuisance. Romer v. St. Paul &c. R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. 455. And it has been held that so laying the track that passing cars overhang the sidewalks a few inches gives no right of action to an abutter whose access is not impaired. Hester v. Durham Tract. Co., 138 N. Car. 288, 50 S. E. 711, 1 L. R. A. (N. S.) 981. See also Campbell v. Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078. A subway for a street railway has been held an additional burden, in some cases, and in others it has been held otherwise. Peabody v. Boston, 220 Mass. 376, 107 N. E. 952, L. R. A. 1915F, 1005 (held not); In re Rapid Transit R. Coms., 197 N. Y. 81, 36 L. R. A. (N. S.) 647, 90 N. E. 456; (held an additonal burden); Lincoln Safe Deposit Co. v. New York, 210 N. Y. 34, 103 N. E. 768, L. R. A. 1915F, 1009, and see other cases reviewed in note in L. R. A. 1915F, 1005-1007.

by the abutter whose property is lessened in value. It is, in truth, somewhat difficult to entirely and satisfactorily vindicate the doctrine that private corporations may use the streets of a city for their own benefit, but as the question is firmly settled by authority, it is profitless to discuss it now; it is not, however, inappropriate to suggest that the doctrine ought not to be extended,[22] and yet it has been extended in some jurisdictions in practice, if not in theory. On the other hand, if, as may, perhaps, be true in the great majority of instances, no injury is done the abutter by the construction and operation of a street railway, then he is not entitled to compensation, but it does not follow that, because there is no injury in the majority of cases, there is no injury in any. It seems to us that whether there is or is not actionable injury in a particular case must depend upon the facts of such case, and that it is not just to turn the sufferer away by affirming that the occupancy of a street by a street railway, in legal contemplation, does the owner of the fee no harm, and therefore he can have no compensation. It is neither logical nor just to conclude that, whatever may be the fact as to actual loss, no compensation can be enforced by law, because a street railway in the eye of the law cannot injure the abutting property. The suggestions above made are not entirely without the support of authority. Thus, where embankments obstruct and materially impair the abutter's easement of access, it has been held that there is an additional bur-

[22] It is to be regretted that Mitchell, J., did not develop the views so well outlined by him in the case of Newell v. Minneapolis &c. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303, for the suggestions made by him will bear elaboration. "It seems to me," said he, "that the maintenance and operation of defendant's railroad constitutes a servitude additional to, and different from, the use for which the streets were acquired—in short, a new use of the streets, not contemplated at the time of their dedication. I do not see that this road differs from any ordinary commercial railroad except that it uses the entire length of the street as its depot at which it receives and lets off passengers. As operated it is, to a certain extent, in aid of travel on the street, but this is a secondary and incidental, and not its main and principal purpose." See also Slaughter v. Meridian Light & R. Co., 95 Miss. 251, 48 So. 6, 1040, 25 L. R. A. (N. S.) 1265, and note.

den[23] or the road may be so constructed and operated as to constitute a nuisance and cause the abutter special damage for which he may be entitled to recover,[24] and where a pole was so placed as to unnecessarily interfere with the abutter's property, it was held that he was entitled to a mandatory injunction.[25]

§ 1454 (1096c). Street railways as highways.—Street railways and ordinary commercial railroads are, in a general sense, highways,[26] but they are not, in the strict sense, public ways, since their owners possess a private proprietary right in the franchise, and such railways are operated for private gain and not primarily for the public benefit. It is true that the public is incidentally benefited, but this benefit is not the chief purpose of the organization. A street railway cannot be regarded as within a statute prescribing rules and regulations for highways unless it appears from the context, or from the object of the

[23] See authorities cited in first note to this section, and particularly Merrick v. Intramontaine R. Co., 118 N. Car. 1081, 24 S. E. 667; Nichols v. Ann Arbor &c. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371. See also Jaynes v. Omaha St. R. Co., 53 Nebr. 631, 74 N. W. 67, 39 L. R. A. 751. Abutter held not entitled to damages and no impairment of access by curve in tracks in Hester v. Durham Tract. Co., 138 N. Car. 288, 50 S. E. 711. See also Reynolds v. Presidio &c. R. Co., 1 Cal. App. 229, 81 Pac. 1118; Larve v. Northampton St. R. Co., 189 Mass. 254, 75 N. E. 255.

[24] Williams v. City &c. Co., 41 Fed. 556; Mahady v. Bushwick &c. R. Co., 91 N. Y. 148, 43 Am. Rep. 661; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 307; Smith v. Street R. Co., 87 Tenn. 626, 11 S. W. 709; Limburger v. San Antonio &c. R. Co. (Tex.), 30 S. W. 533; Belt Line St. R. Co. v. Crabtree, 2 Tex. App. Civ. Cas. (Willson) 579. See also ante, § 1435. The use of a T-rail does not necessarily constitute an additional burden or entitle the abutters to damages. See Neiman v. Detroit &c. St. R. Co., 103 Mich. 256, 1 Am. & Eng. R. Cas. (N. S.) 172, 61 N. W. 519; Easton &c. R. Co. v. Easton, 133 Pa. St. 505, 19 Atl. 486, 19 Am. St. 658; Randal v. Jacksonville St. R. Co., 19 Fla. 409, and compare State v. Madison St. R. Co., 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771; Louisville R. Co. v. Foster, 108 Ky. 743, 57 S. W. 480, 50 L. R. A. 813.

[25] Snyder v. Ft. Madison St. R. Co., 105 Iowa 284, 75 N. W. 179, 41 L. R. A. 345.

[26] Sun Pub. Assn. v. Mayor, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788. And such use of a street is "a mode of using the highway for highway purposes." Tracy v. New York &c. R. Co., 82 Conn. 1, 72 Atl. 156, 158.

statute, that it was the legislative intention to include that class of highways.[27]

§ 1455 (1096f). Right to take property under eminent domain. —The legislature may confer upon a street railway company the right to appropriate private property under the power of eminent domain.[28] This is frequently, but by no means invariably, done. But a street railway company cannot exercise such a right unless it is conferred by the legislature. It is quite clear that a mere grant by a municipal corporation to use its streets would not confer a right to seize private property;[29] and it has even been held that a statute authorizing the condemnation of a right of way by corporations "organized for the construction of any railway" did not give street railways such authority.[30] But it has been held, that, although some of the purposes of the company as shown by the articles of incorporation are private, if others are public and can be separated, the company, under statutory authority, may condemn for the public purpose, and this, too, even though it may not fully and finally have obtained its franchise or license from the city.[31]

[27] Whitaker v. Eighth Ave. R. Co., 51 N. Y. 295. In this case it was said: "It is true also, that every railway for the transportation of persons is for public use. It is, nevertheless, the private property of its owner; and although the highway over which it passes remains a public highway, consistent with the unimpaired use of the railway, the railway itself is, notwithstanding, in the uses for which it was constructed a private road for the accommodation of the public and the profit of its owners, upon which no one but its owners have a right to run a car." See ante, § 43.

[28] Union Depot R. Co. v. Southern R. Co., 105 Mo. 562, 16 S. W. 920; St. Louis &c. R. Co. v. Southern R. Co., 105 Mo. 577, 16 S. W. 960. Petition of Kerr, In re, 42 Barb. (N. Y.) 119; Moran v. Ross, 79 Cal. 159, 21 Pac. 547.

[29] South Beach R. Co. v. Byrnes, 119 N. Y. 141, 23 N. E. 486. See also Fayetteville St. R. Co. v. Aberdeen St. R. Co., 142 N. Car. 423, 55 S. E. 345.

[30] Thompson-Houston Elec. Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 23 Am. St. 86. See also Piedmont Cotton Mills v. Georgia R. &c. Co., 131 Ga. 129, 62 S. E. 52. But see Ogden City R. Co. v. Ogden City, 7 Utah 207, 26 Pac. 288. Compare also F. W. Cook Invest. Co. v. Evansville Terminal R. Co., 175 Ind. 3, 93 N. E. 279.

[31] State v. Centralia &c. Co., 42 Wash. 632, 85 Pac. 344. In this

§ 1456 (1096g). Legislative sanction required to use streets. —Roads or streets can not be occupied by street railway tracks

case it is said: "The relator argues that, inasmuch as the respondent can not construct its proposed road until it procures these franchises and this right of way, it is not in a position to say that this power will be needed by it at all, and hence it ought not to be permitted to condemn his land until it is certain that the land will be needed . . . . It seems to us that the respondent had proceeded far enough to show that its immediate purpose was to apply the power it sought to create by the appropriation of the relator's property to a public use. This was its declared purpose, and its acts in so far as it had actually proceeded pointed to that end. Moreover, it is manifest that an enterprise of this character can not be completed all at once. Being made up of several parts it must be completed in parts. Why, then, should one part be deemed of more importance than another? Why may not the city as well say that it will not grant the franchise until the respondent has produced the power as the court may say that it will not grant the right to procure the power until the franchise is granted? If the city did so say, and the court should hold with the relator, it is plain that the enterprise has reached a point beyond which it can not proceed. But we think there is no reason for such a holding. We think that when it is made to appear that a promoter of an enterprise of this kind is proceeding diligently with it, and nothing is shown to have occurred that will prevent its ultimate accomplishment, the court ought not to deny the right to acquire by condemnation an essential part merely because there is a possibility that the enterprise can not be carried to completion. . . . . There are cases which maintain the doctrine that a statute authorizing the condemnation of property for uses a part of which only are of a public nature is in violation of the rule that private property can not be taken for private use, and hence can not be enforced. Gaylord v. Sanitary District of Chicago, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. 235; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564. And there are cases which deny the right to condemn when the avowed purpose as set out in the petition is to condemn for uses some of which are private. Harding v. Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546. But in this case the respondent asks in its petition to condemn for the public uses only recited in its articles of incorporation, making no mention of those which are purely private. If a private use is combined with a public one in such a way that the two can not be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise; but it has been said, and it seems to us that it is the better reason, that, where the two are not so combined as to be inseparable, the good may be separated from the bad, and the

without legislative sanction,[32] but the authority is not required to be granted directly by the legislature to the company. In an English case,[33] the governing officers of a parish granted the right to construct a tramway in the highway, and it was held that the grant was void, and that the tramway was a nuisance, the court declaring that such a grant could not be made without legislative authority. The authority must be granted by the

right exercised for the uses that are public. Irrigation Co. v. Klein, 63 Kans. 484, 65 Pac. 684; Brown v. Gerald, 100 Maine 351, 61 Atl. 785, 70 L. R. A. 472." See also F. W. Cook Invest. Co. v. Evansville Terminal R. Co., 195 Ind. 3, 93 N. E. 279.

[32] Eichels v. Evansville &c. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Citizens' R. Co. v. Africa, 100 Tenn. 26, 42 S. W. 485, 489 (citing text); Knoxville v. Africa, 77 Fed. 501, 507; Potts v. Quaker City R. Co., 161 Pa. St. 396, 29 Atl. 108. "In this country no franchise can be held which is not derived from the law of the state." People's R. Co. v. Memphis R. Co., 10 Wall. (U. S.) 38, 51, 19 L. ed. 844; Davis v. Mayor &c., 14 N. Y. 506, 67 Am. Dec. 186 and note; Coleman v. Second Ave. R. Co., 38 N. Y. 201; Florida Cent. R. Co. v. Ocala St. R. Co., 39 Fla. 306, 22 So. 692; Farmer v. Myles, 106 La. Ann. 333, 30 So. 858, 863; Pittsburgh &c. R. Co. v. Hood, 94 Fed. 618 (railway in street a nuisance if unauthorized); ante, § 1425. See also Brooklyn Heights R. Co. v. Steers, 211 N. Y. 538, 106 N. E. 919.

[33] Regina v. Train, 2 B. & S. 640, 110 Eng. C. L. R. 640. In this case the court said: "But what has been done here is not making any arrangement for the use of the highway in the ordinary manner of using a highway. On the contrary, it is withdrawing so much of the highway from its ordinary use as such; for it is idle to say that you can use as an ordinary part of this highway the portion taken up by the tramways. A carriage meeting an omnibus running on one of them can not give and take the road. The case is like that of Reg. v. United Kingdom Electric Telegraph Co. (Limited.) (3 F. & F. 73), which we have just disposed of, and others of a similar nature. It also falls within Reg. v. Longton Gas Co., 29 L. J. M. C. 118, 6 Jurist N. S. 601, with which we took a good deal of pains, where a gas company, without being authorized by statute, opened trenches in the streets of a town for the purpose of laying down gas pipes, and this was adjudged a nuisance. If persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the legislature." And in South &c. R. Co. v. Highland Ave. &c. R. Co., 119 Ala. 105, 24 So. 114, it is held that a street railway company can not condemn land for a freight belt road.

legislature directly or through the authorized action of the municipality.[34]

§ 1457 (1096h). Dedication to municipality of right to authorize use of streets.—As intimated in the last preceding section, it is not necessary that authority to construct street railways on city streets should be conferred by a direct grant from the legislature, for the power to authorize the use of the streets by a street railway may be delegated to municipal corporations, and this is generally done.[35] Municipal corporations

[34] Pittsburgh &c. R. Co. v. Hood, 94 Fed. 618; Farmer v. Myles, 106 La. Ann. 333, 30 So. 858, 863 (citing text).

[35] State v. Jacksonville &c. R. Co., 29 Fla. 590, 10 So. 590, 593; ante, § 1425. In Covington v. South Covington &c. St. R. Co., 246 U. S. 413, 38 Sup. Ct. 376, 62 L. ed. 802, it is held that under the Kentucky statute a municipality has authority to grant a perpetual franchise to a street railway company. But the power of the municipal corporation to license the use of its streets is derived from the legislature, for independently of legislation it does not possess this power. In granting the franchise the municipality exercises a derivative power and not an inherent one. State v. Hilbert, 72 Wis. 184, 39 N. W. 326; Saginaw &c. Co. v. Saginaw, 28 Fed. 529. See also Almand v. Atlanta &c. R. Co., 108 Ga. 417, 34 S. E. 6, 9; Shreveport Tract. Co. v. Kansas City &c. R. Co., 119 La. 759, 44 So. 457; Detroit Citizens' St. R. Co. v. Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859, 64 Am. St. 350; Horner v. Eaton Rapids, 122 Mich. 117, 80 N. W. 1012; Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552; Elizabeth City v. Banks, 150 N. Car. 407, 64 S. E. 189, 22 L. R. A. (N. S.) 985, and cases there reviewed in note. But compare Stockdale v. Rio Grande &c. R. Co., 28 Utah 201, 77 Pac. 849. Whether the municipality possesses the power to license the use of its streets for railway purposes must, of course, depend upon the charter or act of incorporation. The dominant power which the state possesses over all its highways vests in the legislature the authority to license the use of the streets of a city without the consent of the municipal authorities. Jersey City v. Railroad Co., 20 N. J. Eq. 360. See also Vincennes v. Vincennes Tract. Co. (Ind App.), 120 N. E. 27. Municipalities can not grant the right to construct a railroad in a street for merely private use. Mikesel v. Durkee, 34 Kans. 509, 9 Pac. 278; Heath v. Des Moines &c. R. Co., 61 Iowa 11, 15 N. W. 573; Macon v. Harris, 75 Ga. 761; Glaessner v. Anheuser-Busch &c. Co., 100 Mo. 508, 13 S. W. 707. See also Winfield v. Public Service Com., 187 Ind. 50, 118 N. E. 531 (grant of franchise by municipality can not bind state beyond authority granted and as to matters not purely

have no general or inherent power to create corporations, and it is only to such corporations as are created by law that they can grant the franchise of maintaining and operating street railways. Municipal corporations cannot authorize the occupancy of the public streets for railway purposes unless the act of incorporation confers such power, but it is not necessary that the power to authorize the use of the street by railway companies should be granted in express terms, for the right of the municipality to license the use of its streets by street railways may sometimes be inferred or arise by necessary implication.[36] Where full control is vested in a municipality, no street can be used for a railroad without the consent of the municipality, except, of course, where the legislature itself has authorized such a use. The legislature may do so without the consent of the municipality,[37] but in the case of street railways the matter is generally left by the legislature to the municipality to determine. And the general rule is that no one can use the public streets for any other purpose than that of ordinary travel, without the consent of the municipal authorities.[38]

local state has a supervisory power); Swift v. Delaware &c. R. Co., 66 N. J. 34, 57 Atl. 456. But see as to right to grant to an individual to be assigned to a corporation thereafter organized for the purpose of executing the same. Village of Phoenix v. Gannon, 195 N. Y. 471, 88 N. E. 1066. Compare, however, Goddard v. Chicago &c. R. Co., 202 Ill. 362, 66 N. E. 106.

[36] Ante, §§ 1425, 1426; Beaumont Trac. Co. v. Brock, 48 Tex. Civ. App. 41, 106 S. W. 460.

[37] See ante, § 1425. Also Denver v. Mercantile Trust Co., 201 Fed. 790; Chicago City R. Co. v. South Park Comrs., 257 Ill. 602, 101 N. E. 201; State v. Parsons St. R. Co., 81 Kans. 430, 105 Pac. 704, 28 L. R. A. (N. S.) 1082. But under the Missouri constitution the legislature has no power to do so without the consent of the municipal authorities, yet they can not prescribe terms and conditions which would not be subject to the police power, properly exercised by the legislature. City of St. Louis v. Public Service Com., 276 Mo. 509, 207 S. W. 799, and earlier Missouri cases there cited. Compare Denver v. Mercantile Trust Co., 201 Fed. 790.

[38] Chicago &c. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907; Atchison St. R. Co. v. Missouri &c. Co., 31 Kans. 661, 3 Pac. 284; Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800 and note; State v. Parsons St. R. Co., 81 Kans. 430, 105 Pac. 704, 28 L. R. A. (N. S.) 1082; Brooklyn &c. Co. v. Brooklyn, 78 N. Y. 524; People v. Comrs. of Public Works, 98 N. Y. 6; Pennsylvania Co., Appeal of, 116 Pa. St. 55, 8 Atl. 914; Indianola v.

§ 1458 (1096i). Consent of municipality or local authorities. —The consent of the municipality is usually required to be by ordinance.[39] But it has been held that, although the consent is required to be by ordinance, yet where, in the ordinance granting the consent, the right is reserved to the council to determine and control the location of poles, tracks and the like, the council may, on a mere motion, authorize a change of the location of a curve.[40] Ordinarily, however, the ordinance should show where the tracks are to be laid or over what streets,[41] at least where the termini and route are required to be stated; but when the consent is once properly obtained, it cannot be again required[42] and cannot be arbitrarily taken away, after it is acted upon, without compensation.[43] It has been held that,

Gulf &c. R., 56 Tex., 594, 599. The consent given by a city ordinance to a street railway company is called an easement in Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 643, 26 L. R. A. 667.

39 Atchison Board of Education v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. ed. 573; Tennessee v. East Tennessee &c. Co., 115 Fed. 305; Holst v. Savannah &c. Co., 131 Fed. 931 (reversed on another point in 132 Fed. 901); West Jersey Tract. Co. v. Shivers, 58 N. J. L. 124, 33 Atl. 55. See also Thomas v. Inter-Co. St. Ry. Co., 167 Pa. St. 120, 31 Atl. 476; Tamaqua &c. Co. v. Inter-Co. St. Ry. Co., 167 Pa. St. 91, 31 Atl. 473, to the effect that it must be given by the authorities and in the manner required. See also ante, § 1427. A certificate of public convenience or necessity by commissioners is also required in some states. See People v. Steward Ry. Comrs., 160 N. Y., 202, 54 N. E. 697; Wood, In re, 181 N. Y. 93, 73 N. E. 561.

40 Mennel v. Detroit &c. R., 139 Mich. 106, 102 N. W. 633.

41 Knoxville v. Africa, 77 Fed. 501; West Jersey Tract. Co. v. Camden &c. Co., 53 N. J. Eq. 163, 35 Atl. 49; Denver v. Mercantile Trust Co., 201 Fed. 740. See also State v. Lincoln St. R. Co., 80 Nebr. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336. But compare Meyers v. Hudson County Elec. Co., 63 N. J. L. 573, 44 Atl. 713. See also as to location when not definitely prescribed, New York &c. R. Co. v. Stevens, 81 Conn. 16, 69 Atl. 1052.

42 Rochester El. R. Co. Matter of, 123 N. Y. 351, 25 N. E. 381.

43 Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48, 18 Sup. Ct. 732, 43 L. ed. 67; Coney Island &c. R. Co. v. Kennedy, 44 N. Y. S. 825. See also Madison v. Alton &c. Tract. Co., 235 Ill. 346, 85 N. E. 596. Where the company has lost the consent by failure to perform conditions it is held that it can not acquire the right by contract with another company for joint use of its tracks. City of Erie v. Erie Trac. Co., 222 Pa. St. 43, 70 Atl. 904. "Such a street franchise has been called by various names—an incorpo-

where the statute limits the period for which the consent or right to use the streets may be granted, a consent or grant by the municipality without any limitation as to time will not be good, even for the time limited by the statute,[44] and that where the boundaries of a city are extended after the granting of the company's charter, the new portion is subject to the provisions of such charter requiring the consent of the city for the location of tracks and operation of the road.[45] It has also been held in Pennsylvania that if the proposed line passes through one or more boroughs or towns, the company must have the consent of any and all such municipalities or it cannot be built at all.[46] Although a statute provided that no street railroad corporation should construct, extend, or operate its road or tracks in that portion of any street, avenue, road or highway in which a street surface railroad is or shall be lawfully constructed, except for necessary crossings, without first obtaining the consent of the corporation owning or maintaining the same, it was held that

real hereditament, an interest in land, a right of way—but, howsoever designated, it is property," and it cannot be revoked or impaired without compensation after the grant has been accepted and acted on except for failure to perform the conditions express or implied as by misuser or nonuser. New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 35 Sup. Ct. 72, 59 L. ed. 184, L. R. A. 1918E, 874, 880, and cases cited in the opinion on pages 880, 881; Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. ed. 912, L. R. A. 1918E, 882, and note.

[44] Blaschko v. Wurster, 156 N. Y. 437, 51 N. E. 303. This however seems doubtful as a general proposition, and in the case cited the consent appears to have been granted on another theory, and not in pursuance of authority of the governing statute.

[45] Illinois Central R. Co. v. Chicago, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. ed. 622. See also Pittsburgh Rys. Co. v. Borough of Carrick, 259 Pa. 333, 103 Atl. 106.

[46] Pennsylvania R. Co. v. Parkersburg &c. St. R. Co., 26 Pa. Sup. Ct. 159; Rahn Twp. v. Tamaqua &c. R. Co., 167 Pa. St. 84, 31 Atl. 472. See also West Jersey R. Co. v. Camden &c. Co., 53 N. J. Eq. 163, 35 Atl. 49. But compare Fayetteville St. R. v. Aberdeen &c. R. Co., 142 N. Car. 423, 55 S. E. 345. So, consent of county commissioners to a street railway on a certain road has been held not to authorize it on such part of the highway as is a street of a town or city, without the latter's consent. Wheeling &c. R. Co v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321.

"the consent of an existing railroad to the use of streets occupied by it by a competing company was not a condition precedent to the right of such competing company to obtain the consent of local authorities to the use of such streets."[47]

§ 1459 (1096j). Consent of property owners.—In some jurisdictions the consent of the abutting property owners is also required, and it is sometimes provided that a petition must be filed by a certain number of such owners or those owning a certain number of feet of property fronting on the street. The requirements of the statute in this regard are material and must be complied with.[48] If the consents are for a single track,[49] or, it seems, a double track,[50] or the time for the construction of the road is limited, or the like,[51] the local authorities, under such statute, are limited thereby, and cannot authorize something materially different, although, of course, the statute on the subject, if it contains a different provision, will govern.[52] It has been held in New York that the consents of the property owner may be given to individuals, their legal representatives and assigns, and turned over by them to a corporation legally

[47] Electric City Ry. Co. v. Niagara Falls, 95 N. Y. S. 73. And a turnpike company is not a local authority whose consent is required or is sufficient under a statute requiring consent of the local authorities. Rochester El. R. Co., Matter of, 123 N. Y. 351, 25 N. E. 381.

[48] See New York Cable Co. v. Mayor, 104 N. Y. 1, 10 N. E. 332; Merritt v. Port Chester, 71 N. Y. 309, 27 Am. Rep. 47; Attorney-General v. Chicago &c. R. Co., 121 Ill. 638, 13 N. E. 176; Roberts v. Easton, 19 Ohio St. 78.

[49] Roberts v. Easton, 19 Ohio St. 78.

[50] Burlington v. Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145. But see Lake Roland El. R. Co. v. Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126.

[51] Tibbetts v. West &c. St. R. Co., 153 Ill. 147, 38 N. E. 664.

[52] See People v. Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736. It is held in Golstrom v. Interborough &c. Transit Co., 100 N. Y. S. 911, that easements of abutting owners may be acquired by prescription. As to when consents as to part of route may be sufficient as to that part without consents to enter route. See In re People's R. Co., 112 N. Y. 578, 20 N. E. 367; as to when consent must be obtained by both companies using same track, see Colonial City Trac. Co. v. Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810; Ingersoll v. Nessau Elec. R. Co., 157 N. Y. 453, 52 N. E. 545.

authorized to construct and operate the road,[53] but under the Illinois statute, providing that any company which has been or shall be incorporated under the general laws of the state to construct, maintain or operate, any street railroad may enter on and appropriate any property necessary for the construction and operation of its road, and the statute providing that the city council shall have no power to grant the use of or right to lay down any railroad tracks in any street of the city to any railroad company, whether incorporated under general or special law of the state, except on petition of property owners, an ordinance granting a street railway franchise to individuals is void.[54] It seems that when jurisdiction is obtained, by filing the necessary consent required by statute, it is not lost, in the absence of any condition to the contrary or estoppel, by lapse of time or ineffectual attempt to exercise it in the first instance,[55] and that such consents are not revocable.[56] Decisions showing who may consent and how the consent should be given and evidenced are cited below.[57]

53 Geneva &c. Ry. Co. v. New York &c. R. Co., 163 N. Y. 228, 57 N. E. 498.

54 Wilder v. Aurora &c. Tract. Co., 216 Ill. 493, 75 N. E. 194. See also Allen v. Clausen, 114 Wis. 244, 90 N. W. 181. It was also held in the Illinois case, that an assignment by such individuals of their rights to a corporation subsequently organized did not operate as an assignment of the petition so as to authorize the city to pass another ordinance granting a new franchise to the corporation, although a new ordinance amending a void ordinance would not necessarily be invalid because passed as an amendment to a void act. As to the validity of a new grant after necessary consents are obtained, see Sanfleet v. Toledo, 10 Ohio C. C. 460.

55 Currie v. Atlantic City, 66 N. J. L. 140, 48 Atl. 615, 1116.

56 Adee v. Nassau El. R. Co., 65 App. Div. 529, 72 N. Y. S. 992. But see Bullock v. West Chicago Rapid Transit Co., 23 Chic. Leg. N. 147.

57 Beesor v. Chicago, 75 Fed. 880 (forged consents); Chicago City R. Co. v. People, 73 Ill. 541 See Tibbets v. West &c. St. R. Co., 153 Ill. 147, 38 N. E. 664; Sea Beach R. Co. v. Coney Island &c. R. Co., 22 App. Div. 447, 47 N. Y. S. 981; Cortland &c. Horse R. Co., Matter of, 31 Hun 72, affirmed in 98 N. Y. 336; St. Michael's &c. Church v. Forty-Second St. &c. R. Co., 26 Misc. 601, 57 N. Y. S. 881; Baker v. New York Munic. Ry. Corp., 102 Misc. 719, 168 N. Y. S. 509; Paige v. Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; State v. Bechel, 22 Nebr. 158, 34 N. W. 342; Paterson &c. R. Co. v. Paterson, 24 N. J. Eq. 158; Shepard v. East Orange, 70 N. J. L. 203, 57 Atl. 441; Mont-

§ 1460 (1096k). **Selling franchise to bidder.**—In some states it is provided that the franchise or right to use the streets shall be sold to the lowest or to the best bidder who will agree to certain conditions, such as paying the city the largest per centum on gross earnings, carrying passengers at the lowest rate of fare, or the like.[58] The statute must be substantially complied with, and the statutory conditions cannot be modified and changed.[59] But considerable discretion is usually vested in the municipal authorities.[60]

§ 1461 (1096l). **Time for which franchise may be granted.**—It seems clear that, when the statute limits the term or time for which a municipality may grant to a street railway company the so-called franchise or right to use its streets, the grant cannot be made so as to extend beyond such term;[61] but where

clair &c. Acadamy v. North Jersey St. R. Co., 70 N. J. L. 229, 57 Atl. 1050; Simmons v. Toledo (Ohio C. C.) 1 Toledo Leg. N. 249; Ronnebaum v. Mt. Auburn Cable R. Co., 29 Ohio L. J. 338; Emerson v. Forest City Ry., 33 Ohio Circ. Ct. 34, aff'd in 77 Ohio St. 596, 84 N. E. 1127.

[58] See Smith v. Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849; State v. West Side St. Ry., 146 Mo. 155, 47 S. W. 959; Kuhn v. Knight, 190 N. Y. 339, 83 N. E. 293 (reviewing New York legislation and applying it only to New York City).

[59] See Hart v. Buckner, 54 Fed. 925; Johnson v. New Orleans, 105 La. Ann. 149, 29 So. 355; Gill v. Lake Charles, 122 La. 1019, 48 So. 440; State v. West Side R. Co., 146 Mo. 155, 47 S. W. 950; People v. Barnard, 110 N. Y. 548, 18 N. E. 354; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; State v. Bell, 34 Ohio St. 194. See also Pacific Elec. R. Co. v. Los Angeles, 194 U. S. 112, 24 Sup. Ct. 586, 48 L. ed. 896.

[60] See Beekman v. Third Ave. &c. R. Co., 153 N. Y. 144, 161, 47 N. E. 277; Knorr v. Miller, 5 Ohio C. C. 609; Sloane v. People's El. R. Co., 7 Ohio C. C. 84; New Orleans &c. R. Co. v. Watkins, 48 La. Ann. 1550, 21 So. 199; Johnson v. New Orleans, 105 La. Ann. 149, 29 So. 355. See generally Smith v. Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849; Kuhn v. Knight, 101 N. Y. S. 1.

[61] A perpetual grant under such a statute has been held not to be valid even for the term limited. Blaschko v. Wurster, 156 N. Y. 437, 51 N. E. 303. See also Gas. Light &c. Co. v. New Albany, 156 Ind. 406, 59 N. E. 176, and authorities cited. But, on the other hand it is held that where the permit or grant is without any fixed limit it must be assumed not to extend beyond the constitutional or statutory limit and is not void as in conflict there-

there is no such limitation, a more doubtful question is presented. In our opinion the better rule is that the ordinary general powers of a municipality over its streets will not authorize it to grant a monopoly or a perpetual right.[62] We have elsewhere considered the subject of monopolies and perpetual grants, however, and it is sufficient, in this connection, to add that where a municipality is given the power to make a grant of such a character it seems, according to the weight of authority, that the term of such grant may extend beyond the corporate life of the grantee, at least where the grant is assignable.[63] So, on the other hand, it has been held that a street

with. Peck v. Detroit &c. Ry., 180 Mich. 343, 146 N. W. 977. See also Boise Water Co. v. Boise City, 230 U. S. 84, 33 Sup. Ct. 997, 57 L. ed. 1400.

[62] Birmingham &c. St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Denver &c. R. Co. v. Denver City R. Co., 2 Colo. 673; Eichels v. Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Louisville City R. Co. v. Louisville, 8 Bush (Ky.) 415; Lake Roland &c. R. Co. v. Mayor, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126; Boston v. Richardson, 13 Allen (Mass.) 146, 161; Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; State v. Trenton, 36 N. J. L. 79; Davis v. Mayor, 14 N. Y. 506, 67 Am. Dec. 186, and note; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Memphis City R. Co. v. Memphis, 4 Cold. (Tenn.) 406. See also Detroit v. Detroit City R. Co., 64 Fed. 628, 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71; State v. Des Moines City R. Co., 159 Iowa 259, 140 N. W. 437; Altgelt v. San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383, and note; Houston v. Houston &c. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679, 685; New Orleans &c. R. Co. v. New Orleans, 44 La. Ann. 748, 11 So. 77; Parkhurst v. Capital City R. Co., 23 Ore. 471, 32 Pac. 304, 7 Am. & Corp. Rep. R. 562, 26 Am. L. Rev. 675. But compare Brown v. Duplessis, 14 La. Ann. 842; State v. Corrigan &c. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361, 29 Am. & Eng R. Cas. 591.

[63] Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71; Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; Minneapolis v. Minneapolis St. R. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. ed. 259; People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255 and note, 7 Am. St. 410, 40 L. ed. 592; Minneapolis v. 684 and note. See also Union Pac. R. Co. v. Chicago &c. R. Co., 51 Fed. 309; Omaha Elec. Light &c. Co. v. Omaha, 172 Fed. 494; People v. President of California College, 38 Cal. 166; State v. Des Moines City R. Co., 159 Iowa 259, 140 N. W. 437; Nicoll v. New York R. Co., 12 N. Y. 121; Davis v. Mayor, 14 N. Y.

railway company which is given perpetual corporate existence by the statute under which it is incorporated, although subject to the reserved power of the legislature to amend or repeal, acquires a perpetual right to use the streets of a city, notwithstanding a provision of the statute requiring it to first obtain the consent of the city, and notwithstanding it obtained such consent only upon the express condition, embodied in the ordinance which it accepted, that its rights in the streets should be limited to a specified term of years.[64] It seems to us, however, that all that the railway company derived directly from the state by its incorporation under the statute was the right to be a corporation with capacity to receive the right to use the streets of the city upon such terms as the city might consent to grant; that this was an entirely different thing from the so-called franchise or right to use certain streets in a certain city, which, according to the very statute under which it was incorporated, it could never have used at all under any circumstances without the consent of the city; and that as the city could have entirely prohibited such use of its streets, it certainly had the power to impose a condition limiting the time of the use. As we have elsewhere shown, a railroad or other corporation may exist without a right of way or any property whatever. It does not follow, as the courts seem to have thought in the cases referred to, that the grant of a franchise to exist perpetually as a corporation necessarily carries with it a perpetual right to use the streets of a city in the face of a statutory provision that it shall not use such streets at all without the city's consent and an ordinance, accepted by it, which expressly limits such use to a specified time. We content ourselves with citing some of the authorities which lead us to this conclusion, without further comment.[65] Where the

506, 67 Am. Dec. 186 and note; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314. But compare Turnpike Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Detroit v. Detroit City R. Co., 56 Fed. 867; Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Augusta &c. R. Co. v. Augusta, 100 Ga. 701, 28 S. E. 126.

[64] Citizens' St. R. Co. v. City R. Co., 64 Fed. 647, Per Woods, J. (Dissenting opinion upon this point by Baker, J., Id. 656); Africa v. Board &c. of Knoxville, 70 Fed. 729.

[65] Logansport R. Co. v. Logansport, 114 Fed. 688, 192 U. S. 604, 24 Sup. Ct. 851, 48 L. ed. 583, Detroit v. Detroit City R. Co., 56 Fed.

grant was directly to the company by the legislature of streets to be selected, it was held that the grant was for the life of the corporation, and could not be limited by the municipality,[66] but the judgment in the case referred to was reversed by the Supreme Court of the United States.[67] The term may be extended, or the grant renewed, in a proper case.[68]

867; Andrews v. National &c. Works, 61 Fed. 782; Pacific Railroad Co. v. Leavenworth City, 1 Dillon (U. S. C. C.) 393, 398; Southern &c. Co. v. Orton, 32 Fed. 457; Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Augusta &c. R. Co. v. Augusta, 100 Ga. 701, 28 S. E. 126; Tudor v. Chicago &c. R. Co., 154 Ill. 129, 39 N. E. 136; Board v. South Bend &c. Co., 118 Ind. 68, 20 N. E. 499; City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. 157; Northern &c. Co. v. Mayor, 21 Md. 93; Suburban &c. Co. v. Board, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497 and note; Boston Elec. Lt. Co. v. Boston Terminal Co., 184 Mass. 566, 69 N. E. 346; Grand Rapids &c. Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585; Union &c. Co. v. Southern Co., 105 Mo. 562, 16 S. W. 920; St. Louis &c. Co. v. Southern Co., 105 Mo. 577, 16 S. W. 960; Larimer &c. R. Co. v. Larimer &c. R. Co., 137 Pa. St. 533, 20 Atl. 570; Allegheny v. Millville &c. St. R. Co., 159 Pa. 411, 28 Atl. 202; Fort Worth &c. Co. v. Rosedale &c. R. Co., 68 Tex. 169, 4 S. W. 534; Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679. See also ante, §§ 80, 81, and Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801.

[66] Govin v. Chicago, 132 Fed. 248.

[67] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801. It has been held by the same court, however, that the state may grant such a perpetual right. Louisville v. Cumberland Tel. &c. Co., 224 U. S. 649, 32 Sup. Ct. 572, 56 L. ed. 934. See also City of Covington v. South Covington &c. St. R. Co., 246 U. S. 413, 38 Sup. Ct. 376, 62 L. ed. 802, and a grant not specifying any limit of time has been held not a mere revocable right but a contract protected by the constitution against arbitrary termination by county commissioners. Northern Ohio Tract. &c. Co. v. State, 245 U. S. 574, 38 Sup. Ct. 196, 62 L. ed. 481.

[68] Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. ed. 1114; Cleveland v. Cleveland Elec. R. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854. As to extensions of road, see West Jersey Tract. Co. v. Camden &c. Co., 53 N. J. Eq. 163, 35 Atl. 49; Citizens' St. R. Co. v. Africa, 100 Tenn. 26, 42 S. W. 485; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; Mt. Auburn Cable Co. v. Neare, 54 Ohio St. 153, 42 N. E. 768; Silsby v. Lyle, 117 Mich. 327, 75 N. W. 886.

§ 1462 (1096m). **Extension of term.**—The continued operation of a street railway is a sufficient consideration for an ordinance extending the term originally fixed, and a city which extends the time, in order to enable the company to refund its bonded debt at a lower rate of interest, is estopped, after the negotiation of the new bonds, on the faith thereof, from attaching such extension for want of consideration.[69] It has also been held, by the Supreme Court of the United States, that municipal extensions of the life of a street railway franchise before the original grant has expired are authorized by the Ohio statute, although the language of the statute is that the council may renew any such grant at its expiration; that an ordinance extending a street railway franchise from the time originally fixed for its termination to the date fixed for the expiration of a franchise granted to another company with which the company operating the former franchise was consolidated, with the consent of the city, does not violate the provision of the Ohio statute that a municipal corporation shall not, during the term of a street railway grant or renewal thereof, release the grantee from any obligation or liability thereby imposed; and that an intention to prolong the life of the franchise of such first company from the date originally fixed for its termination to the date fixed for the expiration of the franchise granted to such other company with which the company operating the former franchise was consolidated should be inferred from ordinances authorizing the consolidated company to extend its lines and changed to electricity as a motive power, the rights under all of which were to terminate with the franchise of the "main line," which was recognized as continuing until that date.[70] But in a still more recent case,

[69] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. ed. 1114. An ordinance extending the right to operate street railways and requiring the company to grade, and keep in repair the street occupied by it, is a contract and the city can not impose any further obligation in that respect. Chicago v. Chicago Rys. Co., 282 Ill. 383, 118 N. E. 728.

[70] Cleveland v. Cleveland Elec. R. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854. It is also held in Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 757, 48 L. ed. 1102, that the right to extend or renew the grant may be exer-

where, however, a branch had been kept separate and given a different term of life, and there were other distinguishing facts, it was held by the same court that an extension of the life of one did not extend that of the other; that a grant made to terminate with the grant to the main line meant and was measured by the grant as it then existed, and not any subsequent extension of the term; and that a municipal ordinance consenting to consolidation did not operate to extend the term of all.[71]

§ 1463 (1096n). **Ordinance granting the right is a contract.**—The prevailing and sound opinion is that an ordinance proposing conditions and terms to a street railway company becomes an irrevocable contract when it is accepted and acted upon by the company.[72] Indeed, this may be re-

cised under such statute before the expiration of the original grant.

[71] Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. ed. 399.

[72] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. ed. 1114; Grand Trunk W. R. Co. v. South Bend, 227 U. S. 554, 35 Sup. Ct. 303, 57 L. ed. 638, 44 L. R. A. (N. S.) 405; Portland R. &c. Co. v. Portland, 201 Fed. 119; Arcata v. Arcata &c. Co., 92 Cal. 639, 28 Pac. 676; Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681 (although a mere license up to that time); Peoria R. Co. v. Peoria &c. Terminal Co., 252 Ill. 73, 96 N. E. 456; People v. Chicago &c. Co., 18 Ill. App. 125; Williams v. Citizens' R. Co., 130 Ind. 71, 73, 29 N. E. R. 408, 409 (citing text), 15 L. R. A. 64, 30 Am. St. 201; Columbia St. R. Co. v. Columbus, 43 Ind. App. 265, 86 N. E. 83; City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. 157; Vincennes v. Vincennes Tract. Co. (Ind. App.), 120 N. E. 27; Shreveport Tract Co. v. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. 345; State v. Noyes, 47 Maine 189; Commonwealth v. Proprietors &c., 2 Gray (Mass.) 339; Detroit v. Detroit United R. Co., 172 Mich. 136, 137 N. W. 937; People v. O'Brien, 111 N. Y. 1, 7 Am. St. 684, 2 L. R. A. 255 and note; Asheville St. R. Co. v. Asheville, 109 N. Car. 688, 14 S. E. 316; Enid City R. Co. v. Enid, 43 Okla. 778, 144 Pac. 617. In People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255 and note, 7 Am. St. 684 and note, it is held that a grant to a street railway company vests property in it in perpetuity, although the corporation is created only for a limited period. The court cited, among others, the cases of People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Davis v. Mayor, 14 N. Y. 406, 67 Am. Dec. 186; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314. See also Detroit v. Detroit &c.

garded as the well-settled rule. But, while it is true that, in granting a railway company the right to use its streets, a municipal corporation exercises a governmental power delegated to it by the legislature, and the ordinance, when accepted, is in the nature of a contract, it is not a contract entirely beyond municipal or legislative control. And, while the right granted by the municipality to use the streets is frequently called a franchise, it is not, ordinarily at least, a primary franchise, but is more in the nature of a license, which is not irrevocable until accepted.[73] And in a recent case in New York a mere license to construct a spur track on a certain street was held revocable even after the track was built.[74]

Co., 43 Mich. 140, 5 N. W. 275; Commonwealth v. Essex Co., 13 Gray (Mass.) 239; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 26 L. R. A. 667; Citizens' St. R. Co. v. City R. Co., 64 Fed. 647; Northern Ohio Tract. & L. Co. v. Ohio, 245 U. S. 574, 38 Sup. Ct. 196, 62 L. ed. 481, and note in L. R. A. 1918E, 902-905. But compare Turnpike Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Detroit v. Detroit &c. R. Co., 56 Fed. 867. So, the right to use the street may be limited to a shorter period than the life of the company. Louisville &c. R. Co. v. Cincinnati, 76 Fed. 296. As to the right to amend or repeal, see Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961; Owensboro v. Cumberland &c. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; Medford &c. R. Co. v. Somerville, 111 Mass. 232; People v. Chicago &c R. Co., 118 Ill. 113, 7 N. E. 116; Ante, § 1428.

[73] In Govin v. Chicago, 132 Fed. 848, 857, it is said, " 'Franchise' is the grant from the state . . .; 'licenses' are the designation by the council of the streets to be occupied; and 'contracts' are the stipulated arrangements between the companies and the city as to the manner of occupancy." See also Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800; Silkman v. Comrs. of Yonker City, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827; United States v. Hayt, 158 Fed. 167. But compare Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801; State v. East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. 742; New York v. Bryan, 196 N. Y. 158, 89 N. E. 467; Wright v. Milwaukee Elec. R. &c. Co., 95 Wis. 29, 60 N. W. 791, 36 L. R. A. 47, 60 Am. St. 74 and note; Milwaukee v. Milwaukee Elec. R. Co., 156 Wis. 83, 144 N. W. 206.

[74] Brooklyn Heights &c. Ry. Co. v. Stiers, 213 N. Y. 76, 106 N. E. 919; Lincoln &c. Co. v. New York, 210 N. Y. 34, 103 N. E. 768.

§ 1464 (1096o). Contract is subject to police power.—No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public.[75] This is especially true of the police power, for it is incapable of alienation.[76] It cannot be doubted that a company which secures a right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty.[77] It is upon this principle that it has been held that a municipal corporation may displace the track of a street railway and prevent its operation for a reasonable time when it becomes necessary in order to enable the municipality to construct a sewer.[78] The surrender or alienation of the

[75] It has been held by the Supreme Court of the United States, however, that a state may bind itself by a charter in the nature of a contract not to exercise the power of taxation. New Jersey v. Wilson, 7 Cranch (U. S.) 164, 3 L. ed. 303; McGee v. Mathis, 4 Wall. (U. S.) 143, 18 L. ed. 314; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; University v. Illinois, 99 U. S. 309, 25 L. ed. 387.

[76] New Orleans Gas. &c. Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; Bulkley v. New York &c. R. Co., 27 Conn. 479; Westbrook's Appeal, 57 Conn. 95; Indianapolis &c. Co. v. Kercheval, 16 Ind. 84; Jones v. Galena &c. Co., 16 Iowa 6; Bradly v. McAtee, 7 Bush (Ky.) 667, 3 Am. Rep. 309; Brimmer v. Boston, 102 Mass. 19; Detroit v. Fort Wayne &c. R. Co., 90 Mich. 646, 51 N. W. 688; Horn v. Atlantic &c. Co., 35 N. H. 169; State v. Hoboken, 41 N. J. L. 71; State v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; Brick &c. Church v. Mayor, 5 Cow. (N. Y.) 538; Penna. Co. v. Riblet, 66 Pa. St. 164, 5 Am. Rep. 360; Thorpe v. Rutland &c. R. Co., 27 Vt. 140, 62 Am. Dec. 625.

[77] Chicago v. Chicago Union Tract. Co., 199 Ill. 259, 65 N. E. 243, 247, 59 L. R. A. 666 (quoting text); New Orleans Gas &c. Co. v. Drainage Com., 197 U. S. 453, 25 Sup. Ct. 471, 49 L. ed. 831. See also Anderson v. Fuller, 51 Fla. 380, 41 So. 684, 6 L. R. A. (N. S.) 1026, 120 Am. St. 170.

[78] Kirby &c. Co. v. Citizens' &c. Co., 48 Md. 168, 30 Am. Rep. 455; Middlesex R. Co. v. Wakefield, 103 Mass. 261; Michigan Tel. Co. v. Charlotte, 93 Fed. 11. See also ante, §§ 1431, 1432; New Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453, 25 Sup. Ct. 471, 49 L. ed. 831; Atlantic &c. R. Co. v. Cordele, 128 Ga. 296, 57 S. E. 493; Snouffer v. Cedar Rapids, 118 Iowa 288, 92 N. W. 79. But see Eddy v. Ottawa &c. Co. (Canada), 31 Q. B. 569. In Dayton v. South Covington &c. R. Co., 177 Ky. 202, 197 S. W. 670, L. R. A. 1918B, 476, it is held that a

police power would, it is evident, lead to disastrous consequences, and there can be no doubt that the attempt to surrender or alienate this power, or to so fetter it as to impair its usefulness, would be ineffective; but while this is true, it is also true that it is not possible to accurately define and limit the power.[79] To what extent it prevails as against chartered rights, which are protected as rights flowing from a contract, it is not possible to say with certainty and precision, but we believe that it may be safely affirmed, as it often has been, that the power extends so far as to require the private corporation to yield to the public welfare in the matter of the reasonable regulation of roads and streets.[80]

statute giving a municipality supervisory control over street railways does not empower it to require the removal of a spur track from a street, and that it can not under its police power remove such a track constructed under statutory authority under the pretense that it is a nuisance.

[79] The impossibility of accurately defining and stating the limits of this power has often been recognized by the courts. See decisions referred to in 22 Am. & Eng. Ency. of Law (2nd ed.) 915, et seq., where such definitions and distinguishing features as have been noted by the courts are considered.

[80] Indianapolis v. Consumers' &c. Co., 140 Ind. 107, 39 N. E. 433, 436 (citing text), 27 L. R. A. 514, 49 Am. St. 183; Rodemacher v. Milwaukee &c. R. Co., 41 Iowa 297, 20 Am. Rep. 592; Portland &c. R. Co. v. Boston &c. R. Co., 65 Maine 122; Fitchburgh &c. Co. v. Grand Junction &c. Co., 1 Allen (Mass.) 552; St. Louis v. Missouri R. Co., 13 Mo. App. 524; Cape May &c. R. Co. v. Cape May, 58 N. J. L. 565, 34 Atl. 397; Albany &c. Co. v. Watervliet &c. Co., 45 Hun (N. Y.) 442; People v. Boston &c. Co., 70 N. Y. 569; Pittsburgh &c. R. Co. v. S. W. &c. R. Co., 77 Pa. St. 173; Henderson v. Ogden City R. Co., 7 Utah 199, 26 Pac. 286, 288 (citing text). See also Lake Shore &c. R. Co. v. Ohio, 173 U. S. 285, 305, 19 Sup. Ct. 465, 43 L. ed. 702. Under many of the recent statutes a Railroad or Public Utility Commission is now invested with considerable power and authority over such corporations and the construction or use of tracks and service generally. See for examples, Connecticut Co., Appeal of, 89 Conn. 528, 94 Atl. 992; City of Norwalk, Appeal of, 89 Conn. 537, 94 Atl. 988; Inhabitants of Phillipsburg v. Board of Public Utility, 85 N. J. L. 141, 88 Atl. 1096. And it is even provided in some jurisdictions that the consent of the commission shall be required to the granting of the franchise or right. People v. Wilcox, 133 App. Div. 556, 118 N. Y. S. 248. See also Calumet Service Co. v. Chilton, 148 Wis. 334, 135 N. W. 131. An order of the

§ 1465 (1096p). Terms and conditions.—A municipal corporation invested with general control over the streets, and having the right to grant or refuse its consent to their use by a street railway company, has authority to prescribe the terms and conditions upon which a railway company may construct and operate a railway in its streets.[81] It may impose conditions and terms as to the repair of the street used by the company;[82] and it has been held that it may exact a license fee for the use of the street;[83] and, in short, it may impose any

Public Service Commission requiring street railway passengers to be carried beyond the limits of the particular franchise in question does not impair the obligation of the contract contained in a municipal ordinance granting the street railway franchise. Puget Sound Tract. &c. Co. v. Reynolds, 244 U. S. 574, 37 Sup. Ct. 705, 61 L. ed. 1325, P. U. R. 1917F, 57. But see Pennsylvania R. Co. v. Gebhardt, 90 N. J. L. 36, 103 Atl. 694 (requiring party to be carried free not exercise of police power and is unconstitutional).

81 Indianapolis v. Consumers' &c. Co., 140 Ind. 107, 39 N. E. 433, 436 (citing text), 49 Am. St. 183; Northern &c. R. Co. v. Mayor, 21 Md. 93; Union Depot &c. R. Co. v. Southern R. Co., 105 Mo. 652, 16 S. W. 960 (citing text); People v. Barnard, 110 N. Y. 548, 18 N. E. 354; Harrisburg &c. R. Co. v. Harrisburg, 149 Pa. St. 465, 24 Atl. 56; Allegheny v. Millvalle, 159 Pa. St. 411, 28 Atl. 202; Houston v. Houston City R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679. But see Citizens' St. R. Co. v. City R. Co., 64 Fed. 647. It has also been held that a municipality given the power to designate the streets on which railroad tracks may be laid is not limited to naming the particular streets, but may also impose reasonable conditions and reservations on the use of the street not inconsistent with the grant from the state. Southern Pac. Co. v. Portland, 227 U. S. 559, 33 Sup. Ct. 308, 57 L. ed. 642.

82 City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. 157; Columbus St. R. Co. v. Columbus, 43 Ind. App. 265, 86 N. E. 83; Detroit v. Detroit United R. Co., 172 Mich, 496, 138 N. W. 215; City of Madison v. Southern Wis. R. Co., 156 Wis. 352, 146 N. W. 492, and see ante, § 1430.

83 New Orleans v. New Orleans &c. R. Co., 40 La. Ann. 587, 4 So. 512; Newport v. South Covington &c. R. Co., 89 Ky. 29, 11 S. W. 954; Covington v. South Covington &c. R. Co., 147 Ky. 326, 144 S. W. 17; Detroit v. Detroit City R. Co., 37 Mich. 558; New York v. Manhattan R. Co., 192 N. Y. 90, 84 N. E. 745, Potter v. Calumet Elec. R. Co., 158 Fed. 521. See also Venner v. Chicago City R. Co., 236 Ill. 349, 86 N. E. 266. But compare Hodges v. Western U. Tel. Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770; Point Bridge Co. v. Pittsburgh R. Co., 240 Pa. St. 105, 87 Atl. 614.

conditions not illegal and not forbidden by the statute. What the legislature grants to a street railway company cannot, however, be taken away or abridged by the municipality.[84] The authorities cited below[85] serve to show the comprehensive power to impose conditions where the consent of the municipality is required, and, in a very recent decision, it is held by the Supreme Court of the United States that the authority given to the city to fix terms and conditions includes the power to determine and fix the terms of the occupancy of its streets by the company.[86]

[84] In re Kings County Elevated R. Co., 105 N. Y. 97, 13 N. E. 18. See Minneapolis v. Minneapolis St. R. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. ed. 259; Frayser v. State, 16 Lea (Tenn.) 671; Galveston &c. R. Co. v. Galveston, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33 and note, where the authorities upon the general subject are cited and reviewed. And see further, to the effect that an unlawful or prohibited condition, or one in conflict with the statute, can not be imposed, Central R. Co.'s Appeal, 67 Conn. 197, 35 Atl. 32; Grand Rapids Elec. R. Co. v. Grand Rapids, 84 Mich. 257, 47 N. W. 567; Harrisburg City Pass. R. Co. v. Harrisburg, 149 Pa. St. 465, 24 Atl. 56. Whether a forfeiture clause in the charter is self executing or can be waived by the municipality as to breach of condition depends upon the legislative intent. State v. Des Moines City R. Co., 159 Iowa 259, 140 N. W. 437; State v. Duluth St. R. Co., 128 Minn. 314, 150 N. W. 917.

[85] Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; St. Helena v. San Francisco &c. R. Co. (Cal.), 140 Pac. 605; Central R. Co.'s Appeal, 67 Conn. 197, 35 Atl. 32; People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Madison v. Alton &c. Trust Co., 235 Ill. 346, 85 N. E. 596; Newcomb v. Norfolk &c. St. R. Co., 179 Mass. 449, 61 N. E. 42; Nieman v. Detroit Suburban R. Co., 103 Mich. 256, 61 N. W. 519; Rapid R. Co. v. Mt. Clemens, 118 Mich. 133, 76 N. W. 318; Chouquette v. Southern Elec. R. Co., 152 Mo. 257, 53 S. W. 897; St. Louis &c. R. Co. v. Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300; Grey v. New York &c. Tract. Co., 56 N. J. Eq. 463, 40 Atl. 21; Appeal of Carlisle &c. R. Co., 245 Pa. St. 561, 91 Atl. 561; and see ante, §§ 1430, 1431. See also to the effect that the company accepting the charter takes it subject to the conditions imposed, Cincinnati &c. R. Co. v. Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363; Bly v. Nashua St. R. Co., 67 N. H. 474, 32 Atl. 764, 30 L. R. A. 303, 68 Am. St. 681.

[86] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801. Several other interesting questions as to grants to street railways and ex-

§ 1466 (1096q). Motive power confined to that specified.—Among the terms and conditions that may usually be imposed are such as relate to the motive power. It is competent for a

tensions are decided in this case. Upon the point now under consideration it is said, in the course of the able opinion: "Conceding the plenary power of the legislature over the subject at that time, and that franchises, broadly speaking, are rights and privileges conferred by the state, and are derived from a grant of the sovereign power, nevertheless the state, while exercising its authority, might give to the city such measure of right and control in the manner as it saw fit. Dill. Mun. Corp. 5th ed., § 1234; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734. The city is the corporate body directly interested in the use and control of the streets. By the charter of 1851 exclusive control over the streets was given to the council. That it was the intention of the legislature to give effect to the right of municipal control in the act under consideration is shown in its confirmation of terms already fixed by contract between the city and the companies. As to the future, companies were to have no right to the use and occupancy of the streets until they should obtain from the city council authority to that end, under contracts to be agreed upon as to terms and conditions. A more comprehensive plan of securing the city in the control of the use of the streets for railway purposes could hardly be devised. The company must be 'authorized' by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. . . . It is additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets. This power of the city, in the absence of language in the statute excluding the authority and reserving its exercise to the state, necessarily includes the right to fix the time for which the streets may be used (quoting from Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 308, and citing Coverdale v. Edwards, 155 Ind. 374, 381, 58 N. E. 495. See ante, § 1430).

"The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the terms and conditions which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to running of cars, etc., by the city council. On the contrary, under the terms of this act, the city by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the

municipal corporation, invested with control of the streets, to prescribe what motive power shall be used in drawing the cars over the track,[87] and when the ordinance does provide what the motive power shall be, the company cannot use any other. Thus, where the provision is that the cars shall be drawn by horses or mules, the company cannot use steam power, nor can it construct a cable road.[88] Grants are usually construed most strongly against a corporation or company claiming a special franchise or privilege, and under this familiar rule a street railway company in cases of the kind under consideration, cannot successfully assert a right to use any other motive power than that specified in the ordinance licensing it to use the streets of the municipality.[89] But where a continuing

terms of this act, by withholding assent, determine that it was undesirable to have the corporations in control of the use of the streets." It is also said, in the same opinion, that the franchise granted by the state was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. See also Southern Pac. Co. v. Portland, 227 U. S. 559, 33 Sup. Ct. 308, 57 L. ed. 642.

87 Williams v. City Elec. St. R. Co., 41 Fed. 556; Teachout v. Des Moines &c. St. R. Co., 75 Iowa 722, 38 N. W. 145; Louisville &c. R. Co. v. Bowling Green R. Co., 110 Ky. 788, 63 S. W. 4; North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233, 23 Atl. 466; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788. But not, of course, one prohibited by statute. Farrell v. Winchester Ave. R. Co., 61 Conn. 127, 23 Atl. 757. See also North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; Birmingham &c. St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615.

88 People v. Newton, 48 Hun 477, 1 N. Y. S. 197. See also Harris v. Twenty-Second St. &c. R., 1 Pa. Dist. 506; Spokane St. Ry Co. v. Spokane Falls, 6 Wash. 521, 32 Pac. 456; Indianapolis Cable St. R. Co v. Citizens' St. R. Co., 127 Ind. 369, 26 N. E. 893, 24 N. E. 1054, 8 L. R. A. 539 and note. And compare Wilmington City R. Co. v. Wilmington &c. Co., 8 Del. Ch. 468, 46 Atl. 12.

89 People v. Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174 and note; Denver &c. R. Co. v. Denver &c. R. Co., 2 Colo. 673, 681; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Indianapolis &c. St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 393, 24 N. E. 1054, 26 N. E. 893 (citing text), 8 L. R. A. 539 and note. See also Birmingham &c. R. Co. v. Birmingham &c. Co., 79 Ala. 465, 58 Am. Rep. 615; Mayor

option is given to the company to use either of two kinds of power it may change from one to the other, and a grant giving the right to propel the cars either by electricity or cable or both, or partly by each and to make reasonable rules for the operation of the railway lines authorizes the company to electrify its cable routes.[90]

§ 1467 (1096r). Motive power where the kind is not specified.—Where the charter or ordinance is silent upon the subject, there is also much reason for affirming that only such motive power as was in use by street railway companies at the time of the grant could have been contemplated.[91] But this rule would interfere very materially in many instances with progress and deprive the patrons as well as the company of the advantage of new discoveries or inventions by which the road might be operated not only more economically but also in such a way as to give much better service, and, in analogous cases, it has often been presumed in highway cases that new discoveries and uses were contemplated, at least where no additional servitude or burden is thereby created or imposed. For this reason, principally, it is held by other courts that a motive power unknown at the time the charter or franchise was granted may be used in a proper case where the charter or grant does not limit the power in any way,[92] and where the right is

v. Ohio &c. R. Co., 26 Pa. St. 355; Houston v. Houston &c. R. Co., 83 Tex. 548, 19 S. W. 786, 29 Am. St. 679. Where a petition is required as a condition precedent to construct a track, it must conform to the statute. People's R. Co., In re, 112 N. Y. 578, 20 N. E. 367; Union &c. Co., In re, 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359.

[90] McGilvia v. Seattle Elec. Co., 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B, 1020. To the same effect is McCartney v. Chicago &c. R. Co., 112 Ill. 611.

[91] North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; State v. Trenton, 54 N. J. L. 92, 23 Atl. 281; Farrell v. Winchester Ave. &c. Co., 61 Conn. 127, 23 Atl. 757. See also Richmond &c. R. Co. v. Richmond, 26 Grat. (Va.) 96.

[92] Wilmington City R. Co. v. Wilmington, 8 Del. Ch. 468, 46 Atl. 12; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Howley v. Central Val. R. Co., 213 Pa. St. 36, 62 Atl. 109, 2 L. R. A. (N. S.) 138. See also Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Paterson R. Co. v. Grundy 51 N. J. Eq. 213, 26 Atl. 788; Hud-

granted to employ a specified motive power and "any other motive power," or the like, any kind then in general use would doubtless be included,[93] and, probably, any lawful power subsequently discovered.[94] If the ordinance authorizes the use of steam as a motive power, then, as we suppose, the license can not be recalled unless the case is an unusual one, wherein it appears that steam cannot be used without almost certain danger to life and property.[95] It is possible to conceive a case where changes made by the growth of a city might be so great as to make it impossible to employ steam as a motive power without endangering the lives of those having a right to use

son River Tel. Co. v. Watervliet &c. R. Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. 383; Buchner v. Hart, 52 Fed. 835; Riverside &c. R. Co. v. Riverside, 118 Fed. 736. But compare Farrell v. Winchester Ave. R. Co., 61 Conn. 127, 23 Atl. 757; State v. Trenton, 54 N. J. L. 82, 23 Atl. 281; Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324, and cases cited in last preceding note.

[93] Green v. City &c. R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. 288; Halsey v. Rapid &c. R., 47 N. J. Eq. 380, 20 Atl. 859; Hudson &c. Co. v. Watervliet, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. 838; Lockhart v. Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26; Taggart v. Newport &c. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205.

[94] Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007. See also Chicago Gen. R. Co. v. Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734; North Baltimore &c. R. Co. v. North Ave. R. Co., 75 Md. 233, 23 Atl. 466; Hoofer v. Baltimore &c. R. Co., 85 Md. 509, 37 Atl. 359, 38 L. R. A. 509; Tonergan v. Lafayette St. R. Co., 3 Am. Electl. Cas. 273; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788; ante note 92.

[95] In the case of the North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788, it was said: "It is conceded that the company's charter authorizes it to maintain and operate a street railway along and over the street in question, and it is contended that inasmuch as the charter is silent as to the power to be used in propelling the company's cars, the company has the option to use for that purpose either steam or horse power, as it may prefer. We think, in such a case, it would be more reasonable to hold the legislature intended the company should use the motive power in propelling its cars which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in the state."

the streets,[96] and it seems ot us that, in such a case, the municipal authorities might require the company to use some less dangerous motive power. It can hardly be possible that the municipality would be bound to yield its power to provide for the safety of its citizens, or that the citizens would be bound to surrender the use of the streets to further the interests of a private corporation. It would undoubtedly require an extraordinarily strong case to warrant the municipality in modifying its license and requiring the licensee to substitute some other motive power for that designated in the grant, but we are inclined to think there may be such a case,[97] and, at all events, the use can be properly regulated under the police power.

§ 1468 (1096s). Exclusive right—Monopoly.—There is some conflict in the decided cases upon the question of the power of the legislature to grant an exclusive right to a street railway company to occupy and use a highway, and the question is not free from doubt. Some authorities hold that the legislature cannot create a monopoly by granting an exclusive privilege, and there is much reason for this doctrine,[98] especially under

[96] North Chicago R. Co. v. Lake View, 105 Ill. 183; North Chicago R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788. See also Kettering v. Jacksonville, 50 Ill. 39; Fash v. Third Ave. R. Co., 1 Daly (N. Y.) 150; Commonwealth v. Allen, 148 Pa. St. 358, 23 Atl. 1115, 16 L. R. A. 148 and note, 33 Am. St. 830; Richmond &c. R. Co. v. Richmond 26 Grat. (Va.) 96; Henderson v. Central Passenger R. Co., 20 Am. & Eng. R. Cas. 542; Regina v. Train, 2 B. & S. 640.

[97] As to the right to authorize or require change of motive power, see generally Third Ave. R. Co., In re, 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124; Sioux City St. R. Co. v. Sioux City, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. ed. 898; City R. Co. v. Citizens' &c. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. ed. 1114; Attorney-General v. Chicago &c. R. Co., 112 Ill. 611; Hooper v. Baltimore &c. Co., 85 Md. 509, 37 Atl. 359, 38 L. R. A. 509; People v. Board, 158 N. Y. 711, 53 N. E. 1129, affirming 52 N. Y. S. 908; St. Michael's &c. Church v. Forty-second St. &c. Co., 57 N. Y. S. 831; Potter v. Scranton Traction Co., 176 Pa. St. 271, 35 Atl. 188; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205.

[98] New Orleans City R. Co. v. Crescent City R. Co., 12 Fed. 308; Jackson Co. Horse R. Co. v. In-

some of the state constitutions. At all events, the construction should be liberal in favor of the public and strict as against the corporation claiming an exclusive privilege or monopoly.[99]

terstate Rapid Transit Co., 24 Fed. 306; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Birmingham &c. R. Co. v. Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Montgomery Light &c. Co. v. Citizens' Light &c. Co., 142 Ala. 462, 38 So. 1026; St. Louis &c. R. Co. v. Belleville, 20 Ill. App. 581; Citizens' Gas &c. Co. v. Elwood, 114 Ind. 332, 16 N. E. 624; Canal &c. R. Co. v. Crescent City R. Co., 41 La. Ann. 561, 6 So. 849; Kinsman St. R. Co. v. Broadway &c. R. Co., 36 Ohio St. 239; Memphis City R. Co. v. Memphis, 4 Cold. (Tenn.) 406. See also Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Denver &c. R. Co. v. Denver &c. R. Co., 2 Colo. 673, 681; Winnetka v. Chicago &c. R. Co., 204 Ill. 297, 68 N. E. 407; Russell v. Chicago &c. R. Co., 205 Ill. 155, 68 N. E. 727; Des Moines &c. R. Co. v. Des Moines, 73 Iowa 513, 33 N. W. 60, 35 N. W. 602; Teachout v. Des Moines &c. R. Co., 75 Iowa 722, 38 N. W. 145; New York &c. Co. v. Mayor, 1 Hilt. (N. Y. C. P.) 562; Fort Worth &c. R. Co. v. Rosedale &c. R. Co., 68 Tex. 169, 4 S. W. 534; Gulf City R. &c. Co. v. Galveston, 69 Tex. 660, 7 S. W. 520; Fort Worth &c. R. Co. v. Queen City R. Co., 71 Tex. 165, 9 S. W. 94. The Supreme Court of the United States and many other courts, however, seem to take a different view. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; St. Tammany Waterworks v. New Orleans Waterworks, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. ed. 563; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. ed. 1114; Des Moines &c. R. Co. v. Des Moines, 73 Iowa 513, 33 N. W. 60, 35 N. W. 602; Wilmington City R. Co. v. Wilmington &c. Co., 8 Del. Ch. 468, 46 Atl. 12. But however it may be as to the power of the legislature, it is clear that a municipality can not grant a monopoly or exclusive right unless clearly authorized. Detroit Citizens' St. R. Co. v. Detroit Railway, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859, 64 Am. St. 350, affirmed in 171 U. S. 48, 18 Sup. Ct. 732, 43 L. ed. 67; Florida Cent. &c. R. Co. v. Ocala St. R. Co., 39 Fla. 306, 22 So. 693; Parkhurst v. Capital City R. Co., 23 Ore. 471, 32 Pac. 304; Clarksburg &c. Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994, 996 (citing text), 50 L. R. A. 142 and note; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 78, 83, 84, 43 L. ed. 341, and, authorities cited (grant, however, held not exclusive); ante, § 1426, and numerous authorities there cited.

[99] Proprietors of Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. ed. 1059; Oregon R. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Central Transp. Co. v. Pullman Car

But it is not every grant that creates a monopoly, although it may, to some extent, be exclusive, for the grant may be of a privilege or franchise that is, of necessity, in some measure of the nature of a monopoly. This is so in many cases, as, for instance, where the grant is to use a patented thing or a copyrighted article. In some degree, at least, this is also true where there is a grant to use a designated part of a street or road for railway purposes. In such cases it is necessity that impresses the grant with its exclusive character, and it must either be conceded that the legislature may grant a privilege or franchise that is in some of its features monopolistic, or else the power of the legislature to make any grant at all in such cases must be denied.

§ 1469 (1096t). Physical monopoly.—To deny the power of the legislature to make a grant that is of necessity of a monopolistic character would lead to the unwarranted conclusion that in no case can the legislature grant the right to lay and operate a street railway in a road or street, for, if the power to make such a grant be conceded, it necessarily and unavoidably results that the occupancy of the part of the road or street is exclusive, as two railways cannot occupy the same space. But it does not follow from this that a monopoly in the true sense is created, for other parts of the road or street may be granted to competing lines.[1] If, however, the legislature should under-

Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Detroit Citizens' St. R. Co. v. Detroit Railway, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. ed. 67; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Detroit v. City R. Co., 56 Fed. 867; Logansport R. Co. v. Logansport, 114 Fed. 688; Birmingham &c. R. Co. v. Birmingham &c. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Chicago &c. R. Co. v. People, 222 Ill. 427, 78 N. E. 790; Indianapolis Cable St. R. Co. v. Citizens' &c. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539 and note; People v. Broadway R. Co., 126 N. Y. 29, 26 N. E. 961; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471 and note. See also Louisville City R. Co. v. Central Pass. R. Co., 87 Ky. 223, 8 S. W. 329; Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 679; Parkhurst v. Capital City R. Co., 23 Ore. 471, 32 Pac. 304; Thurston v. Huston, 123 Iowa 157, 98 N. W. 637.

[1] North Baltimore Pass. R. Co. v. Mayor, 75 Md. 247, 23 Atl. 470, 471 (citing text); Hamilton &c. Tract.

take to grant a right to transport all passengers over a designated highway, a monopoly would be created within the meaning of the constitution. The effect of a grant to use a designated part of a highway is to license the company first in point of time to occupy and use the designated space, but as already intimated, it does not follow from this that the statute creates a monopoly, since others may occupy other parts of the same highway.[2] There is not, at all events, a monopoly of a business, nor is there a monopoly in the profits of a business. There are many cases in which the right to confer privileges which, in their essential features, are monopolistic, has been asserted. Thus, it has been held that the exclusive right to maintain a market may be granted.[3] The same principle is asserted in the cases which hold that excluding all persons except druggists from selling intoxicating liquors is a rightful exercise of legislative power.[4] A grant of a franchise to maintain a ferry is in its very nature exclusive, and yet such grants have from the earliest years of the common law been recognized as valid; indeed, no court has ever suggested a doubt as to their validity. It is evident that there are many grants which cannot be any-

Co. v. Hamilton &c. Co., 69 Ohio St. 402, 69 N. E. 991, 994 (quoting text). See also San Jose &c. Interurban R. Co. v. San Jose R. Co., 156 Fed. 455; Peoria &c. R. Co. v. Peoria &c. Terminal Co., 252 Ill. 73, 96 N. E. 689.

[2] New Orleans &c. R. Co. v. Crescent City R. Co., 12 Fed. 308; Jackson &c. R. Co. v. Interstate &c. Co., 24 Fed. 306; Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Denver &c. R. Co. v. Denver &c. R. Co., 2 Colo. 673; Indianapolis Cable &c. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 8 L. R. A. 539 and note; Hamilton &c. Tract. Co. v. Hamilton &c. Co., 69 Ohio St. 402, 69 N. E. 991, 994 (quoting text); Fort Worth St. R. Co. v. Rosedale R. Co., 68 Tex. 169, 4 S. W. 534; Henderson v. Ogden City R. Co., 7 Utah 199, 26 Pac. 286.

[3] Le Claire v. Davenport, 13 Iowa 210, overruling Davenport v. Kelley, 7 Iowa 102, 109; New Orleans v. Guillotte, 12 La. Ann. 818.

[4] Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284. In line with the general doctrine of the above case are cases of Hudson v. Thorne, 7 Paige (N. Y.) 261; Ruth, In re, 32 Iowa 250; Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196. Although there is much conflict in the authorities, it seems that the doctrine asserted in the Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394, is the only defensible one.

thing else than exclusive, and the element of exclusiveness is owing, not to the statute which confers them, but to the inherent nature and character of the franchise granted. It is impossible to sever this essential element, for it inheres in the thing granted so firmly and closely that severance is impossible,[5] and it therefore distinguishes the case from that of an unlawful monopoly.[6]

§ 1470 (1096u). Limitation of power to create monopoly.— Even though the legislature or municipality may not directly create an exclusive privilege in matters of common right, necessity may do so. It is one thing to restrict the exercise of common right and quite another thing to create an extraordinary right or privilege and make it exclusive. In granting a right to use a highway for a street railway the legislature makes that lawful which, but for the grant, would be unlawful, for no citizen has a right to use a highway in any other than the usual modes, except where the legislature authorizes him to do so. But, as we have indicated, we do not believe that the doctrine we have stated, as to a physical monopoly or monopoly from necessity, can legitimately be pressed so far, at least

[5] Judge Cooley discusses the question with care and ability, and says: "Still, the legislature, when it grants special privileges or franchises, may undoubtedly make them exclusive. The distinction seems to be this: The following of the ordinary and necessary employments of life is a matter of right, and can not be made to depend upon the state's permission or license." He also says: "But when the state gives permission to do something not otherwise lawful, it may, in its discretion, make the gift exclusive. Thus it may grant an exclusive ferry, or an exclusive right to erect a toll bridge, or to set up a lottery, because no one is wronged, because no one had such liberty before, and, therefore, no one is deprived of anything by the grant." Cooley Torts, 328.

[6] A somewhat similar distinction is drawn under statutes providing for competitive bidding, where it is held that a monopoly can not unnecessarily be created by the authorities, so as to prevent competitive bidding, but that an article which is a natural monopoly, or one from necessity, may be obtained or used, notwithstanding the provision for competitive bidding. Swift v. St. Louis, 180 Mo. 80, 79 S. W. 172. See also Field v. Barber &c. Co., 117 Fed. 925, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. ed. 1142; Smith v. Syracuse &c. Co., 161 N. Y. 484, 55 N. E. 1077.

under some of the state constitutions, as to authorize the legislature to confer an exclusive privilege to reap all the profits of transporting passengers, except in cases where necessity produces that result, as it may sometimes do, as, for instance, where it is impossible to operate more than one railway upon the same street. The subject is not free from difficulty, but our conclusions are not without the support of authority.[7]

§ 1471 (1096v). General grant does not exclude other companies.—Where the legislature, or the municipal officers, grant a general license or franchise to a street railway to occupy the streets of a city, it is apparent that it may often be difficult to determine the extent and effect of such a general license or grant. Some rights necessarily accrue to the company which secures the first grant, and yet some rights remain in the licensor, for it cannot well be true that a railway company may hold a general franchise and not do anything toward rendering the public the service which forms the principal element that supports the right to grant a special privilege to use a highway. It is only upon the ground that the public welfare is promoted that grants of such privileges can be sus-

[7]Jackson Co. Horse Car Co. v. Interstate Rapid Transit Co., 24 Fed. 306; Livingston v. Pippin, 31 Ala. 542; Montgomery v. Montgomery Waterworks, 79 Ala. 233; American Tel. &c. Co. v. Morgan &c. Co., 138 Ala. 597, 36 So. 178, 100 Am. St. 53; Norwich Gas Light Co. v. Norwich &c. Co., 25 Conn. 19; Rome v. Cabot, 28 Ga. 50; East St. Louis v. East St. Louis &c. Co., 98 Ill. 415, 38 Am. Rep. 97; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 8 L. R. A. 539 and note; Atchison St. R. Co. v. Mo. Pacific R. Co., 31 Kans. 661, 3 Pac. 284; Crescent City &c. Co. v. New Orleans &c. Co., 27 La. Ann. 138; Morton v. Power, 33 Minn. 521, 24 N. W. 194; Hovelman v. Kansas City Horse R. Co., 79 Mo. 632; Davis v. Mayor &c., 14 N. Y. 506, 67 Am. Dec. 186; Richmond &c. Co. v. Middletown, 59 N. Y. 228; State v. Gas Light Co., 18 Ohio St. 262; Nashville v. Hagan, 9 Baxt. (Tenn.) 495; Brenham v. Brenham Water Co., 67 Tex. 542, 4 S. W. 207; State v. Milwaukee &c. Co., 29 Wis. 454, 9 Am. Rep. 598. See ante, § 1468; also Murray Hill Land Co. v. Milwaukee &c. Co., 110 Wis. 555, 86 N. W. 199; Birmingham St. R. Co. v. Railway Co., 79 Ala. 465, 58 Am. Rep. 615; Des Moines St. R. Co. v. Des Moines &c. St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602.

tained, for special privileges can only be granted in cases where the public interest will be promoted. Eliminate this element and it is impossible to sustain the grant of a right to construct and operate a railway in a street or road, for such a right is necessarily, to some extent or in some sense, an exclusive one, and, to a great extent, prevents the free use of the highway by all the citizens upon equal terms. In spite of all that can be done, the exercise of such a right does in some measure give the possessor of the right something in the nature of a monopoly, and to justify this it must appear that the public good demands that there should be some abridgment of the general and common right. It must follow that a mere general grant to use the streets of a city does not, of its own force and vigor, operate to exclude other companies and place it in the power of the licensee to use or decline to use the streets at its own pleasure, and at the same time keep others from using them.[8]

§ 1472 (1096w). **Effect of taking possession.**—If the company which secures the first grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is paramount and exclusive. By actually taking possession of the street and using it for the accommodation of the public, the company first in point of time does such acts as vests its rights. But to have this effect, the company, as it seems to us, must take possession in good faith and for the purpose of constructing and operating such a railway as the grant contemplates. A colorable possession, taken solely for the purpose of keeping out other companies and unaccompanied by acts

[8] See City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. 157. Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324. See also Koch v. North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377 and note; People's Tract. Co. v. Atlantic City, 71 N. J. L. 134, 57 Atl. 972; Brooklyn City &c. R. Co. v. Coney Island &c. R. Co., 35 Barb. (N. Y.) 364; Western Union Tel Co. v. Electric &c. Co., 178 N. Y. 325, 70 N. E. 866; Electric City R. Co. v. Niagara Falls, 48 Misc. 91, 95 N. Y. S. 73; Henderson v. Ogden City R. Co., 7 Utah 199, 26 Pac. 286; Wood v. Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369 and note.

indicating an intention to furnish reasonable facilities for the accommodation of the public, ought not to be regarded as sufficient to vest a right under the general license. If, however, reasonable facilities are actually furnished, or preparations are in good faith really made for furnishing them, then the fact that one of the reasons which influenced the company is that of excluding other companies ought not to prevent the vesting of the granted right.[9]

§ 1473 (1096x). When grants may be made to other companies.—We very much doubt whether a general grant which would prevent the legislature or the municipal authorities from granting privileges to other companies would be valid in cases in which the right to use the highway is left entirely to the licensee. The legislature cannot bind itself not to legislate for the welfare of the public, and it would seem to follow that it cannot rightfully place itself in a position where it cannot make provision for the public necessities. If it cannot do this, then it cannot make a grant which leaves it entirely in the discretion of a private corporation to provide, or decline to provide, the facilities for travel upon the highways which are demanded by the public welfare. We think there is sufficient reason for affirming that the legislature must retain the power to provide for the necessities of the public, and that a general grant to occupy highways is only effective to prevent a grant to another company when something is done vesting the right granted and securing what the public requires. Until something is done vesting the granted privilege, it is within the legislative power to secure the welfare of the public by granting the necessary license to another company, although there may be a prior general grant.[10]

[9] Peoria &c. R. Co. v. Peoria Terminal &c. Co., 252 Ill. 73, 96 N. E. 689; Tulsa St. R. Co. v. Oklahoma Union Tract. Co., 27 Okla. 339, 113 Pac. 180; Hamilton &c. Tract. Co. v. Hamilton &c. Elec. Transit Co., 69 Ohio St. 402, 69 N. E. 991.

[10] See Capital City Light &c. Co. v. Tallahassee, 186 U. S. 401, 16 Sup. Ct. 705, 46 L. ed. 1219; New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 35 Sup. Ct. 72, 59 L. ed. 184, L. R. A. 1918E, 874.

§ 1474 (1096y). Effect of commencing work by company having prior grant.—While it is true, as we believe, that some act must be done vesting the inchoate right conferred by a general grant, still we do not regard it as essential that manual possession should be taken of all of the streets or roads embraced in the general grant or license. If the company having the prior right enters upon the work of constructing a system, and with reasonable diligence and in good faith does actually construct a considerable part of the system, it ought not to lose its rights unless it has failed to comply with a proper demand to complete the system, or has unreasonably delayed its completion.[11] Much must necessarily depend upon the terms of the particular grant, but, nevertheless, there are fundamental principles which cannot be excluded, and the chief of these is that the legislature cannot surrender or barter away any substantial part of the police power.[12]

§ 1475 (1096z). Conflicting claims.—Conflicting claims asserted by rival companies claiming under general grants must often be settled by applying the rule that the first to rightfully occupy the street has the better right.[13] This statement, however, cannot be regarded as more than a general expression of

[11] Newport News &c. Co. v. Jones, 105 Va. 503, 54 S. E. 314, 316, 6 L. R. A. (N. S.) 247 (quoting text). See also ante, § 1472, n9.

[12] It seems to us that the legislature can not yield the right, by a mere general grant not fully vested by actual or constructive occupancy, to declare, whenever the public welfare demands, that the company shall not lay tracks in streets covered by the grant; changes may take place which may render it hurtful to the public to permit the use of such streets and we think that in such cases the grant may be recalled, provided there has been no occupancy or use of the street under it.

[13] Text approved in Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 391, 392, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539 and note. City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. 157; Africa v. Board, 70 Fed. 729. See also Peoria &c. R. Co. v. Peoria Terminal &c. Co., 252 Ill. 73, 96 N. E. 689; Tulsa v. Oklahoma Union Tract. Co., 27 Okla. 339, 113 Pac. 180. But see Knoxville v. Africa, 77 Fed. 501; Homestead St. R. Co. v. Pittsburg &c. R. Co., 166 Pa. St. 162, 30 Atl. 950, 27 L. R. A. 383.

the rule, for so much depends upon the facts of each particular case that little more can be done than to state the rule in a very general way. It is true, however, that where there is a general grant, neither perfected nor vested, it becomes vested when a location and an appropriation is made,[14] and it must be true that a company having a general grant cannot be divested of its rights until it has had a reasonable opportunity for vesting them by actually entering upon the work of constructing its tracks.[15]

§ 1476 (1096aa). Grant must be accepted as an entirety.—It has been held, and we think it may be stated as a general rule, that the railway company must accept the grant as an entirety or reject it.[16] This general rule is applied with considerable

[14]In the case of Railway Co. v. Alling, 99 U. S. 463, 25 L. ed. 438, it was said: "When such location and appropriation were made, the title, which was previously imperfect, acquired precision and took effect as of the date of the grant. The settled doctrines of this court would seem to justify that conclusion." Railroad Co. v. Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599; Schulenberg v. Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551; Leavenworth &c. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Missouri &c. R. Co. v. Kansas Pac. R. Co., 97 U. S. 491, 24 L. ed. 1095; Waterbury v. Dry Dock &c. R. Co., 54 Barb. (N. Y.) 388; Christopher &c. R. Co. v. Central Cross-Town R. Co., 67 Barb. (N. Y.) 315; Titusville &c. R. Co. v. Warren &c. R. Co., 12 Phila. (Pa.) 642. See also Fayetteville St. Ry. v. Aberdeen &c. R. Co., 142 N. Car. 423, 55 S. E. 345; Grand Trunk W. R. Co. v. South Bend, 227 U. S. 554, 35 Sup. Ct. 303, 57 L. ed. 638, 44 L. R. A. (N. S.) 405.

[15]See West Jersey &c. Co. v. Camden &c. R. Co., 52 N. J. Eq. 452, 53 N. J. Eq. 163, 29 Atl. 333, 35 Atl. 49; Union Pass. R. Co. v. Continental R. Co., 11 Phila. (Pa.) 321; Omaha Horse R. Co. v. Cable &c. Co., 32 Fed. 727. See also and compare Nanticoke &c. St. R. Co. v. People's St. R. Co., 212 Pa. St. 395, 61 Atl. 997.

[16] Allegheny v. Millville, 159 Pa. St. 411, 28 Atl. 202. See also People's R. Co. v. Memphis R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 555, 556, 33 Sup. Ct. 303, 57 L. ed. 633, 44 L. R. A. (N. S.) 405; Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. ed. 912, L. R. A. 1918E, 882, 890, 891 (and when accepted and acted upon the grant becomes binding as an entirety according to its terms and not merely pro tanto or foot by foot as the work is

strictness. The company must conform to the requirements of the ordinance or statute in constructing its road, and a failure to obey the statute will not be excused, although the railway as constructed does not, in fact, injure or obstruct the street to any greater degree than it would have done if it had been constructed in strict accordance with the statute.[17] It is held that the road must be kept and maintained as the statute requires.[18] It must be constructed upon the line designated in the statute or ordinance.[19] But where a railway company is authorized to construct a road along a designated street, it may construct it across all cross streets, although the statute or ordinance may except such cross streets.[20] It has also been held that turn-outs cannot

done); State v. New York &c. R. Co., 81 Conn. 645, 71 Atl. 942; Tudor v. Chicago &c. R. Co., 154 Ill. 129, 39 N. E. 136; Cincinnati &c. Elec. St. R. Co. v. Stahle, 37 Ind. App. 539, 76 N. E. 561, 562; Chouquette v. So. Elec. R. Co., 152 Mo. 257, 53 S. W. 897; Bly v. Nashua St. R. Co., 67 N. H. 474, 32 Atl. 764, 68 Am. St. 681; Fort Worth &c. R. Co. v. Rosedale R. Co., 68 Tex. 163, 7 S. W. 381; Bristow v. Whitmore, 9 H. L. Cas. 391, ante, § 1425.

[17] Regina v. Toronto &c. R. Co., 24 Q. B. (U. C.) 454. See also Day v. Tacoma R. &c. Co., 80 Wash. 161, 141 Pac. 347.

[18] Attorney-General v. Toronto &c. R. Co., 14 Grant Ch. 673.

[19] Metropolitan &c. Co., In re, 111 N. Y. 588, 19 N. E. 645; Citizens' R. Co. v. Africa, 100 Tenn. 26, 42 S. W. 485, 489 (citing text). See also State v. Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506; Gardner v. Templeton St. R., 184 Mass. 294, 68 N. E. 340. The streets should be designated. State v. Lincoln St. R. Co., 80 Nebr. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336; Denver v. Mercantile Trust Co., 201 Fed. 790. It has, however, been held that a slight deflection from the designated line will not impair the rights of the company. Commonwealth v. Wilkes Barre R. Co. (Pa.), 38 Am. & Eng. R. Cas. 428n; Concord v. Concord Horse R., 65 N. H. 30, 18 Atl. 87.

[20] State v. Newport St. R. Co., 16 R. I. 533, 18 Atl. 161. See also Chicago and Western R. Co. v. Dunbar, 100 Ill. 110. It seems to us that the court, in the case last cited, construed the statute too strongly against the public. We think that where a right to locate a railway is given in general terms it does not deprive the municipal officers of the authority to determine what streets shall be used. We believe that the general words can not be construed to take away all power from the municipality, but that they must be deemed to confer a right to locate under the control of the local authorities. The decision was by a divided court, and it is difficult for us to resist the conviction that the minority views are correct.

be constructed unless authorized by the ordinance or statute.[21] Conduct committing the company to the described service may, constitute an acceptance of the grant as an entirety.[22]

§ 1477 (1096ab). Mandamus against municipal officers.—Where a street railway company is licensed to use a designated street, and it accepts the grant in the prescribed mode, it is the duty of the ministerial municipal officers, upon proper request, to take such steps as may be necessary to secure to the company the benefit of the privileges and franchises conferred upon it. In the event of the refusal of such an officer to perform his duty under the statute or ordinance, it has been held that the company will be entitled to a writ of mandate to coerce the performance of the duty. Thus, a surveyor whose duty it is to furnish lines and levels for the construction of a railway may be compelled to perform that duty by mandamus.[23]

§ 1478 (1096ac). Railway must be constructed within time specified.—The company must construct its road within the time designated, otherwise it will have no right to use the streets. The right conferred by the license does not outlast the time fixed by the licensor for the construction of the railway. If the company fails to construct its railway within the time limited, it generally loses its right and cannot use the streets without a new grant.[24] Where the condition of the

[21] Concord v. Concord Horse R., 65 N. H. 30, 18 Atl. 87.

[22] Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 521, 58 L. ed. 912, L. R. A. 1918E, 882; Grand Trunk &c. R. Co. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. ed. 633, 44 L. R. A. (N. S.) 405; City R. Co. v. Citizens' St. R. Co., 166 U. S. 559, 17 Sup. Ct. 653, 41 L. ed. 1114.

[23] State v. Cochrem, 25 La. Ann. 356. Compare Blocki v. People, 220 Ill. 444, 77 N. E. 172; People v. Wilcox, 196 N. Y. 212, 89 N. E. 459; Carolina &c. R. Co. v. Board of Supervisors Scott County, 109 Va. 34, 63 S. E. 412.

[24] Market St. R. Co. v. Central R. Co., 51 Cal. 583; Williamson v. Gordon Heights R. Co., 8 Del. Ch. 192, 40 Atl. 933; Chicago &c. R. Co. v. Story, 73 Ill. 541; Chicago v. Chicago &c. R. Co., 105 Ill. 73; Atchison Street R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800; Detroit v. Detroit City R. Co., 37 Mich. 558; Grand Rapids Street R. Co. v. West Side R. Co., 48 Mich. 433, 12 N. W. 643, 7 Am. & Eng. R. Cas. 95;

grant is that the company shall have notice that it is required to construct its railway under the grant, then notice is essential in order for the municipal corporation to withdraw the license or to defeat the right of the railway company to use the street. What the notice shall be must, of course, be determined from the terms of the grant.[25] Where an ordinance provides that a railway company shall build a railway upon designated streets within a limited time, the municipality may, it has been adjudged, grant the privilege to another upon the failure of the old company to construct its railway within the time limited by the ordinance.[26] But there are doubtless cases in which

Grey v. New York &c. Co., 56 N. J. Eq. 463, 40 Atl. 21; New York &c. R. Co. v. Railway Co., 50 Barb. (N. Y.) 285; Brooklyn &c. R. Co., Matter of, 72 N. Y. 245; Galveston C. R. Co. v. Galveston &c. R. Co., 63 Tex. 529. See also Plymouth v. Chestnut Hill &c. R. Co., 168 Pa. St. 181, 32 Atl. 19. But compare Wilmington City R. Co. v. Wilmington &c. Co., 8 Del. Ch. 468, 46 Atl. 12; Hornbrook v. Elm Grove, 40 W. Va. 548, 28 L. R. A. 416. See also Toledo &c. R. Co. v. Johnson, 49 Mich. 148, 13 N. W. 492; Oakland R. Co. v. Oakland &c. Co., 45 Cal. 365, 13 Am. Rep. 181. Some of the cases hold that the failure to construct the railway within the time limited does not operate to extinguish the franchise, but operates simply as a defeasance, leaving an option in the licensors. Hovelman v. Kansas City &c. R. Co., 79 Mo. 632; People v. President &c. of Manhattan Co., 9 Wend. (N. Y.) 351. It seems to us that the doctrine of Hovelman v. Kansas City &c. R. Co., 79 Mo. 632, is not sound. We think the true doctrine is that asserted in the other cases cited, and that, as said in Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800 and note, "Until the license is accepted and used no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires, the license lapses, and no revocation is needed to terminate the same." The only acceptance that can be effective to fasten the right of the grantee is such an acceptance as the grant prescribes, and where use is essential to create a complete right, use must be shown or the grant fails. But much depends upon the provisions of the particular grant as to whether the condition is a condition precedent or subsequent.

[25] In the case of Fort Worth &c. R. Co. v. Rosedale R. Co., 68 Tex. 163, 7 S. W. 381, it seems to have been assumed that the adoption of an ordinance was sufficient notice.

[26] Fort Worth &c. R. Co. v. Rosedale R. Co., 68 Tex. 163, 169, 7 S. W. 381. The municipal officers may, of course, extend the time for the construction of the railway. Mc-

this cannot be done without notice to the old company or proper proceedings to forfeit its rights, or at least giving it an opportunity to comply with the terms of the grant. And it has recently been held that the right to take property of a street railway company remaining in the street at the expiration of its franchise cannot be conferred by the municipality upon another company.[27]

§ 1479 (1096ad). Transfer of company's rights.—A street railway company acquires a right in the street it is licensed to occupy which, it has been held, may be sold or transferred.[28] It is the property of the company, and may be mortgaged.[29] A sale upon a decree of fore-

Neil v. Chicago R. Co., 61 Ill. 150. See also Omnibus R. Co. v. Baldwin, 57 Cal. 160, 1 Am. & Eng. R. Cas. 316. As to abandonment by non-user, see Henderson v. Passenger R. Co., 21 Fed. 358; People v. Broadway R. Co., 126 N. Y. 29, 45, 26 N. E. 961; Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Wright v. Milwaukee &c. Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. 74.

[27] Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. ed. 399. See also Detroit v. Detroit United R. Co., 172 Mich. 136, 137 N. W. 645; Gainesville Water Co. v. Gainesville, 103 Tex. 394, 128 S. W. 370.

[28] Knoxville v. Africa, 77 Fed. 501; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 26 L. R. A. 667. See also Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Owensboro v. Cumberland Tel. &c. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; People v. Central Union Tel. Co., 232 Ill. 260, 83 N. E. 829 (when the grant is to the company and its successors and assigns); Bardstown &c. R. Co. v. Metcalf, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829; Chlanda v. St. Louis Trans. Co., 213 Mo. 244, 112 S. W. 249; Cooper v. Utah Light &c. Co., 35 Utah 570, 152 Pac. 202; note in L. R. A. 1917D, 709. But compare People v. Commercial Tel. &c. Co., 277 Ill. 265, 115 N. E. 379, L. R. A. 1917D, 704 (not unless the grant is to it and its successors and assigns, or legislative authority is otherwise given); Clemmens El. &c. Co. v. Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820; Braslin v. Somerville &c. R. Co., 145 Mass. 64, 13 N. E. 65; State v. Bridgeton &c. Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837. Others may obtain control and all the property and rights by buying all the stock. Whiting v. Malden &c. R. Co., 202 Mass. 298, 88 N. E. 907, 132 Am. St. 493.

[29] Sixth Avenue R. Co. v. Kerr, 72 N. Y. 330; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536, and authorities cited in last preceding

closure will vest the franchise in the purchaser.[30] It would seem to follow, from the principle stated, that the purchaser, upon a foreclosure sale, whether the purchase be made by an individual,[31] or by a corporation, may operate and maintain the railway upon the same terms and conditions as those upon which the mortgagor held the franchise. But it is a general rule that a railroad company cannot voluntarily, and without legislative authority, sell or mortgage its franchise of being a corporation and operating and maintaining a railroad.[32] It is also the general rule that a sale of a part of a railway cannot

note. See also Farmers Loan &c. Co. v. Meridian Waterworks Co., 139 Fed. 661; State v. Topeka &c. Co., 61 Kans. 547, 60 Pac. 337; Russell v. Frankfort Suburban R. Co., 131 Ky. 862, 116 S. W. 289: note in L. R. A. 1917D, 111, 112. But compare People v. Commercial Tel. &c. Co., 277 Ill. 265, 15 N. E. 379, L. R. A. 1917D, 704; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

[30] In the case of New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244, it was held that: "Where there has been a sale of railroad property, under a mortgage authorized by law, covering its franchise, it is now settled that the franchises necessary to the use and enjoyment of the railroad pass to the purchaser." In another case it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchaser at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road." Memphis &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 619, 5 Sup. Ct. 299, 28 L. ed. 837. See also State v. Citizens' St. R. Co., 80 Nebr. 357, 114 N. W. 429; People v. Brooklyn &c. R. Co., 89 N. Y. 75; Brooklyn Central R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358, 360; Bardstown &c. R. Co. v. Metcalf, 4 Metc. (Ky.) 199, 81 Am. Dec. 541. But see, as to the franchise of being a corporation, ante, § 601.

[31] People v. Brooklyn &c. R. Co., 89 N. Y. 75. See also Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357. See also In re Long Acre Elec. &c. Co., 188 N. Y. 361, 80 N. E. 1101; Phoenix v. Gammon, 195 N. Y. 471, 88 N. E. 1066. But compare Abbott v. Johnstown &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572.

[32] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Oregon R. &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Fietsam v. Hay, 122 Ill. 293, 3 Am. St. 492; Rollins v. Clay, 33 Maine 132; Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Black v. Delaware &c. Co., 22 N. J. Eq. 130; Coe v. Columbus &c. R. Co., 10 Ohio St. 372; ante, §§ 79, 82, 83, 553.

be made upon execution, and this rule must obtain to a great extent in sales upon decrees of foreclosure, since the public are interested in the existence of the railway, and the franchise is essentially an indivisible right.[33] It is probably true that there may be cases where the railway is severable and parts may be sold, but such cases, if any such there are, must be deemed exceptional ones.[34]

§ 1480 (1096ae). Police power.—It may be said, generally, that the state, or its duly authorized municipality, may lawfully require a street railway company to do whatever is required for the health, safety and welfare of the community, for the authority to enact measures for this purpose never passes from the sovereign, no matter what grants it may make. All corporations take their rights and privileges subject to this general power which permanently resides in the state.[35] Under

[33] Covington Drawbridge Co. v. Shepard, 21 How. (U. S.) 112, 16 L. ed. 38; Gue v. Tide Water Canal Co., 24 How. (U. S.) 257, 16 L. ed. 635; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; East Alabama R. Co. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136; Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435 and note; Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506; Black v. Delaware &c. Co., 22 N. J. Eq. 130.

[34] A purchaser takes it subject to the conditions and burdens of the original grant. Potwin Place v. Topeka R. Co., 51 Kans. 609, 33 Pac. 309, 37 Am. St. 312; Grosse Point Twp. v. Detroit &c. R. Co., 130 Mich. 363, 90 N. W. 42; Louisville Trust Co. v. Cincinnati, 73 Fed. 716, 76 Fed. 296, 78 Fed. 307. See also Bridgeton v. Bridgeton &c. Tract. Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837. Compare Bonham v. Citizens' St. R. Co., 158 Ind. 106, 62 N. E. 996; Stafford v. Chippewa &c. R. Co., 110 Wis. 331, 85 N. W. 1036. There is not, perhaps, so much reason for applying the general rule so strictly to street railways.

[35] Ante, § 1464. See also Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418; People v. Detroit &c. R., 134 Mich. 682, 97 N. W. 36, 63 L. R. A. 746, 104 Am. St. 626 and note. In the case of Westbrook's Appeal, 57 Conn. 95, 16 Atl. 724, it was held that the enactment of a statute abolishing grade crossings was a valid exercise of the police power. It was said by the court, in the course of the opinion, that: "We might stop here, but we will add that the act in question is an exercise of the police power of the state. Its object is to change or remove certain conditions, lawful in themselves, but which have become

the police power it is competent for the state, or one of its duly authorized municipalities, to compel a street railway company to so manage and operate its railway as to prevent danger to life or property. Under the wide sweep of the general power are necessarily embraced many incidental and subsidiary powers. Much in the matter of detail and upon questions of expediency and necessity must be left to the governing power. Whether it is necessary or expedient to require new or additional precautions is intrinsically a legislative and not a judicial question. When a regulation is prescribed by the legislature itself the courts can do no more than ascertain whether or not any constitutional provision is violated, and if they find that no constitutional right has been invaded, the statute must be upheld. Where the regulation is prescribed by a municipal corporation the field of judicial duty is larger, for the courts must ascertain whether there is a constitutional statute authorizing the act of the municipality, whether the act is within the scope of the statute and is performed in the mode prescribed, and whether the regulation is a reasonable one. In determining whether the municipal by-law or resolution is reasonable, the courts do, it seems to us, exercise a power essentially legislative, for whether an act is or is not reasonable is a question, as a general rule, for the legislature, and it does not lose its inherent character by delegation to a political corporation. It is perhaps, difficult to vindicate the doctrine that courts may overthrow the by-laws or ordinances of governmental subdivisions upon the ground that they are unreasonable, since what is or is not reasonable is not a question to be determined by fixed rules, and local officers are, as a general rule, in a position quite as favorable for reaching a satisfactory conclusion as the judges. But the rule that the courts may overturn such ordinances and by-laws as they find to be unreasonable is too firmly settled to be shaken.[36]

a source of danger to life and property. The remedy consists in requiring those charged with the duty of maintaining highways to change the conditions, and hereafter discharge their duties in such a manner as to avoid danger." See also Ridge Ave. &c. R. Co. v. Philadelphia, 181 Pa. St. 592, 37 Atl. 910; State v. St. Paul City R. Co., 78 Minn. 331, 81 N. W. 200.

[36] See ante, § 1431; 1 Elliott Gen. Pr., § 436.

§ 1481 (1096af). **Municipal control.**—Under the police power, a municipal corporation may enact ordinances or by-laws prohibiting a street railway company from running its cars at such a rate of speed as to endanger the safety of persons rightfully using the streets. But under the rule that by-laws will be condemned if unreasonable the courts may prevent the enforcement of a by-law or ordinance that unreasonably restricts the rate of speed.[37] Courts should interfere with the judgment of the municipal officers only in clear cases, however, for some discretion is unquestionably committed to them, and as long as they act within the scope of their authority, and do not abuse their discretion, they are free from judicial control. We suppose it clear that a municipal corporation may, within reasonable limits, regulate the places of stopping cars so as to prevent the unnecessary hindrance of travel, and that it may also prevent the unnecessary obstruction of the streets. These rights of the municipality cannot, however, extend so far as to permit it to unnecessarily and unreasonably limit or restrict the operation of the railway, nor can they extend so far as to authorize any act that will destroy the franchise of the company.

§ 1482 (1096ag). **Illustrative cases.**—It has been held, under a municipal charter granting a city council power to "make, ordain and establish such by-laws, ordinances and regulations as shall appear to them requisite and necessary for the security, welfare and convenience of said city, and for preserving health, peace and good government within the limits of the same," that the council may lawfully enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its track,[38] and to remove snow thrown up by its

[37] See Evison v. Chicago &c. R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434. See also ante, § 1431; Burg v. Chicago &c. R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419. In Licznerski v. Wilmington City R. Co., 5 Penn. (Del.) 201, 62 Atl. 1057, an ordinance limiting the speed of railroad cars is held not to apply to street cars. See also Bonham v. Citizens' St. R. Co., 158 Ind. 106, 62 N. E. 996.

[38] City &c. R. Co. v. Savannah, 77 Ga. 731, 4 Am. St. 106; State v. Canal &c. R. Co., 50 La. Ann. 1189, 24 So. 265, 56 L. R. A. 287. The

snow-plows.[39] It has also been held, as elsewhere shown, that street railway companies take the privilege granted to them subject to the municipal authority to regulate the use of the streets as the necessities of the public may require, and that this authority extends so far as to vest in the municipality a right to change the track of the railway from one part of the street to another.[40] In accordance with the principle which

doctrine of the cases cited will be found, on examination, to be well supported by the decisions in analogous cases, for the power to protect life, health and property is very comprehensive. Railroad Co. v. Chenoa, 43 Ill. 209; Chicago v. Chicago Union Tract. Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666; Whitson v. Franklin, 34 Ind. 392; Gahagan v. Railroad Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724 and note; Knobloch v. Railway Co., 31 Minn. 402, 18 N. W. 106; Robertson v. Railroad Co., 84 Mo. 119; Merz v. Railway Co., 14 Mo. App. 459; Railroad Co. v. Jersey City, 47 N. J. L. 286. But see State v. New Orleans &c. R. Co., 49 La. Ann. 1571, 22 So. 839, 39 L. R. A. 618 and note; Fielders v. New Jersey St. R. Co., 68 N. J. 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. 552. It is held that an ordinance of a municipality regulating the speed of trains may control their movement in the yards of the company. Crowley v. Railroad Co., 65 Iowa 658, 20 N. W. 467; Green v. Canal Co., 38 Hun (N. Y.) 51. Contra State v. Jersey City, 29 N. J. L. 170.

[39] Broadway &c. R. Co. v. Mayer, 1 N. Y. S. 646. See also Bowen v. Detroit City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822; Chicago v. Chicago &c. Tract. Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666; McDonald v. Toledo &c. St. R. Co., 74 Fed. 104.

[40] West Philadelphia Passenger R. Co. v. Philadelphia, 10 Phila. (Pa.) 70; Macon St. R. Co. v. Macon, 112 Ga. 782, 38 S. E. 60, 61 (citing text); Snouffer v. Cedar Rapids &c. R. Co., 118 Iowa 287, 92 N. W. 79, 86 (citing text). "Private corporations," said the court, in the first case cited, "take their rights subject to the rights of individuals and communities; and the strong presumption of law is always against unconditional adverse privileges." It was also said: "To this must be added the general principle that, where a private corporation accepts the grant of a franchise upon a highway over which a municipality possesses a general power of regulation and control for public purposes, it accepts its special privileges upon the implied condition that it holds them subject to the reasonable and necessary exercise of the general power of the municipality. 'Until the legislature overrides the local authorities, their jurisdiction is not ousted' Philadelphia v. Lombard &c. R. Co., 3 Grant (Pa.) 403, 405." See also Detroit v. Fort Wayne &c. R. Co., 90 Mich. 646, 51 N. W. 688; New

we have heretofore stated, it has been adjudged that a municipal corporation may temporarily remove the tracks of a street railway company if necessary to enable the municipal officers to construct a culvert under one of the streets of the city.[41] In an Iowa case it is held that where the ordinance grants authority to lay down two tracks, the city cannot limit the company to one track, but it is intimated in the opinion that if the second track wrought an injury, the city might require its removal.[42] In another case the general question of the nature and extent of municipal control was elaborately discussed, and it was held that compelling a street railway company to number each of its cars and pay a designated license fee for each of them was a valid exercise of the police power vested in the municipality.[43] It has also been held that smoking in street

Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453, 25 Sup. Ct. 471, 49 L. ed. 831. But compare Des Moines City R. Co. v. Des Moines, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767.

41 North Pennsylvania Railroad v. Stone, 3 Phila. (Pa.) 421. See also Indiana R. Co. v. Calvert, 168 Ind. 321, 80 N. E. 961, 10 L. R. A. (N. S.) 780.

42 Burlington v. Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145. In that case it was said: "It is urged that the city, in the exercise of its police power, may forbid the laying of the double track. The question presented by this position is not in the case, for the reason that it is not shown in the pleadings that the proposed double track would operate to the inconvenience of the public or would work an injury to the city or any of the people. It is not claimed that the proposed improvement would be a nuisance, nor is it shown that the best interest of the city or the people require it to be forbidden. If, therefore, the city retains, in the exercise of the police power, the authority to forbid the construction of the double track, the facts present no case for the exercise of that power." The question suggested by the line of reasoning adopted by the court is delicate and difficult. Who shall determine what is required by the necessities of the public or the welfare of the community? If the question is a legislative one, then, clearly enough, the courts can not interfere, nor can they interfere if the power is a discretionary one. We have no doubt that the courts may prevent an abuse of power, but where there are facts invoking the exercise of discretion in deciding what is and what is not required by the public welfare, we should seriously doubt the right of the courts to control or direct the exercise of that power.

43 Frankford &c. Co. v. Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242. "But the grant," said the court,

cars may be prohibited;[44] that the number of passengers to be carried in each car may be limited,[45] that an employe may be required on each car in addition to the driver or motorman,[46] and that all cars shall have suitable fenders in front to prevent accident,[47] and shall be equipped with efficient air or electric

"of a privilege to carry passengers in cars over the streets does not necessarily involve exemption from liability to municipal regulation. It is not the bestowal of a right superior to the rights enjoyed by passenger carriers generally, whether such carriers be natural or artificial persons. The facilities for the use of the right may be greater, but the right itself can be neither more nor less than a natural person possesses. It is to be presumed that when the legislature creates a corporation, and authorizes it to carry on a specified business within the limits of a municipal corporation, the business is intended to be conducted under the restrictions, rules and regulations that govern the same business when transacted by others within the corporate limits." The court referred to the cases of Commissioners v. Northern Liberties Gas Co., 2 Jones 318, and Trenton Water Works Company's Cases, 6 Pa. Law J. 32, with approval, and to some extent denied the doctrine asserted in the case of Mayor v. Second St. R. Co., 32 N. Y. 261. See also Fort Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L. R. A. 238, 105 Am. St. 51; New Orleans v. New Orleans &c. R. Co., 40 La. Ann. 587, 4 So. 512; Newport v. South Covington &c. R. Co., 89 Ky. 29, 11 S. W. 954; Covington v. South Covington &c. R. Co., 147 Ky. 326, 144 S. W. 17; New York v. Manhattan R. Co., 192 N. Y. 90, 84 N. E. 745; Potter v. Calumet Elec. St. R. Co., 158 Fed. 521. But compare Cape May v. Cape May Transp. Co., 64 N. J. L. 80, 44 Atl. 948; Point Bridge Co. v. Pittsburgh R. Co., 240 Pa. St. 105, 87 Atl. 614.

[44] State v. Hiedenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. 388.

[45] St. Louis v. St. Louis &c. R. Co., 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82.

[46] State v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410 But see Brooklyn &c. R. Co. v. Brooklyn, 37 Hun (N. Y.) 413; Toronto v. Toronto &c. Co., 15 Ont. App. 30. It has also been held that the city may require the company to provide a seat for the motorman. Silva v. Newport, 150 Ky. 781, 150 S. W. 1024, Ann. Cas. 1914D, 613.

[47] State v. Cape May (N. J.), 36 Atl. 696, 698; Tecker v. Seattle &c. R. Co., 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842 and note, where the authorities are reviewed and other illustrative cases are cited. And that the company shall furnish a sufficient number of cars to prevent over-crowding, and heated to a certain reasonable temperature. Chicago v. Chicago City R. Co., 222 Ill. 560, 78 N. E. 890. See also State v. Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170; State v. Smith, 58 Minn. 35, 59 N. W. 1098, 25 L. R.

brakes.[48] Accordingly "contract obligations are not impaired by compelling a street railway company, at its own expense, to lower, or, at its option, remove, a tunnel constructed by it under the Chicago river, which, though not an obstruction to navigation when constructed, has since become such by reason of the increased size of the vessels plying on that river, where the municipal ordinance under which such tunnel was constructed contains no stipulation that the city will not exert any power it possesses to deepen the channel and improve navigation, and it was adopted while a state statute was in force which, as construed by the state courts, made it a condition of the construction of such a tunnel that navigation should not be unnecessarily interrupted," and compelling the company to so lower or remove the tunnel, under such circumstances, is not a taking of property without due process of law.[49] It has also been held in many cases that a city may regulate the kind of rails to be used,[50] and, where the contract permits, it may compel a street railway company to extend its lines.[51]

A. 759 and note. But see for ordinance held invalid as delegating authority and vesting arbitrary discretion. Elkhart v. Murray, 165 Ind. 304, 75 N. E. 593, 1 L. R. A. (N. S.) 940.

[48] People v. Detroit United R., 134 Mich. 682, 97 N. W. 36, 63 L. R. A. 746, 104 Am. St. 626 and note. And shall stop at certain points. Camden v. Public Service R. Co., 84 N. J. L. 305, 86 Atl. 447, Ann. Cas. 1914D, 1090. But compare Excelsior v. Minneapolis &c. R. Co., 108 Minn. 407, 120 N. W. 526, 122 N. W. 486, 17 Ann. Cas. 550.

[49] West Chicago St. R. Co. v. People, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. ed. 845. See also Chicago &c. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 948 (may require tracks to be lowered or elevated).

[50] State v. Alabama City &c. St. Ry. Co., 172 Ala. 125, 55 So. 176, Ann. Cas. 1913D, 696; Central R. &c. Co.'s Appeal, 67 Conn. 199, 35 Atl. 32; Louisville City R. Co. v. Louisville, 8 Bush (Ky.) 415; Gardner v. Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340; Pawcatuck Valley St. R. Co. v. Westerly, 22 R. I. 307, 47 Atl. 691; State v. Madison St. R. Co., 72 Wis. 612, 616, 40 N. W. 487, 1 L. R. A. 771.

[51] State v. St. Paul City R. Co., 117 Minn. 316, 135 N. W. 976, Ann. Cas. 1913D, 142; Minneapolis St. R. Co. v. Minneapolis, 189 Fed. 445. For additional illustrative cases, see People v. Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St.

§ 1483 (1096ah). Regulation of fare.—It has been held not only that the legislature has the power to reasonably regulate the rate of fare on street cars, but also that a city has no power to enter into any contract which would prevent the legislature from regulating the fare,[52] and that a municipality cannot contract away the right to compel or assess the company for street improvements, even though the assent of the city is required before a street can be used by the company, no matter whether such an assessment is an exercise of the taxing power or of the police power.[53] It has also been held that the requirement of the Texas statute of 1903 that street railway companies shall issue half-fare tickets to school children does not impair the obligation of any contract with the municipality, fixing the rates which such company might charge, entered into after the adoption of the Constitution of Texas in 1876, which subjects to the control of the legislature all privileges and franchises granted by it or created under its authority; and that any contract exemption from legislative regulation of rates, possessed by a street railway company chartered before the adoption of such constitution, "was lost by the sale of its property on foreclosure, and

626, 63 L. R. A. 746; Newport News &c. Co. v. Hampton Roads &c. Co., 102 Va. 795, 47 S. E. 839. But compare Elkhart v. Murray, 165 Ind. 304, 75 N. E. 593, 1 L. R. A. (N. S.) 940, and note, 112 Am. St. 228; Helena Light &c. Co. v. Helena, 47 Mont. 18, 130 Pac. 446; Townsend v. Circleville, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. (N. S.) 914 and note.

52 Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337. See also Chicago &c. R. Co. v. Railroad Commission, 38 Ind. App. 439, 78 N. E. 338; Milwaukee Elec. R. &c. Co. v. Railroad Com., 153 Wis. 592, 142 N. W. 491; Minneapolis v. Minneapolis Street R. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. ed. 259. And the same view is taken as to a change of rates, which may be made under the police or rate making power. Iowa R. &c. Co. v. Jones Auto Co., 182 Iowa 982, 164 N. W. 780; Pawhusha v. Pawhusha Oil &c. Co. (Okla.), 166 Pac. 1058; Salt Lake City v. Utah Light & Tract. Co., 52 Utah 210, 173 Pac. 556. See also Hite v. Cincinnati &c. R. Co., 284 Ill. 297, 119 N. E. 904; Puget Sound Tract. &c. Co. v. Reynolds, 244 U. S. 574, 37 Sup. Ct. 705, 61 L. ed. 1325; Benwood v. Public Service Com., 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261, and elaborate note, where the subject is considered at length and numerous authorities are reviewed.

53 Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

the acquisition of its franchise, under a municipal ordinance, together with that of another company, by a new corporation, incorporated since the adoption of such Constitution, although such ordinance provides that all the rights and privileges previously granted to the old corporations were conferred on the new one, including all the limitations, contracts and obligations."[54] But, as elsewhere shown, the well-settled general rule is that an ordinance granting the right to a street railway company to use the city streets upon authorized terms and conditions therein stated, when accepted by the company, constitutes a binding contract, and, upon this principle, it is correctly held that the city, when authorized by the legislature to make such a contract fixing an unalterable rate for a reasonable term of years, cannot thereafter lower the rate of fare authorized in such ordinance to be charged by the company as against the objection of the company, and that to permit it to do so would be to impair the obligation of the contract.[55] This rule was applied where ordinances had been passed and accepted for the consolidation of certain street railway lines and extensions, and the city afterwards undertook to reduce the rate of fare over a portion of the consolidated lines under the alleged authority of a right to regulate fares, which had been reserved by it in an ordinance adopted before consolidation, granting a renewal franchise to the corporation which then owned such portion of the lines.[56] And the right to regulate the fare, even if it is not or cannot be taken away from the legislature, does not include the power to compel the company to carry passengers without reward, or for such sum as

[54] San Antonio Tract. Co. v. Altgelt, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. ed. 491.

[55] Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592. See also Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. ed. 887; Minneapolis v. Minneapolis St. R. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. ed. 259, note in L. R. A. 1915C, 263, et seq., where many other authorities are cited and reviewed.

[56] Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102. But see as to when and how right to have rates unchanged may be lost, note in L. R. A. 1915C, 279-281.

would amount to a confiscation or taking of its property without compensation or due process of law.[57] But it has been held that a statute requiring street railway companies to carry pupils of the public schools, going to and from school, at rates not exceeding half the regular fare charged by the company for the transportation of other passengers between the same points, and leaving unchanged the previous law exempting a certain elevated railroad company, is constitutional and valid.[58]

§ 1484 (1096ai). Duty of company to repair.—It is no more than just that a street railway company which secures a right to use a public road or street should maintain the part so used in as good repair, at least, as it was at the time possession was taken by the company, except in cases where it is otherwise provided by the ordinance or resolution which grants the franchise.[59] It is, indeed, not easy to find any solid ground

[57] See Chicago &c. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Chicago &c. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed 970; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 464, 36 L. ed. 247; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757; Covington Bridge &c. Co. v. Kentucky, 154 U. S. 204, 213, 214, 14 Sup. Ct. 1087, 38 L. ed. 962; Detroit United Ry. Co. v. Detroit 248 U. S. 429, 39 Sup. Ct. 151; Attorney Gen. v. Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112; State v. Fremont &c. R. Co., 23 Nebr. 117, 36 N. W. 305. Compare also State v. Missouri &c. R. Co., 262 Mo. 507, 172 S. W. 35.

[58] Commonwealth v. Interstate &c. St. R. Co., 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973. The soundness of this decision is not entirely free from question. But see also Commonwealth v. Boston &c. St. R. Co., 212 Mass. 82, 98 N. E. 1075; State v. Chicago &c. R. Co., 118 Minn. 380, 137 N. W. 2, 41 L. R. A. (N. S.) 524, Ann. Cas. 1913E. 494; State v. Sutton, 83 N. J. L. 48, 84 Atl. 1057; San Antonio Tract Co. v. Altgelt (Tex. Civ. App.), 81 S. W. 106, aff'd in 200 U. S. 304, 26 Sup. Ct. 261, 50 L. ed. 492. Compare, however, as holding or tending to the contrary. In re Gardner, 84 Kans. 264, 113 Pac. 1054, 33 L. R. A. (N. S.) 959; Wilson v. United Tract. Co., 72 App. Div. 233, 76 N. Y. S. 203.

[59] Emporia v. Emporia R. &c. Co., 92 Kans. 232, 139 Pac. 1185; Memphis &c. R. Co. v. State, 87 Tenn. 746, 11 S. W. 946; North Hudson &c. Co. v. Hoboken, 41 N. J. L. 71. See generally to the effect that the company must lay its tracks in a proper manner and keep the same in repair. Worater v. Forty-second St. R. Co., 50 N. Y. 203; Western Pav. &c.

upon which it can be held that the street or road can be subjected to a use which, as matter of common knowledge, every one knows greatly increases the wear and tear, and, consequently, the expense of maintaining the way, and yet individual property owners be compelled to bear the increased burden. The benefit which accrues from the use is enjoyed by the company and not the property owners, and it seems, upon the salutary equitable doctrine that "he who derives the advantage ought to sustain the burden," the company should bear the burden of keeping the way in as good condition, at least, as it was when it entered upon the enjoyment of its franchise. The company is unquestionably bound to use ordinary care and diligence to keep the space it occupies in a reasonably safe condition for ordinary travel in so far as its own use and acts are concerned, and there is reason for extending the doctrine, for the company secures a special privilege in a highway, and in consideration of the grant of such a privilege it ought to be held bound to keep the space it occupies in a reasonably convenient condition for travel. The principle upon which we base our conclusion is one that has been long established and often enforced, for it is the principle which is asserted in cases of the crossing or occupancy of highways by ordinary steam railroads.[60] It is competent for the municipal officers to make it the duty of the street railway company licensed to occupy the public streets to maintain the streets in good repair by inserting a provision to that effect in the ordinance or resolution conferring the franchise. Where there is a provision in

Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 883, 10 L. R. A. 770, 25 Am. St. 462 and note; Sioux City St. R. Co. v. Sioux City, 78 Iowa 742, 39 N. W. 498, 43 N. W. 224; Groves v. Louisville R. Co., 109 Ky. 76, 58 S. W. 508, 52 L. R. A. 448; Keitel v. St. Louis Cable &c. Co., 28 Mo. App. 657; Rutherford v. Hudson River Tract. Co., 73 N. J. L. 227, 63 Atl. 84; Houston City R. Co. v. Delesdermier, 84 Tex. 82, 19 S. W. 366. As to change of tracks to conform to grade, see Little Rock v. Citizens' St. R. Co., 56 Ark. 28, 19 S. W. 17; Ashland St. R. Co. v. Ashland, 78 Wis. 271, 47 N. W. 619; Karst v. St. Paul &c. Co., 22 Minn. 118.

[60] Louisville &c. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; 2 Elliott Roads & Streets (3rd ed.), § 1056; People v. Chicago &c. Co., 67 Ill. 118; Eyler v. Allegheny County, 49 Md. 257, 33 Am. Rep. 249; post, § 1573, et seq.

the ordinance or resolution imposing the duty of repairing upon the company, the duty is held to be a continuing one, and it is not discharged by a simple restoration of the streets to the condition they were in at the time possession was taken.[61] This doctrine is clearly right. We are strongly inclined to the opinion that the duty exists as a continuous one, although there may be no express provision in the grant creating it, since the implication is, where no provision is made to the contrary, that a company which acquires a right to use a highway for its special benefit will keep it in reasonable repair. The case falls within the rule that it is the act done for its own benefit, and to advance its own interests, that makes repairs necessary, and, therefore, it is equitable that it should bear the burden of maintaining the highway in repair.[62] It has also been held that an ordinance requiring street railway companies to keep in good repair all that part of the street occupied by their tracks includes additional tracks thereafter laid,[63] and that a city, as a condition of a grant to use electric motors and erect and place poles and wires in the street, may require the company to pave the parts of the street between and adjoining the tracks.[64]

§ 1485 (1096aj). Liability of company for failure to repair.— If the street railway company refuses to repair, mandamus will

[61] Burritt v. New Haven, 42 Conn. 174; State v. Minneapolis &c. R. Co., 39 Minn. 219, 39 N. W. 153; State v. St. Paul &c. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313. See also Dist. of Columbia v. Washington &c. R. Co., 4 Mackey (D. C.) 214; State v. Jacksonville &c. R. Co., 29 Fla. 590, 10 So. 590; Cambria Iron Co. v. Union Trust Co., 154 Ind. 292, 55 N. E. 745; Conway v. Rochester, 157 N. Y. 335, 1 N. E. 395; McKeesport v. Pittsburgh &c. R. Co., 213 Pa. St. 542, 62 Atl. 1075; Reading v. United Tract. Co., 202 Pa. St. 571, 52 Atl. 106.

[62] People v. Chicago & Alton &c. R. Co., 67 Ill. 118; Paducah &c. Co. v. Commonwealth, 80 Ky. 147; Leopard v. Chesapeake & Ohio Canal, 1 Gill (Md.) 222; Northern Central R. Co. v. Baltimore, 46 Md. 425; Trenton Water Power Co., In re, 20 N. J. L. 659; King v. Lindsey, 14 East 318; King v. Kerrison, 3 Maule & S. 526; Queen v. Isle of Ely, 15 Q. B. 827. See also Johnston v. Providence &c. Co., 10 R. I. 365; People v. Dutchess &c., 58 N. Y. 152.

[63] Montgomery St. R. Co. v. Smith, 146 Ala. 316, 39 So. 757.

[64] Trenton v. Trenton St. R. Co., 72 N. J. L. 317, 63 Atl. 1.

lic to compel it to perform that duty.[65] So, if the company fails or refuses to perform its duty by making the necessary repairs, the municipal authorities may make them and collect the expense from the company.[66] If the railroad company negligently fails to perform its duty, and injury is thereby caused to travelers, the municipal corporation may recover from the company the damages it has been compelled to pay to the injured person.[67] The undertaking of a street railway company to maintain the streets in repair does not relieve the municipal corporation from the general duty imposed upon it

[65] State v. St. Paul &c. R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Halifax v. City R. Co., 1 Russ. Eq. (Nova Scotia) 319; State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590, 597. It has been so held where the defective condition was due to faulty paving by a paving company pursuant to contract with the street railway company, notwithstanding the city engineer allowed it. City of Emporia v. Emporia R. &c. Co., 92 Kans. 232, 139 Pac. 1185. See also Detroit v. Ft. Wayne &c. R. Co., 90 Mich. 646, 51 N. W. 688; Oshkosh v. Milwaukee &c. R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. 175. But compare Benton Harbor v. St. Joseph &c. St. R. Co., 102 Mich. 386, 60 N. W. 758, 26 L. R. A. 245, 47 Am. St. 553.

[66] New Haven v. Fair Haven &c. Co., 38 Conn. 422, 9 Am. Rep. 399. Chicago v. Pittsburgh &c. R. Co., 146 Ill. App. 403; Minneapolis &c. R. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609, 610; Columbus v. Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651, 32 Am. & Eng. R. Cases, 292; Philadelphia &c. Co. v. Philadelphia, 11 Phila. (Pa.) 358. See also Washington &c. R. Co. v. Dist. of Columbia, 108 U. S. 522, 2 Sup. Ct. 868, 27 L. ed. 807; Lincoln St. R. Co. v. Lincoln, 61 Nebr. 109, 84 N. W. 802; Ashland St. R. Co. v. Ashland, 78 Wis. 271, 47 N. W. 619. The municipal authorities must proceed in the ordinary way, and they have no right to make extravagant or unreasonable repairs. New York City v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839. See generally Gulf City &c. Co. v. Galveston, 69 Tex. 660, 7 S. W. 520, 32 Am. & Eng. R. Cas. 300; State v. Ingram, 5 Ired. (N. Car.) 441; Rutland v. Dayton, 60 Ill. 58.

[67] Atlanta St. R. Co. v. Wilker, 93 Ga. 462, 21 S. E. 48; Oakland R. Co. v. Fielding, 48 Pa. St. 320, 2 Elliott Road & Streets (3rd ed.), §1056. As to whether a passenger can recover because of failure of the company to perform such duty, see Fielders v. North Jersey R. Co., 68 N. J. L. 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. 552, reversing 67 N. J. L. 76, 50 Atl. 533. Both sides of the question are forcibly presented and the authorities are reviewed by both courts and in the principal and dissenting opinions in the New Jersey case above cited.

by law; but where a street railway company is the primary wrong-doer, the municipal corporation may compel the company to reimburse it for all damages and costs that it has been compelled to pay.[68] It has also been held that a street railway company which negligently fails to keep the part occupied by it in repair may be indicted for a nuisance, and it was further held that, upon failure to abate the nuisance, the obstructions created by it might be removed.[69] In a comparatively recent case the supreme court of Wisconsin held that a railway company might be compelled by mandatory injunction to restore a public street, which it had torn up, to its former condition of usefulness.[70]

§ 1486 (1096ak). When company is bound to improve.—It is competent for the municipal corporation which grants a street railway company the privilege of using its streets to require the company, as a condition of the consent or grant which the municipality is authorized to give or withhold, to pave or otherwise improve the streets.[71] It has been held with much reason that where the ordinance under which the company claims provides that it shall keep the streets in perpetual repair, it may be compelled to repave or

[68] People v. Brooklyn, 65 N. Y. 349; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Brooklyn v. Brooklyn City R. Co., 57 Barb. (N. Y.) 497.

[69] Memphis, Prospect Park and Belt R. Co. v. State, 87 Tenn. 746, 11 S. W. 946.

[70] Oshkosh v. Milwaukee &c. R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. 175. It was held that a county may sue to compel a restoration of a highway, in Greenup County v. Maysville &c. R. Co., 88 Ky. 659, 11 S. W. 774.

[71] McKeesport v. Pittsburgh &c. R. Co., 23 Pa. St. 542, 62 Atl. 1075. See also Fair Haven &c. R. Co. v. New Haven, 75 Conn. 442, 53 Atl. 960; Anna v. Northern, 261 Ill. 538, 104 N. E. 171; Southern Bitulithic Co. v. Algiers R. &c. Co., 130 La. Ann. 830, 58 So. 588; St. Louis v. Missouri R. Co., 13 Mo. App. 524; Trenton v. Trenton St. R. Co., 72 N. J. L. 317, 63 Atl. 1; Kettle v. Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874. A company can not successfully attack the validity of an ordinance requiring it to pave its roadbed when such ordinance was in force where its franchise or right to use the street was granted and accepted. Boisot v. Amarillo St. R. Co., 244 Fed. 839.

otherwise improve the streets.[72] Where there is a general undertaking to keep the street in repair it seems to us that the duty should be regarded as a continuing one, and that the company must make repairs to correspond with the changed and improved condition of the street. It has been expressed so decided.[73] and decisions in analogous cases give support to this conclusion.[74] If it be true that the company is not bound

[72] District of Columbia v. Washington &c. R. Co., 1 Mackey (D. C.) 361, 379; Conway v. Rochester, 157 N. Y. 33, 51 N. E. 395; Pittsburgh &c. R. Co. v. Birmingham, 51 Pa. St. 41; Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. St. 442, 22 Atl. 695; Williamsport v. Williamsport Pass. R. Co., 206 Pa. St. 65, 55 Atl. 836. In Trenton v. Trenton St. R. Co., 72 N. J. L. 317, 63 Atl. 1, it is held that under a statute providing that any street railway company may use electric motors as the propelling power of its cars instead of horses, provided it shall first obtain the consent of the municipal authorities, the city might make it a condition that the company should pave between and adjacent to the tracks, and that a contract whereby the city gave the street railroad company the right to use electric motors on condition that it should pave certain parts of streets was not ultra vires. And it was also held that a statute providing for the taxation of all the property and franchises of corporations using or occupying public streets, and that the franchise tax provided by that act shall be in lieu of all other franchise taxes, did not relieve the company of its duty to pave certain parts of streets imposed as a condition to its right to use electric motors, as above stated.

[73] New York v. Harlem Bridge &c. R. Co., 186 N. Y. 304, 78 N. E. 1072; City of Reading v. United Trac. Co., 202 Pa. St. 571, 52 Atl. 106, 107, Danville v. Danville R. &c. Co., 114 Va. 382, 76 S. E. 913, 43 L. R. A. (N. S.) 463; State v. Milwaukee Elec. R. Co., 151 Wis. 520, 139 N. W. 396, Ann. Cas. 1914B, 122, 127 (quoting and approving 2 Elliott Roads & Streets (3rd ed.), §§ 987, 988). See also State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Columbus St. R. Co. v. Columbus, 43 Ind. App. 265, 86 N. E. 83; Fair Haven &c. R. Co. v. New Haven, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. ed. 237; Wheeling Tract. Co. v. Board, 248 Fed. 205; Cleveland R. Co. v. Cleveland, 97 Ohio St. 122, 119 N. E. 202.

[74] The principle was asserted by the supreme court of Pennsylvania in the case of Phoenixville v. Phoenixville Iron Co., 45 Pa. St. 135, 137, where it was said: "It is a fair presumption the legislature never intended to give away public rights or to impose burdens upon any local community without compensation. This is a continuing obligation upon the company to keep up the bridge." See also Pennsylvania R. Co. v. Duquesne,

under the continuing duty to make repairs to correspond with the improved or changed condition of the street, then the practical result would be that it would be entirely released from its duty, since it is quite clear that repairs of any other character would be without value or service to the public. Nor is it unreasonable or unjust to hold that the company accepted its franchise under the implied condition that changes and improvements required by progress and growth would be made, for, certainly, neither the municipality nor the company can be presumed to have intended that no progress should be made nor any changes be required. There is more reason for holding that the company is bound to improve, by repaving or otherwise, the space used by it, than there is for holding that the duty to repair extends no further than to require the company to keep the space in the condition it was at the ime it took possession. Our conclusion is that where there is a clearly expressed requirement binding the company to repair, the duty is a continuing one, and the repairs must be so made as to correspond with the changed condition of the street wrought by the improvement made under the direction of the municipality. In affirming that it is the general duty of the street railway company to repair by restoring the street to the condition in which it was when possession was taken, or by restoring it to the condition in which it is subsequently placed by the municipal government, we are, as we believe, fully within the authorities. There are, indeed, strongly reasoned cases which, pressing the doctrine further, hold that it is the duty of the company to improve as well as to repair.

§ 1487 (1096a1). Company not generally bound to improve.—As much as can be safely affirmed in the present state of the decided cases is that the private corporation is bound to repair, but is not, perhaps, bound to improve.[75] It is bound to restore,

46 Pa. St. 223, 224; Oconto v. Chicago &c. R. Co., 44 Wis. 231, 238; Mayor v. Harlem Bridge &c. Co., 186 N. Y. 304, 78 N. E. 1072.

[75] State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590, 595 (citing text); Western Pav. &c. Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, and note, 25 Am. St. 462, 466 (quoting text); Indianapolis &c. R. Co. v. Newcastle, 43 Ind. App.

but is not, according to what seems to be the weight of authority, bound to change, where no such duty is imposed by statute or in granting the consent or right to use the streets. We do not, however, think that the duty to repair is to be so narrowed as to require no more than that the private corporation shall restore the street to the condition in which it was when possession was taken; we think the duty extends much beyond that limit. The duty to repair requires that the street shall be so kept as to correspond with its general condition at the time the repairs are required. To illustrate our meaning: If a street paved with wooden blocks is subsequently paved with stone, it would be the duty of the company, when it became necessary to repair after the improvement by paving with stone, to make repairs to correspond with the changed condition of the street.[76] It would not, as we interpret the rule sustained by the weight of authority, be compelled to make the new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them to correspond to the new pavement. Any other rule would make the duty to repair practically valueless, and not only this, but it would tend to check the growth and development of towns and cities without just reason or excuse.

§ 1488 (1096am). Conflict of authority.—The question whether a street railway company can be required to improve a street where that duty is not imposed upon it by the terms of its grant is one upon which the decisions are in conflict. It is maintained by some of the courts, with much force and plausibility, that the franchise of a street railway company is property, and should be assessed for the expense of the improvement.[77]

467, 87 N. E. 1067; State v. Vincennes Tract. Co., 187 Ind. 291, 117 N. E. 961. Compare Lightner v. Peoria, 150 Ill. 80, 37 N. E. 69; Harris v. Macomb, 213 Ill. 47, 72 N. E. 762.

[76] See Conway v. Rochester, 157 N. Y. 33, 51 N. E. 395; Philadelphia v. Thirteenth St. &c. Co., 169 Pa. St. 269, 33 Atl. 126; Mayor v. Harlem Bridge &c. Co., 186 N. Y. 304, 78 N. E. 1072; ante, § 1486, n. 73.

[77] Chicago v. Baer, 41 Ill. 306; Chicago City R. Co. v. Chicago, 90 Ill. 573, 32 Am. Rep. 54; Lake St. El. R. Co. v. Chicago, 183 Ill. 75, 55 N. E. 721, 47 L. R. A. 624; Columbus v. Columbus St. R. Co.,

The franchise of the company is unquestionably property, and the improvement benefits that property to a greater extent in most cases than it does the property of abutting lot-owners, and, as the foundation of the right to assess private property for the cost of a public improvement is the theory that the benefit is the equivalent of the assessment, there is no little strength in the position that the railway company is liable to assessment; but this doctrine is denied by able courts.[78] The question must, perhaps, be regarded as settled by the decision of the Supreme Court of the United States in the case referred to in the note so far as it affects cases in which the ordinance simply binds the company to repair, for to that extent the question is a federal one. But the question of construction remains an open one, and that can only be determined from the

45 Ohio St. 98, 12 N. E. 651, 32 Am. & Eng. R. Cas. 292. See also Fair Haven &c. R. Co. v. New Haven, 75 Conn. 442, 53 Atl. 960; Pittsburgh &c. R. Co. v. Taber, 168 Ind. 419, 77 N. E. 741; Erie R. Co. v. Paterson, 72 N. J. L. 83, 59 Atl. 1031. But see Ware v. Willis, 45 Ala. 120; Lightner v. Peoria, 150 Ill. 80, 37 N. E. 69; West Chicago &c. R. Co. v. Chicago, 178 Ill. 339, 53 N. E. 112; Harris v. Macomb, 213 Ill. 47, 72 N. E. 762; McChesney v. Chicago, 213 Ill. 592, 73 N. E. 368. In other cases a somewhat similar doctrine is laid down, but the decisions turn upon the language of the grant. Fort Wayne &c. St. R. Co. v. Detroit, 34 Mich. 78; Fort Wayne &c. St. R. Co. v. Detroit, 39 Mich. 543; and see ante, § 950, et seq., where the somewhat different question as to assessment of the right of way or track along with other property under various statutory provisions, is considered. As to that question see also Des Moines City Ry. Co. v. Des Moines, 183 Iowa, 1261, 159 N. W. 450, L. R. A. 1918D, 839, and Seattle v. Seattle Elec. Co., 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486, and note.

[78] Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594; Baltimore v. Scharf, 54 Md. 499; State v. Corrigan Consol. R. Co., 85 Mo. 263, 55 Am. Rep. 361; Philadelphia v. Empire Passenger R. Co., 7 Phila. (Pa.) 321; Galveston v. Galveston City R. Co., 46 Tex. 435; Galveston City R. Co. v. Nolan, 53 Tex. 139. See also Western Pav. &c. Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770 and note, 25 Am. St. 462; Oskaloosa St. R. Co. v. Oskaloosa, 99 Iowa 496, 68 N. W. 808; Ft. Dodge Elec. &c. Co. v. Ft. Dodge, 115 Iowa 568, 89 N. W. 7; Shreveport v. Shreveport Belt &c. Co., 104 La. Ann. 260, 29 So. 129; Springfield v. Springfield St. R. Co., 182 Mass. 41, 64 N. E. 577; Dean v. Paterson, 67 N. J. L. 199, 50 Atl. 620; Philadelphia v. Philadelphia Pass. R. Co., 177 Pa. St. 379, 35 Atl. 720.

language of the ordinance or resolution involved in the particular case, for various provisions are made in such municipal enactments to which diverse constructions have been given.[79]

§ 1489 (1096an). Duty to improve or repair—Conclusion.—We think that it is safe to affirm that the assumption should be, where there is nothing evidencing the contrary, that the local authorities did not intend to relieve the private corporation from the duty of repairing, for in the absence of a provision relieving it from that duty the law would imply that it exists.[80] It is not to be forgotten that in cases where the expense of improving a street must be borne by private property owners, neither the legislature nor the municipal corporation can entirely disregard the rights of such owners. It is impossible to successfully deny that in many instances the use of a street by a railway company lessens the special benefits which accrue to abutting property, whereas, in almost every instance, the street railway company profits from the improved condition of the street. But it is probably true that, under the rule as now declared by the majority of the cases, as much as can be safely said is, that the railway company is under a general and continuous duty to repair, but is not bound to

[79] Pittsburgh &c. R. Co. v. Pittsburgh, 80 Pa. St. 72; Philadelphia &c. Co. v. Philadelphia, 11 Phila. (Pa.) 358; McMahon v. Second Avenue R. Co., 75 N. Y. 231; Robbins v. Omnibus R. Co., 32 Cal. 472. See also Philadelphia v. Thirteenth St. &c. R. Co., 169 Pa. St. 269, 33 Atl. 126. But compare Philadelphia v. Hestonville &c. R. Co., 177 Pa. St. 371, 35 Atl. 718; Baltimore v. Scharf, 54 Md. 499; Dean v. Paterson, 67 N. J. L. 199, 50 Atl. 620. And see McKennie v. Charlottesville &c. R. Co., 110 Va. 70, 65 S. E. 503.

[80] This is in harmony with the general principle that a corporation which uses a highway for its special benefit must restore it to its former condition and maintain it in reasonable repair. Roberts v. Chicago &c. R. Co., 35 Wis. 679; People v. Chicago & Alton R. Co., 67 Ill. 118; Gear v. Chicago &c. R. Co., 43 Iowa 83; Eyler v. County Comrs., 49 Md. 257, 33 Am. Rep. 249; Cooke v. Boston &c. R. Co., 133 Mass. 185; People v. New York Central R. Co., 74 N. Y. 302; Little Miami &c. Co. v. Commissioners, 31 Ohio St. 338. The duty is continuous and an action to enforce is not barred by the statute of limitations. Hatch v. Syracuse &c. Co., 50 Hun 64, 4 N. Y. S. 509; Little Miami &c. Co. v. Commissioners, 31 Ohio St. 338.

improve. The contract, however, is usually controlling, and by it the rights and duties of the parties are to be measured and determined.[81]

§ 1490 (1096ao). Limitation of rights of company.—Under the rule to which we have often referred, a street railway company takes under its charter or license only such rights as are expressly conferred or are clearly implied, and it therefore acquires only a right to use the road or street for the purpose of moving its cars or transporting passengers, or the like. It does not acquire any right, under a general grant, to use a highway for the storage of its cars, or other similar purposes.[82] As we have seen, street railway companies are allowed to use highways upon the ground that they furnish means of travel, and thus promote the public welfare and convenience. To permit them to use the streets or roads for any other purpose would be an invasion of the public right as well as an infringement of the private rights of abutting owners.[83] It is the duty of a street railway company to so maintain and operate its railway as not to unnecessarily impede travel or obstruct the highway. It has no right to use more of the highway than is reasonably necessary to enable it to conduct its legitimate

[81] But where the legislature has reserved the power to impose further conditions, it may require the company to pave beyond the rails of its track, although the original ordinance required the company to pave only between the rails. Sioux City St. R. Co. v. Sioux City, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. ed. 898; Sioux City St. R. Co. v. Sioux City, 78 Iowa 367, 39 N. W. 498, 43 N. W. 224; Lincoln St. R. Co. v. Lincoln, 61 Nebr. 109, 84 N. W. 802; Wood v. Binghamton, 56 N. Y. S. 105. See also Fair Haven &c. R. Co. v. New Haven, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. ed. 237, aff'g 77 Conn. 67, 60 Atl. 651.

[82] See ante, § 1425.

[83] It has also been said that a city "can not so multiply street railway tracks in a particular street as to interfere with the rights of the public in the street." Grand Rapids St. R. Co. v. West Side St. R. Co., 48 Mich. 433, 12 N. W. 643; and to the same effect see Canal &c. St. R. Co. v. Crescent City R. Co., 41 La. Ann. 561, 6 So. 849; Dooly Block v. Salt Lake &c. Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610; Sherlock v. Kansas City &c. R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. 551. But compare Pittsburgh R. Co. v. Borough of Carrick, 259 Pa. St. 333, 103 Atl. 106.

business, nor has it any right to unnecessarily interfere with the easement of access of the adjoining lot-owners.[84] In short, a railway company ordinarily acquires such rights, and such rights only, as are necessary to enable it to enjoy in a reasonable mode the franchise granted to it.

§ 1491 (1096ap). Illustrative cases.—The general doctrine stated in the last preceding section is illustrated by a case in which it was held that the company was liable for so negligently removing snow from its track as to make the street unsafe.[85] In another case the question as to the duty of a street railway company was considered at some length, and it was held, in substance, that it must exercise its privileges with a due regard to the rights of the public to travel the highway.[86] In a Maryland case it was held that a street railway company has no right to throw masses of snow into a gutter and thus so

[84] Stephenson v. Atchison &c. R. Co., 88 Kans. 794, 129 Pac. 1188; Prime v. Twenty-Third St. R. Co., 1 Abbott New Cases (N. Y.) 63; Hussner v. Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. 679. See also Robinson v. Helena Light &c. Co., 38 Mont. 222, 99 Pac. 837; Southern Tract. Co. v. Feass (Tex. Civ. App.), 199 S. W. 856.

[85] Wallace v. Detroit City R. Co., 58 Mich. 231, 24 N. W. 870. It was said by the court that: "As it was decided in Bowen's Case (Bowen v. Detroit City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822), we think that any disposition of the snow must be made with due reference to the rights of travel upon the highway." See also Dixon v. Brooklyn City &c. R. Co., 100 N. Y. 170, 3 N. E. 65; West Chicago St. R. Co. v. O'Connor, 85 Ill. App. 278; Smith v. Nashua St. Ry. Co., 69 N. H. 504, 44 Atl. 133; Gerrard v. La Crosse City R. Co., 113 Wis. 258, 89 N. W. 125, 57 L. R. A. 465.

[86] Bowen v. Detroit City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822. "Although the legislature," said the court, "by implication granted the right to the defendant to deposit the snow on the street, the company notwithstanding was bound to exercise the right conferred with the rights of the community in the use of the street, and it was also bound to use the highest degree of care to prevent injury to persons and property of those affected by its acts." The rule, as the court states it, is perhaps rather more stringent than the doctrine of analogous cases warrants, for, as it seems to us, if a street railway company uses ordinary care and diligence to prevent injury to travelers and property it will not be liable.

obstruct the flow of water as to cast it upon private property.[87] It was, however, declared in the case referred it, that the company was not bound to haul the snow away in any event, although it was bound to exercise ordinary care. We think the doctrine was too broadly stated when it was affirmed that the company was not bound to remove the snow, for, as we believe, the company was bound to do whatever ordinary care and diligence made necessary in order to enable the public to use the street in a reasonable manner. We do not believe that a street railway company can clear away its track and bank up the snow so as to make it dangerous to use the street, or so as to prevent travelers from leaving the track with safety in order to make way, as it is their duty to do, for the passage of the cars. A street railway company which accepts a grant or license impliedly agrees that it will use due care not to unnecessarily impede travel or to make the use of the street hazardous.[88] The burden which it assumes in conjunction with the benefit which it obtains is a continuing one, and it must bear it, although to do what due care and diligence requires may sometimes entail considerable expense. We know of no principle which will permit a railway company licensed to use the public roads or streets to clear away its tracks and do no more, although in doing this it may make the use of the street dangerous. If the work of clearing its track necessarily obstructs passage, then the company must do all that ordinary care requires to remove the obstruction and prevent injury to per-

[87] Short v. Baltimore Passenger R. Co., 50 Md. 73, 33 Am. Rep. 298. In speaking of the duty of the company the court said: "It was obliged to exercise ordinary care and prudence, not only in removing the snow from the track, but also in throwing it on the street." This, as we think, may be accepted as an accurate statement of the general rule, but, as we have endeavored to show in the text, the court unduly restricted the operation of the principle it laid down as the ruling one. As the question presents itself to our minds, it seems clear that the company was bound to do whatever ordinary care required, and if ordinary care required the removal of the snow, then it was the duty of the company to remove it.

[88] See Grover v. Louisville R. Co., 109 Ky. 76, 58 S. W. 508, 52 L. R. A. 448 and note; Cline v. Crescent City R. Co., 43 La. Ann. 327, 9 So. 122, 126, 26 Am. St. 187.

sons or property. Where the track is cleared for its own convenience it must do what is reasonably necessary to make the part of the street not occupied by its tracks reasonably safe, for it can not for its own accommodation obstruct it so as to endanger travelers. The privileges secured by the company are not so far reaching or so exclusive as to exempt them from using due care; on the contrary, the privileges are granted upon the implied condition that they shall be used with due regard to the rights of the public in the highway.[89]

§ 1492 (1096aq). Rights of company superior to those of travelers.—The grant of a right to use the streets of a city gives the company rights in some respects superior to those of persons riding or driving along the street.[90]

[89] What has been said in the text is a just deduction from the adjudged cases. In People v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480, it is held that a corporation, aside from the privilege of transporting passengers, possesses only private rights, and it is quite clear that the right to transport passenger does not carry the right to encumber or obstruct the street. After a full use of the street for the movement of cars, "a further use becomes an obstruction, and it is the duty on the part of the person causing the obstruction to remove it." People v. Cunningham, 1 Denio (N. Y.) 524, 43 Am. Dec. 709; Prime v. Twenty-third St. R. Co., 1 Abbott's N. C. (N. Y.) 63, 71. In the case last mentioned, it was said: "The use of no more of the street is granted than is necessary for the operation of the railway. After the snow has been cleared from the track, its remaining on the street on the side has nothing to do with it, and does not in any way affect the operation of the railway, using that term in whatever way it may be used. The deposit of the snow on the side has the same relation to the corporation that a deposit elsewhere would have, and no other. The use of the side has no other relation to the full existence of the franchise than the stables for the horses and the houses for the cars." It was also said: "The convenience and inexpensiveness of using the street at the side of the track for a permanent place for snow do not of themselves create any necessity that this use of the street is a part of the grant." See also Ogsden v. Aberdeen &c. Co., L. R. 1 H. L. 111; Cape May &c. Co. v. Cape May, 60 N. J. L. 224, 34 Atl. 397, 35 L. R. A. 609 (as to compelling removal and necessity for notice). And see authorities cited in first note of this section, and in last preceding note.

[90] Moore v. Kansas City &c. R. Co., 126 Mo. 265, 29 S. W. 9, 11 (citing text); Brown v. Wilmington City R. Co., 1 Pennewill (Del.)

A street railway company must necessarily possess greater rights than those of the ordinary traveler, for, as is very evident, the cars of the company cannot give and take the road but must move upon the track. It is, therefore, the duty of those traveling in the ordinary mode to leave the track when necessary in order that the movement of the cars may be unimpeded. It is held almost without dissent that, although the rights of the company and of travelers may be, in a sense, equal or reciprocal, to the cars of the company must be yielded the right of passage, and that horsemen and vehicles must usually leave the track when cars approach.[91] The rights of the company are not exclusive for travelers have a right to go upon the track or right of way in the street when and where it is not occupied by a car and use it as they use other parts of the street. In this sense their rights may, perhaps, be said to be equal, but not in the sense that a traveler may unnecessarily go or remain upon the tracks so as to interfere with the running of the cars. At street intersections and crossings their rights are said to be equal.[92]

332, 40 Atl. 936. See also Jersey City &c. R. Co. v. Jersey City &c. R. Co., 20 N. J. Eq. 61; West Chicago St. R. Co. v. Levy, 82 Ill. App. 202; Government St. R. Co. v. Hanlon, 53 Ala. 70, 81; De Lon v. Kokomo &c. St. R. Co., 22 Ind. App. 377, 53 N. E. 847; Flenelling v. Lewiston &c. R. Co., 89 Maine 585, 36 Atl. 1056.

[91] Chicago &c. Co. v. Bert, 69 Ill. 388; Indianapolis Tract. &c. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143; Daniels v. Bay City Tract. &c. Co., 143 Mich. 493, 107 N. W. 94; Hicks v. Railroad Co., 124 Mo. 115, 27 S. W. 542, 544, 25 L. R. A. 508 and note; Wilbrand v. Eighth Ave. R. Co., 3 Bosw. (N. Y.) 314; Hegan v. Eighth Ave. R. Co., 15 N. Y. 380; Whitaker v. Eighth Ave. R. Co., 51 N. Y. 295; Adolph v. Central Park R. Co., 65 N. Y. 554; O'Neil v. Dry Dock &c. Co., 129 N. Y. 125, 29 N. E. 84, 26 Am. St. 512 (holding, however, that rights are equal at crossing); Ehrisman v. Railroad Co., 150 Pa. St. 180, 24 Atl. 596, 17 L. R. A. 448 See also Cincinnati St. R. Co. v. Whitcomb, 66 Fed. 915; Hot Springs St. R. Co. v. Johnson, 64 Ark. 420, 42 S. W. 833; Bailey v. Market St. Cable R. Co., 110 Cal. 320, 42 Pac. 914; Orange &c. R. Co. v. Ward, 47 N. J. L. 560, 4 Atl. 331.

[92] Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; Omaha St. R. Co. v. Cameron, 43 Nebr. 297, 61 N. W. 606; Earle v. Consolidated Tract. Co., 64 N. J. L. 573, 46 Atl. 613; McClain v. Brookyn City R. Co., 116 N. Y. 459, 22 N. E. 1062; O'Neil v. Dry Dock &c. R. Co., 129 N. Y.

§ 1493 (1096ar). **Liability of persons who injure the tracks.** —The right vested in a street railway company is of such a nature as to make it wrongful for any one to so negligently use that part of the street occupied by its tracks as to unnecessarily injure them. An extraordinary use of that part of the street upon which the tracks are laid may subject the person who so uses it, and who fails to exercise ordinary care to protect the tracks from injury, to an action. Thus, where a person engaged in moving a house negligently injured the track of a street railway, it was held that he must respond in damages,[93] and in another case the owner of a house was enjoined from moving it across the company's track in such a manner as to injure its property and interrupt traffic for many hours.[94]

125, 29 N. E. 84, 26 Am. St. 512; Nashville &c. R. Co. v. Norman, 108 Tenn. 324, 67 S. W. 479. See also Ashley v. Kanawha &c. Tract. Co., 60 W. Va. 306, 55 S. E. 1016. And, in a general sense, the company even at other places has only a concurrent or reciprocal right with other travelers to use the street. Bremer v. St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. (N. S.) 887 and note where many cases are cited.

[93] Toronto &c. Co. v. Dollery, 12 Ontario Appeal, 679. In this case it was held that an owner who employed an independent contractor to move the house was liable, and that the case fell within the rule respondeat superior. The case is an instructive one, and cites Peachey v. Rowland, 13 C. B. 182; Overton v. Freeman, 11 C. B. 868; Ellis v. Sheffield Gas Co., 2 E. & B. 769; Hole v. Sittingbourne R. Co., 6 H. & N. 488; Hughes v. Percival, L. R. 8 H. L. 443; Angus v. Dalton, L. R. 6 H. L. 740; Tarry v. Ashton, L. R. 1 Q. B. D. 318; Day v. Green, 4 Cush. (Mass.) 437. The case last named was one against a person for moving a house, and the court held, Shaw, C. J., delivering the opinion, that there was no common law right to move a house along public streets, but that it might be done under a license from a municipal corporation, provided reasonable care was used to prevent the obstruction of the streets.

[94] Williams v. Citizens' R. Co., 130 Ind. 71, 75, 29 N. E. 408, 410 (citing text), 15 L. R. A. 64, 30 Am. St. 201. See also Ft. Madison St. R. Co. v. Hughes, 137 Iowa 122, 114 N. W. 10; Kibbie Tel Co. v. Landphere, 151 Mich. 309, 115 N. W. 244, 16 L. R. A. (N. S.) 689; Millville Tract. Co. v. Goodwin, 53 N. J. Eq. 448, 32 Atl. 263. Eureka v. Wilson, 15 Utah 53, 48 Pac. 41, 44 (citing text and holding valid a municipal ordinance prohibiting the moving of houses along the streets without permission). Compare Dulaney v. United Rys. &c. Co., 104 Md. 423, 65 Atl. 45.

§ 1494 (1096as). Liability of traveler for injuring cars.—It is the duty of persons using a road or street occupied by a street railway to use ordinary care and diligence to avoid injuring the cars or other property of the company. It has accordingly been held that one who carelessly drives against a car moving upon the track of a street railway is liable for damages which proximately result from his wrongful act.[95]

§ 1495 (1096at). Rights of travelers—Rival companies.—Subject to the superior right of passage, the public may freely use the street or road occupied by the tracks of a street railway company. In using the street for the purpose of travel in the ordinary mode, travelers are in no sense trespassers, no matter what the motive power employed in drawing the cars may be. The public retains its right to make the ordinary use of the street or road, and its grantee or licensee takes the privileges granted upon the implied condition that this right of the public shall not be unnecessarily impaired or lessened. This is the general rule as declared by all of the decided cases.[96] But in a case which was strongly contested and very fully considered, it was held that a street railway company was not bound to permit the use of the space covered by its tracks by a rival omnibus line, although it was bound to permit it to be used by ordinary travelers.[97] We suppose that the rule declared in the

[95] Chicago &c. R. Co. v. Rend, 6 Bradwell (Ill. App.) 243.

[96] Bennett v. Railroad Co., 102 U. S. 577, 26 L. ed. 235; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155; Kansas Pacific R. Co. v. Pointer, 9 Kans. 620; Rascher v. East Detroit &c. R. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. 447; Frick v. St. Louis &c. R. Co., 75 Mo. 595; Adolph v. Central Park &c. R. Co., 65 N. Y. 554; Smedis v. Brooklyn &c. R. Co., 88 N. Y. 13; Campbell v. Boyd, 88 N. Car. 129, 43 Am. Rep. 740; Kay v. Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Davis v. Chicago &c. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; note to Thatcher v. Central Traction Co., 45 Am. St. 649; and additional cases cited in opinion in Bremer v. St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. (N. S.) 887, 892, 893.

[97] Citizens' Coach Co. v. Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542. Beasley, C. J., said: "I have no idea that by having thus laid the track such company acquired the exclusive right to use the space so occupied, or any part

case referred to can only apply where the competing line uses the street longitudinally, for we can conceive no reason why it can be held to apply to crossings. The doctrine is not one to be extended, although it is probably true that in the particular instance a just rule was laid down and correctly applied. We suppose that a railroad track is property, but we suppose, also, that if the tracks are laid in a road or street the owners of them must submit to the use of the street in the ordinary modes of travel, although the effect may be to injure their property by wear and tear. It is probably true that a rival company cannot continuously use the property, but we do not believe that it follows from this that a competing omnibus or stage line may not use the same street and occasionally drive upon the track in order to enable other vehicles to pass. It is only when the rival stage or omnibus lines make a continuous use of the space occupied by the track that its owners can be justly deemed wrong-doers. We should hesitate to assent to a rule which would enable a street railway company to practically drive a competing omnibus line from the street, although we incline to the opinion that it might prevent the competing line from continuously using the space occupied by its track. The firmly settled rule is that a street railway company takes its franchise subject to the right of the public to use the street in the ordinary mode, and there is fair reason, at least, for holding that any one, whether the owners of omnibuses or not, may use the street, provided no special or continuous use is intentionally made of the space occupied by the tracks of the railway company.

of such space. That space still remained part of the public street, open, in its entire area, to the use in the ordinary way of every citizen. Such citizens, under such conditions, could use as a part of the street, either transversely or longitudinally, the rails so laid. I would refer only so far to the authorities as to say, that, with almost entire unanimity, they maintain this right in the public as against such chartered rights as the one now in question." Other cases maintain the right of a street railway company to exclude rivals. Brooklyn Central &c. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Cottam v. Guest, 1 Am. & Eng. R. Cas. 474n. See also Toledo Consol. St. R. Co. v. Toledo Elec. St. R. Co., 50 Ohio St. 603, 36 N. E. 312.

§ 1496. (1096au). Right of one company to use another's track.—Although the tracks of a street railway company may be used by the general public for ordinary travel with vehicles, in common with the rest of the street, without compensation,[98] yet a rival company cannot, without authority and without paying compensation, run its own cars upon and along such tracks.[99] Under its reserved power to amend or repeal, however, the legislature, or, when empowered to do so, the municipality, may authorize one company to make a joint use of the tracks of another.[1] So, it has been held that one company may acquire the right to use the tracks of another by the exercise of the power of eminent domain.[2] But compensation

[98] See Pacific R. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. 201; ante, § 923. This is subject, however, to the company's superior right of passage.

[99] It may be enjoined from so doing. Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Central &c. R. Co. v. Fort Clark &c. R. Co., 81 Ill. 523; Louisville &c. R. Co. v. Central &c. R. Co., 87 Ky. 223, 8 S. W. 329, 36 Am. & Eng. R. Cas. 463; Brooklyn &c. R. Co. v. Brooklyn City R. Co., 33 Barb. (N. Y.) 420; Cottam v. Guest, L. R. 6 Q. B. Div. 70, 1 Am. & Eng. R. Cas. 474, note. See also Mercantile Trust &c. Co. v. Collins Park R. Co., 101 Fed. 347.

[1] Canal &c. St. R. Co. v. Crescent &c. R. Co., 41 La. Ann. 561, 6 So. 849; 40 Am. & Eng. R. Cas. 329; North Baltimore &c. R. Co. v. Baltimore, 75 Md. 247, 23 Atl. 470; Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290; South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485; New Bedford &c. R. Co. v. Achusnet St. R. Co., 143 Mass. 200, 9 N. E. 536; Union Depot Co. v. Southern R. Co., 105 Mo. 562, 16 S. W. 920; Sixth Ave. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; Kinsman &c. R. Co. v. Broadway &c. R. Co., 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327; Toledo &c. R. Co. v. Toledo &c. R. Co., 50 Ohio St. 603, 36 N. E. 312, 1 Am. & Eng. R. Cas. (N. S.) 230 (upheld as an exercise of the police power). See also State v. King, 104 La. Ann. 735, 29 So. 359. This matter now left largely to Public Utility or Railroad Commissions in some jurisdictions, and as nothing but an exercise of the police power is involved in some cases, compensation is not always required. But even where the statute gives a right to make connections it has been held that this is subject to the supervision and control of the municipality whose consent may be required. Monroe v. Detroit R. Co., 143 Mich. 315, 106 N. W. 704.

[2] Metropolitan &c. R. Co. v. Chicago &c. R. Co., 87 Ill. 317; Canal &c. R. Co. v. Orleans &c. R. Co., 44 La. Ann. 54, 10 So. 389, 50 Am. & Eng. R. Cas. 369; Pennsylvania R. Co. v. Baltimore &c. R. Co.,

must be made to the company whose tracks are so used or condemned.[3] The entire matter, however, including the procedure and method of ascertaining the compensation, is largely regulated by express statutory provisions in most of the states.[4] And, as elsewhere shown, traffic arrangements are frequently authorized and made by the companies.

60 Md. 263; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Toledo &c. R. Co. v. Toledo &c. R. Co., 50 Ohio St. 603, 36 N. E. 312, 1 Am. & Eng. R. Cas. (N. S.) 230; Covington R. Co. v. Covington &c. R. Co., 19 Am. L. Reg. (N. S.) 765. See also Mercantile Trust &c. Co. v. Collins Park &c. R. Co., 101 Fed. 347.

[3] Pacific R. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. 201; Mercantile Trust &c. Co. v. Collins Park &c. R. Co., 101 Fed. 347; Louisville &c. R. Co. v. Central &c. R. Co., 87 Ky. 223, 8 S. W. 329; Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290; Jersey City &c. R. Co. v. Jersey City &c. R. Co., 20 N. J. Eq. 61; Second &c. St. R. Co. v. Green &c. R. Co., 3 Phila. (Pa.) 430; and authorities cited in preceding notes. In some cases, however, it has been held that this may be compelled under the police power. See Missouri case cited in note 1 of § 1496.

[4] See Ingersoll v. Nassau &c. R. Co., 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236; Toledo Consolidated St. R. Co. v. Toledo &c. St. R. Co., 12 Ohio C. C. 367; People's R. Co. v. Grand Ave. R. Co., 149 Mo. 245, 50 S. W. 829.

CHAPTER XLVI.

INTERURBAN RAILROADS.

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1518. Duty after traveler's peril is discovered.
1519. Carriers—Rights, duties and liabilities.
1520. Power to make traffic arrangements — Connections with other roads.
1521. Action for death caused by negligence of employe — Statute applied to electric railroads.
1522. Employes and injuries to them—Employer's liability acts.
1523. Miscellaneous.

§ 1500 (1096ba). Definition.—A definition of interurban railroads has already been given,[1] but it seems advisable, in this connection, to call attention to definitions given or suggested by others. The subject is a comparatively new one, and few attempts have been made, either by text writers or by the courts, to define interurban railroads. Judge Baldwin says: "Interurban railroads are those connecting distant communities, which are laid mainly on highways, and as to so much of

[1] Ante, § 12.

as lie within each of these communities are built upon its streets and operated so as to promote local convenience and make these streets more serviceable to the public."[2] The Iowa statute provides that "any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town or village, or any railway operated by electric or other power than steam, extending from one city, town or village, to another city, town or village, shall be known as an interurban railway." The definition is said by the Supreme Court of Iowa to accord with the common understanding. "Both agree that an interurban line is one extending from within the limits of one city or town to and within the limits of another city or town."[3] No better definition, perhaps, has been suggested.[4]

§ 1501 (1096bb). **Nature and characteristics.**—Interurban railroads seem to be of a somewhat mixed or hybrid character. They partake, to some extent, of the nature both of street railways and of commercial railroads. In some instances the track is not only laid in city streets but also in country highways throughout all or a part of the course, but in most instances, especially in case of the newer roads, such companies have their own right of way through the country, outside of the cities and towns, and do not use the country highways. The motive power usually, if not always, consists of electricity, and

[2] Baldwin Am. Railroad Law, 9.

[3] Cedar Rapids &c. R. Co. v. Cummins, 125 Iowa 430, 101 N. W. 176, 177, 178. See also Hartzell v. Alton &c. Tract. Co., 183 Ill. App. 641, aff'd in 263 Ill. 205, 104 N. E. 1080.

[4] The term has no exact legal or technical meaning, and it is such a new one that it has as yet been given only the general meaning indicated by the word itself. Railroads differing considerably from one another in their features may all be called interurban railroads in a broad sense, and some suburban railroad companies, and companies operating a road and cars by steam, but running only from within one town to another, or others, a comparatively short distance away, have called themselves interurban railroad or railway companies. At present, however, the term is ordinarily understood, we think, as meaning an electric traction road or railway from within one city or town to another or others.

such companies are common carriers of passengers, and, perhaps, in some instances, also of freight. Some companies carry only passengers, or passengers and their baggage, but many also carry express matter and light freight. The tendency, indeed, is growing to carry freight of many kinds and even to run some cars, not only separately but together as a train, for freight alone. Most of such companies also run limited or through cars as well as local cars. All this makes it difficult to determine, in some instances, whether such a company is within a statute relating to railroads or a statute relating to street railways, and whether a rule as to commercial railroads applies or a rule governing street railways. Interurban railroads are doubtless the result or outgrowth of the development of steet railways and the application of electricity as a motive power.[5] In cities and municipalities generally the rails

[5] In Montgomery Amusement Co. v. Montgomery Traction Co., 139 Fed. 350, 357, it is said: "Street railways superseded stage coaches, omnibus lines, and, in large measure, hacks, in carrying passengers to and from points in cities and towns to suburban places. They went originally only to points reached by public highways. The public convenience and safety alike demanded that the grade of such highways should not be altered to meet the needs of a new method of conveyance, which used these highways jointly with travelers by other modes. They did not need to go upon private property. The law did not contemplate that they should. Besides, the value of private property adjacent to these highways practically forbade its acquisition, if the law had permitted it, for use as a right of way. Being thus limited in their sphere of operation and powers, the term 'street railway,' in legal and popular acceptation, at first included only surface roads built upon streets and public highways for the carriage of passengers in and about cities and towns and adjacent suburban places. Under the influence of changed conditions of population and social life, these surface roads on the streets and highways began to serve the wants of the people in places not in any city or town, but in the vicinity thereof, and sometimes reached out to places not upon any public highway. The legislature of this state, recognizing the usefulness of street railways, and the changed conditions which had grown up, conferred upon them larger discretion as to their termini, and gave them in some instances the power to condemn private property for rights of way to reach their termini. So, in this state, at least, the meaning of the phrase 'street railway' gradually broadened until it included not only surface roads for passsengers

of the tracks are usually laid in the streets at grade, and stops are made to take on and let off passengers and thus accommodate local traffic in much the same manner as in the case of ordinary street railways. In these respects there is comparatively little, if any, difference between the interurban railroad and the ordinary street railway. But in some other respects, the interurban railroad is much more like the ordinary commercial railroad. As already stated, interurban railroads frequently have their own rights of way in the country, often carry freight of some kinds at least, and may, and do sometimes, operate substantially as a through railroad from one city to another, miles away.[6] Indeed, the day seems not far distant when one may go, by such roads, almost across the continent, and the better and faster cars are devoted more and more to through travel from one large city to another rather than to the accommodation of local traffic between or in the smaller places. It seems to us, therefore, that the prevailing tendency to treat them almost altogether as street railways is questionable, and that they constitute a class by themselves.

§ 1502 (1096bc). **Mixed nature—Illustrative cases.** — The mixed or peculiar character of interurban railroads is shown in some of the decisions. In one case, although an interurban electric railroad was classed as a street railway by the statute, it was held that while it was subject to the same regulations and had

on streets and highways, but also what are now known as 'trolley lines,' which reach out from cities to the adjoining country, and frequently run off the public roads—a policy the public authorities now encourage—in order to reach points in the vicinity of cities and towns, though outside of their boundaries, and off the public highways, wherever passenger traffic encourages street railway service." See also Kinsey v. Union Tract. Co., 169 Ind. 563, 81 N. E. 922.

[6] In Malott v. Collinsville &c. R. Co., 108 Fed. 313, 318, it is said: "These electrical roads, in the speed of their trains, in the distances traveled, and in their capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. . . . Nor does their incidental function as street railways, in the towns or cities traversed, lift them out of the railroad statutes." See also Hartzell v. Alton &c. Tract. Co., 263 Ill. 205, 104 N. E. 1080; Chicago &c. R. Co. v. Hunt, 39 Ind. App. 358, 79 N. E. 927, 928.

the powers of a street railway, so far as applicable, and while the law as to negligence in standing on the platform of a moving street car was applicable to it within the city, the law of negligence in so doing outside of the city limits was the same as in the case of steam or commercial railroad cars. The court, therefore concluded that where a rule of the company prohibited passengers from standing on the platform and was properly posted, or the passenger, being duly requested, refused to enter the car, in which there were vacant seats, the passenger remained on the platform at his peril, and there could be no recovery of damages for his death caused by falling off the platform even though the car was derailed.[7] It is certainly somewhat anomalous that rights, duties, and liabilities should change and a different rule become applicable on crossing a line at the city limits; but the decision seems to be supported in reason and has been approved by more than one writer,[8] and, upon the somewhat analogous question as to the duties of travelers at crossings, it is held that the rules applicable to crossings of commercial railroads apply in the country,[9] while in the city a different rule obtains in many, if not most, jurisdictions as to street railways and interurban railroads.[10] In

[7] Cincinnati &c. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637. In the course of the opinion the court said: "It seems reasonably clear that, while operating the cars of an interurban railroad within a municipality, the regulations and powers of a street railroad company are applicable; but when it comes to running cars of such railroads in the open country, upon a track substantially the same as the track of a steam railroad, and at a high rate of speed, it would seem that the same rules as to negligence and contributory negligence should prevail as are applicable to steam railroads, and that a passenger standing upon the platform of an interurban car in the open country should be held to the same rules as if he were standing on the platform of a steam car. The danger is the same in either case, and where there is no difference in danger there should be no difference in the care required, nor in the rights and liabilities flowing from the neglect to observe the proper care." See also Snow v. Indianapolis & E. R. Co., 57 Ind. App. 189, 93 N. E. 1089; State ex rel. Greffet v. Williams, 227 Mo. 32, 127 S. W. 52.

[8] It is approved by the annotator in 67 L. R. A. 637.

[9] McNab v. United Railways &c. Co., 94 Md. 719, 51 Atl. 421.

[10] See post, § 1516; also Robins v. Springfield St. R. Co., 165 Mass. 30,

another case, in which, however, the question was as to the right to assess the railroad or railway for taxation, under a statute, it was said that it was "not conceivable" that the legislature meant to provide "that an interurban line is not an interurban line save only from city or town limit to city or town limit," but did mean to recognize a difference in the matter of regulation; and in the course of the opinion it is said: "As we read the statute it means that as to those portions of its line being within city or town limits a corporaton operating a railway shall, in respect of the operation of its line, be held to the rights and obligations of a street railway only. The character of the lines as an interurban railway is not changed, but it is to be 'subject to the laws governing street railways.' The statute simply recognizes the necessary existence of differences in the matter of regulation between urban and suburban districts; and this by general law, or, in the case of the former, by municipal ordinance."[11]

§ 1503 (1096bd). Statutory classification.—In some of the states interurban railroads are expressly classified by statute as street railways rather than as commercial railroads, especially so far as they operate in cities.[12] But they must necessarily have powers to obtain rights of way and operate outside the city limits that street railways do not ordinarily have and that cannot well be given by the municipality. Nor can municipal

42 N. E. 334; Fairbanks v. Bangor &c. R. Co., 95 Maine, 78, 49 Atl. 421.

[11] Cedar Rapids &c. R. Co. v. Cummins, 125 Iowa 430, 101 N. W. 176.

[12] See Mordhurst v. Ft. Wayne &c. Tract. Co., 163 Ind. 268, 71 N. E. 642; Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 635, 636, 72 N. E. 145; Cedar Rapids &c. Ry. Co. v. Cummins, 125 Iowa 430, 101 N. W. 176; Cincinnati &c. St. R. Co. v. Cincinnati &c., 12 Ohio Circ. Dec. 113; Cleveland &c. R. Co. v. Urbana &c. R. Co., 26 Ohio Cir. Ct. 180; Cincinnati &c. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637. In Waterloo &c. Transit Co. v. Board, 131 Iowa 237, 108 N. W. 316, a company owned street railway systems in two cities, connected by an interurban line, and it was held that the entire system should be taxed as an interurban line. See, as to Kansas statutes, not generally including street railways in using the term "railroads," State v. Cain, 69 Kans. 186, 76 Pac. 443.

ordinances and regulations ordinarily apply to them outside the jurisdiction of the municipality. It would be better, it seems to us, to cover the subject, as fully as possible by a statute relating particularly to interurban railroads as a class by themselves and in some states this has been attempted, in some measure at least, but even where this is true it has been found almost impossible to cover the subject completely, and questions still arise as to whether some statute or some rule of law applicable to commercial railroads or some statute or rule of law applicable to street railways does or does not govern in the absence of a statutory provision upon the subject specifically applying to interurban railroads.[13]

§ 1504 (1096be). Whether an additional burden.—We have elsewhere shown that ordinary commercial railroads usually constitute an additional burden and that street railways usually do not. As interurban railroads partake somewhat of the nature of both commercial railroads and street railways the question as to whether interurban railroads are an additional burden is more difficult and there is sharp conflict among the decisions. It seems to us that, while electric railways are not necessarily additional burdens in a city street,[14] where they serve the local

[13] In some states interurban railroads are included among those over which the railroad commissioners have jurisdiction. Under an Indiana statute they are expressly excluded, except as to one matter. See Chicago &c. Ry. Co. v. Hunt (Ind. App.), 79 N. E. 927, 928. In Kansas it is held that the statute, by giving the commissioners supervision over steam railroads, impliedly excludes electric railroads. Kansas City &c. R. Co. v. Board of R. Comrs., 73 Kans. 168, 84 Pac. 755. See also O'Malley v. Board of Co. Comrs. of Riley County, 86 Kans. 752, 121 Pac. 1108, Ann. Cas. 1913C, 576. In Kentucky an interurban railway is not a street railway within the meaning of the constitution, since its operation is not confined to the streets of any town or city. It belongs simply to its own class—that of an interurban road, as determined by its articles of incorporation. Bentler v. Cincinnati &c. R. Co., 180 Ky. 497, 203 S. W. 199, L. R. A. 1918E, 315. And in Spokane &c. R. Co. v. United States, 210 Fed. 243, L. R. A. 1917A, 558, an interurban electric railway is held within the Federal safety appliance act applicable to railroads and not within the exemption as to street railways or cars used upon street railways.

[14] See ante, § 1452. Even where it is ordinarily held to be an additional

public, the better doctrine is that an interurban electric railroad may be, and usually is, an additional burden upon a country road,[15] and that, in some instances at least, if not in all, it may constitute additional burden upon a street.[16] The urban railway has developed into the interurban railway, and is even now developing into the interstate railway. The small car carrying only local passengers has become almost, if not quite, as large as the ordinary railway coach in size, "and has become a part perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway," and often carrying express matter and freight. "The purely city purpose which the urban railway subserved has developed into, or been supplanted by, an entirely different

burden the laying of a second track in a street for local street railway purposes by an interurban railway company, under a street railway franchise authorizing a double track has been held not to be an additional burden. Brickles v. Milwaukee &c. Co., 134 Wis. 358, 114 N. W. 810, 14 L. R. A. (N. S.) 644.

[15] Pennsylvania R. Co. v. Montgomery &c. R. Co., 167 Pa. St. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. 659; Fidelity &c. Co. v. Philadelphia &c. Co., 6 Pa. Dist. 737; Thompson v. Citizens' Tract. Co., 181 Pa. St. 131, 37 Atl. 205; Schaaf v. Cleveland &c. R. Co., 66 Ohio St. 215, 64 N. E. 145. See also Harvey v. Aurora &c. R. Co., 174 Ill. 295, 51 N. E. 163; Goddard v. Chicago &c. R. Co., 104 Ill. App. 533, and authorities cited in following note.

[16] Wilder v. Aurora &c. Tract. Co., 216 Ill. 493, 75 N. E. 194; Aurora v. Elgin &c. Tract. Co., 227 Ill. 485, 81 N. E. 544, 118 Am. St. 284; Rische v. Texas Transp. Co., 27 Tex. Civ. App. 33, 66 S. W. 324 (but compare Galveston &c. R. Co. v. Houston Elec. Co., 57 Tex. Civ. App. 170, 122 S. W. 287); Chicago &c. R. Co. v. Milwaukee &c. Co., 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. 136; Younkin v. Milwaukee &c. Tract. Co., 120 Wis. 477, 98 N. W. 215; Abbott v. Milwaukee &c. Co., 126 Wis. 634, 106 N. W. 523, 4 L. R. A. (N. S.) 202, and note; Gosa v. Milwaukee &c. Co., 134 Wis. 369, 114 N. W. 815, 15 L. R. A. (N. S.) 531 and note; Marsh v. Milwaukee &c. Co., 134 Wis. 384, 114 N. W. 804. See also Anhalt v. Waterloo &c. Ry. Co., 166 Iowa 479, 147 N. W. 928 (under Iowa Statute); Merrick v. Intramontaine R. Co., 118 N. Car. 1081, 24 S. E. 667; Nichols v. Ann Arbor &c. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Humphreys v. Ft. Smith &c. Co., 71 Ark. 152, 71 S. W. 662; Diebold v. Kentucky Tract. Co., 117 Ky. 146, 77 S. W. 674, 111 Am. St. 230, 63 L. R. A. 637.

purpose, namely the transportation of passengers (and through freight, perhaps) from city to city over long stretches of intervening country." The rails and cars are of such a size and character as to be much more like those of the ordinary commercial railroad than they are to those of the old street railway, and, in many instances the road is built for a great part of the distance upon a grade on the company's own right of way, and is operated mainly to obtain through travel from city to city, and only incidentally to take up a passenger here and there, perhaps, at a highway crossing or in a country town. This through travel is composed of people who would otherwise travel on the ordinary steam railroad, if at all, and would not use the highway. "Thus, the operation of this newly developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many. However, we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway.[17] It has been held, however, in accordance with what is perhaps the weight of authority, that an interurban street passenger railway, though authorized to transport light express matter and United States mails, does not impose any additional burden upon the street, entitling abutting owners to compensation.[18] It has also been held that

[17] Zehren v. Milwaukee Elec. R. &c. Co., 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. 844. And for somewhat similar reasoning, see West Jersey R. Co. v. Camden &c. R. Co., 52 N. J. Eq. 31, 29 Atl. 423. See also 64 Cent. L. J. 283.

[18] Mordhurst v. Ft. Wayne &c. Co., 163 Ind. 268, 71 N. E. 642, 106 Am. St. 222, 66 L. R. A. 105. The court said that such railroads were very different in their equipment, operation and effect, from ordinary steam railroads; that the dedication of a street must be presumed to have been made for all public purposes, prospective as well as present, consistent with its character as a public highway, and not actually detrimental to abutting real estate, and for the convenience of the public at large as well as the local public. See also Birmingham Tract. Co. v. B. & R. Elec. R. Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; Montgomery v. Santa Ana &c. R. Co., 104 Cal. 186, 43 Am. St. 89,

an electric railroad upon a country highway is not an additional burden,[19] and this view is taken in a strongly reasoned article in one of the law periodicals.[20] But the argument in support of this doctrine proceeds upon the theory that the use of a street or country road by an interurban railroad is in furtherance of local traffic and is, therefore, a street or highway use, and does not materially interfere with the property of the abutters or the use of the highway by other travelers in the ordinary mode. As elsewhere stated, we are inclined to the opinion that there is a difference between streets and country highways in regard to the servitude and purpose of their use, but, however that may be, if the interurban railroad does not further local travel and use, or if it does so only incidentally and is primarily for through travel, and runs for a great part of the way through the country on its own private right of way, far from any ordinary highway, and, perhaps, does not stop its cars for travelers on such country road or part of a country as it does use, the argument is wholly without foundation, and it seems clear that the railroad would be an additional burden on such highway. So, if it carries through passengers and freight, running part of the distance, perhaps, on the private right of way, with heavy trains or cars, to and upon town or city streets, and

25 L. R. A. 654, 37 Pac. 786; Huntington v. Curry, 14 Cal. App. 468, 112 Pac. 583; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Southern R. Co. v. Atlanta R. Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; Michigan Cent. R. Co. v. Hammond &c. Elec. R. Co., 42 Ind. App. 66, 83 N. E. 650; Jefferson v. Annapolis, 107 Md. 268, 68 Atl. 553; Newell v. Minneapolis &c. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237.

[19] Floyd v. Rome R. Co., 77 Ga. 614, 3 S. E. 3; Southern R. Co. v. Atlanta R. Co., 11 Ga. 679, 36 S. E. 876, 51 L. R. A. 125; Ehret v. Camden &c. R. Co., 60 N. J. Eq. 246, 46 Atl. 578, 61 N. J. Eq. 171, 47 Atl. 562. See also Ranken v. St. Louis &c. R. Co., 98 Fed. 479; Cadwell v. Connecticut Co., 85 Conn. 401, 83 Atl. 215, 444, Ann. Cas. 1913C, 401 and note; Georgetown &c. Tract. Co. v. Mulholland, 25 Ky. L. 578, 76 S. W. 148; Ashland &c. R. Co. v. Faulkner, 106 Ky. 332, 45 S. W. 235, 51 S. W. 806, 43 L. R. A. 554; Lonaconing v. Midland &c. R. Co., 95 Md. 630, 53 Atl. 420; Austin v. Detroit &c. Ry., 134 Mich. 149, 96 N. W. 35; State v. Seattle &c. R. Co., 64 Wash. 167, 116 Pac. 638.

[20] 57 Cent. Law Jour. 5, 227.

especially if it does not stop in such city or town, or only stops at one place therein, it would seem almost equally clear that such railroad would constitute an additional burden upon such streets. It is, perhaps, true that all these conditions in regard to the construction and operation of the road exist in comparatively few instances, but it is a fact that they do exist in some instances. Between such roads and the short suburban road, or the road running to a neighboring town or city, carrying only passengers, and stopping at various places in each town or city and on the country road or roads over which it runs, to take on and discharge passengers, there is a wide field. These are the two extremes, and most interurban railroads occupy a middle ground. The true doctrine, therefore, would seem to be that the question as to whether a particular interurban railroad constitutes an additional burden in a particular case must depend somewhat on circumstances, such as the nature, location, construction and operation of the road, and the franchise and powers given to the company; and that it cannot be laid down as an absolute rule, on the one hand, that every interurban railroad is, in all states, an additional burden in every instance, merely because it is an interurban railroad, nor on the other hand, that no interurban railroad can be an additional burden.[21]

§ 1505 (1096bf). Incorporation and franchises.—As elsewhere stated, corporations must derive their franchise to be a corporation from the state. In most of the states special charters are no longer granted, and interurban railroad companies, like other corporations, must be incorporated under a general law authorizing such incorporation. These general laws usually

[21] This seems to be the view taken in Cadwell v. Connecticut Co., 85 Conn. 401, 83 Atl. 215, 444, Ann. Cas. 1913C, 401. See also Kinsey v. Un. Tract. Co., 169 Ind. 563, 81 N. E. 922; Mordhurst v. Ft. Wayne &c. Tract. Co., 163 Ind. 268, 71 N. E. 642, 106 Am. St. 222, 66 L. R. A. 105; White v. Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025; Schaaf v. Cleveland &c. R. Co., 66 Ohio St. 215, 64 N. E. 145. We do not mean, however, to approve all that is said in some of these cases. A subway is held an additional burden in Matter of Joralemon St. Subway, 197 N. Y. 81, 90 N. E. 456.

prescribe what is necessary to be done in order to incorporate, and state, more or less specifically, what shall be the powers and duties of such corporations. Being general, they leave, and usually require, the location and termini of the road to be stated in the articles or certificate of incorporation. The right to use streets in municipalities is usually left to the municipal authorities to determine, and, outside of such municipalities the right to use country highways is usually left to the county authorities, or, under some systems, to the township supervisor or other designated authorities,[22] to determine. Thus, in a recent case, it is held that consent of a board of county commissioners to operate an interurban railroad, called a street railway, on and over a certain highway in the county, does not give such company authority to operate the road on and over such portion of the highway as lies within the limits of a city or town, without the consent of the municipal authorities.[23] And it has been held that a provision of an ordinance granting the right to use certain streets which requires the company to pave, having been accepted and acted on by the company, cannot be

[22] See Fowler v. Ft. Wayne &c. Tract. Co., 45 Ind. App. 441, 91 N. E. 47; Galveston &c. R. Co. v. Houston Elec. Co., 57 Tex. Civ. App. 170, 122 S. W. 277. In Smith v. Jackson &c. Tract. Co., 137 Mich. 20, 100 N. W. 121, the company had obtained the consent of the township board, and it was held that the county commissioner could not maintain proceedings to disfranchise it.

[23] Wheeling &c. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321. It is also held in this case that an ordinance of the town granting such right, and accepted by the company, constituted a contract; that the right might be forfeited for failure to comply with the ordinance in the manner of constructing the road where the ordinance expressly gave the right to forfeit for such cause; but that a declaration of forfeiture by the town council, effected by repeal of the ordinance, did not have the force and effect of a judicial determination, nor preclude the company from resorting to the courts, and, by injunction, preventing the town authorities from removing or disturbing its track, if no cause of forfeiture existed. Consent, or a petition by a certain proportion of the abutters, is also required under some statutes. See for instance, Wilder v. Aurora &c. Traction Co., 216 Ill. 493, 75 N. E. 194; Mercer &c. Tract. Co. v. United &c. Co. (N. J. L.), 61 Atl. 461; Rahn Twp. v. Tamaqua &c. R. Co., 167 Pa. St. 84, 31 Atl. 472. But compare City of Mason v. Lansing &c. Ry. Co., 157 Mich. 1, 121 N. W. 466.

successfully claimed by the company to be ultra vires[24] and that the city might also impose a license fee as a condition which could not be questioned by the company after accepting the ordinance.[25] But it has been held on the other hand, that the Indiana Act of 1901, authorizing interurban companies, in addition to powers already granted, to transport persons and property and to regulate the time, manner and compensation is not objectionable as extending the powers of such a company over the streets of a city without its consent.[26] In a number of states, until very recently, there were no statutes specifically authorizing the incorporation of interurban railroad companies or expressly referring to them in any way, and this is still the case in some states. The question has, therefore, arisen, and may still arise, in some states at least, as to whether such a company can be incorporated under a general railroad law or under an act providing for the incorporation of street railways.[27]

§ 1506 (1096bg). **Incorporation—When under railroad law.**—Even a street railway is, in a sense, a railroad, and while many statutes relating to railroads have been rightly held not to apply to street railways, some statutes relating to railroads have been held to include and apply to street railways as well as ordinary commercial railroads.[28] There is at least equal reason, we think, for affirming that an interurban railroad may be included within the meaning of some of the general railroad statutes, especially where there is no other statute under which they could come. Of course there may be railroad laws that clearly could not apply,

[24] Rutherford v. Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84; Trenton v. Trenton St. R. Co., 72 N. J. L. 317, 63 Atl. 1. See also Blodgett v. Worcester &c. R. Co., 192 Mass. 106, 78 N. E. 222.

[25] Jersey City v. Jersey City &c. R. Co., 70 N. J. L. 360, 57 Atl. 445.

[26] Roberts v. Terre Haute &c. Co., 37 Ind. App. 664, 667, 76 N. E. 323. And it has been held that a city cannot by penal ordinance compel such a company to stop and take on and off passengers. Townsend v. Circleville, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. (N. S.) 914.

[27] In State v. Milwaukee &c. R. Co., 116 Wis. 142, 92 N. W. 546, it is held that an ordinary commercial railroad company has no power to obtain and accept a street railway franchise from a city.

[28] See ante, § 1451.

and, perhaps, statutes relating to the incorporation, organization, powers and duties of railroad companies, especially where the legislative enactments in the particular state have expressly or clearly used the term "railroad companies" as meaning only commercial steam railroads, should be construed as not including interurban railroads even though the same term under other circumstances and in statutes of a different character might include them.[29] But there are cases in which it has been held that interurban railroad companies might lawfully be incorporated under the general railroad law,[30] and others in which this proposition seems to have been assumed, or, at least, in which such companies were so incorporated without objection.

§ 1507 (1096bh). Incorporation—When under street railway law.—Although interurban railroads are frequently classed as street railways, we are of the opinion, as already indicated, that they belong in a class by themselves; and there is an additional reason, in some instances at least for holding that a statute relating to the incorporation, organization and powers of street railways cannot so readily apply or be available to them as does one relating to railroads, in that street railway statutes may not grant the power of eminent domain nor authorize the construction or operation of the road in the country. But, perhaps, the company might get authority from some other sources to use country highways to purchase their own right of way in the country. At all events, such companies have been incorporated and organized, in some instances, under

[29] See suggestions to this effect in Egan v. Cheshire St. R. Co., 78 Conn. 291, 61 Atl. 950, 952, where it is held a mechanic's lien law applying to railroads included street railways.

[30] Malott v. Collinsville &c. R. Co., 108 Fed. 313. See also Lieberman v. Railroad Co., 141 Ill. 140, 30 N. E. 544; Wilder v. Aurora &c. Traction Co., 216 Ill. 493, 75 N. E. 194; Indiana R. Co. v. Hoffman, 161 Ind. 593, 69 N. E. 399; Elizabethtown &c. R. Co. v. Ashland &c. St. R. Co., 96 Ky. 347, 355, 26 S. W. 181; Diebold v. Kentucky Traction Co., 117 Ky. 146, 77 S. W. 674, 63 L. R. A. 637, 111 Am. St. 230; Bentler v. Cincinnati &c. R. Co., 180 Ky. 497, 203 S. W. 199, L. R. A. 1918E, 315; Washington St. &c. R. Co., In re, 115 N. Y. 442, 22 N. E. 356; De Grauw v. Long Island &c. R. Co., 60 N. Y. S. 163.

street railway statutes,[31] and some of the statutes, as already shown, expressly classify them as street railways, permit them to be incorporated as street railways and grant them the right to extend their lines into the country, with additional powers. The whole matter necessarily depends very largely upon the language and purpose of the particular statute under which incorporation is sought, and, to some extent, upon the nature and purpose of the particular company. The general railroad law of one state may authorize it and that of another may not, and so the street railway law of one state may authorize the company to be incorporated as a street railway company and that of another may not, or it is possible that such a company might be incorporated under either statute, or, under a general statute for incorporation. So, a statute might be broad enough to authorize such a company to be incorporated, and yet, at the same time, it might fail to grant some power deemed vital to the complete and successful construction and operation of the road as desired and contemplated. Thus, for instance, even though it might be incorporated as a street railway, and constructed and operated as such in a city, under a street railway statute, yet if the company had no right to use country highways, or did not desire to do so, and if the street railway statute did not authorize the exercise of the power of eminent domain, and landowners would not sell the company a right of way, it is evident that the company could not successfully operate as an interurban railroad company.

[31] See Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609, 71 N. E. 612; Chicago &c. R. Co. v. Whiting &c. St. Ry. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. 264, 26 L. R. A. 337; South East Ry. Co. v. Evansville Ry. Co., 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916; Cedar Rapids &c. Ry. Co. v. City of Cedar Rapids, 106 Iowa 476, 76 N. W. 728; Nichols v. Ann Arbor &c. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371. There are also many cases in Pennsylvania in which traction companies organized as street railway companies, and called street railways in the opinions, extended from one city or town, or through different boroughs or townships to another, although, as shown in the next section, it was held that the law did not authorize them to be built and operated across the country and off of the highway.

§ 1508 (1096bi). Franchises—Right to use streets and highways.—The right to exist as a corporation is granted directly by the legislature, and so, as a rule, is the right to construct and operate the road, carry passengers, receive tolls or compensation, exercise the power of eminent domain, and the like. But what may be called secondary franchises, licenses or privileges, are usually left largely to the local authorities to grant or withhold in the proper exercise of their duties, or to impose conditions in their grant of the right to use the streets and highways.[32] In Pennsylvania certain railways running from one city, town or borough to another are called street railways, but it is said that street railways must be located in streets or highways, and "that a street railway may, like a steam railway, locate its route, not for the accommodation of local travel along the highways, but to reduce time and dis-

[32] See Mordhurst v. Ft. Wayne &c. Traction Co., 163 Ind. 268, 270, 273, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. 222; Mercer County Traction Co. v. United &c. Co. (N. J.), 61 Atl. 461; Mercer County Traction Co. v. United &c. Co., 64 N. J. Eq. 588, 54 Atl. 819; Nanticoke &c. R. Co. v. People's St. R. Co., 212 Pa. St. 395, 61 Atl. 997; Berks County v. Reading City &c. Co., 167 Pa. St. 453, 31 Atl. 474. But compare Roberts v. Terre Haute &c. Co., 37 Ind. App. 664, 76 N. E. 323; State v. Williams, 227 Mo. 32, 127 S. W. 52. In St. Louis &c. R. Co. v. Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300 (quoting § 1430), it is held that a city, in whose streets the company can not be operated without the city's consent, may, in granting the consent, limit the use to the carriage of passengers, and acceptance of the terms will be binding on the company, even though its charter from the state gives it power to carry freight as well as passengers. See also In re Plowright, 140 Wis. 512, 122 N. W. 1043; Allegheney City v. Millville &c. R. Co., 159 Pa. St. 411, 28 Atl. 202. See generally as to consent and conditions, Cleveland &c. R. Co. v. Cleveland, 137 Fed. 111; Little Rock R. &c. Co. v. North Little Rock, 76 Ark. 48, 88 S. W. 826, 1026; Goddard v. Chicago Ry. Co., 202 Ill. 362, 66 N. E. 1066; Dunbar v. Old Colony St. R. Co., 188 Mass. 180, 74 N. E. 352; Grosse Pointe v. Detroit Ry. Co., 130 Mich. 363, 90 N. W. 421; West Bloomfield v. Detroit Ry. Co., 146 Mich. 198, 109 N. W. 258; Topping Avenue, In re, 187 Mo. 146, 86 S. W. 190; Asbury Tract. Ry. Co. v. Township Committee, 73 N. J. Eq. 323, 67 Atl. 790; Geneva &c. Ry. Co. v. New York Cent. &c. R. Co., 163 N. Y. 228, 57 N. E. 498. Consent to operate a street railway is held insufficient to authorize the use of the streets for interurban business in, In re Plowright, 140 Wis. 512, 122 N. W. 1043.

tance for passengers traveling from city to city or town to town across the country, is a proposition not to be entertained. It involves a perversion of the character and object of street railways."[33] And in another Pennsylvania case it is held that neither the act of 1878 nor the act of 1889 authorized the construction of electric lines traversing country roads and connecting widely separated cities and towns, for the reason, among others, that such acts did not confer upon the companies the power of eminent domain.[34] But, under the New Jersey Act of March 14, 1893, authorizing the incorporation of traction companies, and giving them power to enter upon any street or highway upon which any street railway is constructed, with the consent of the persons operating the same, it has been held that an interurban traction company which so enters and operates its road with the consent of and under lease for a street railway company, which had obtained the consent of the municipal authorities and had laid the tracks, is entitled to maintain the tracks in the street even though, at the time of the lease, the term for which the lessor was incorporated had expired.[35] And in Maryland it has been held that a municipality may permit an electric railway company to lay tracks connecting its lines with the warehouse of an express company engaged in carrying all kinds of portable freight and express matter, and that such electric railway company may

[33] Rahn Twp. v. Tamaqua &c. R. Co., 167 Pa. St. 84, 31 Atl. 472. See also Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609, 71 N. E. 612. Compare both principal and dissenting opinions in Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; and see under later Pennsylvania law, Pennsylvania R. Co. v. Greensburg &c. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839.

[34] Pennsylvania R. Co. v. Montgomery &c. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. 659. "The trouble," said the court, "is that the supposed needs of the country have outgrown its legislation, and an effort is now being made to adapt street railways to purposes for which they were never intended, and for which the legislation relating to them was not framed." But see Montgomery Amusement Co. v. Montgomery Traction Co., 139 Fed. 353; Gettysburg &c. Assn. v. Electric R. Co., 2 Pa. Dist. 659; Syracuse &c. R. Co., Matter of, 33 Misc. 510, 514, 68 N. Y. S. 881.

[35] Jersey City v. North Jersey St. R. Co., 73 N. J. L. 175, 63 Atl. 906.

limit its express business to a single express company, if it thereby affords reasonable express facilities to the public.[36]

§ 1509 (1096bj). Forfeiture of charter or franchise.—As shown in another part of this work a corporation may forfeit its franchises or rights, and even its charter, by failure to construct or operate its road within the designated time, or by failure to perform certain other conditions, but, in the absence of a statutory declaration or provision to that effect, a judicial declaration of forfeiture is usually necessary, and third persons cannot, as a rule in such cases, take advantage of a mere cause for forfeiture in a collateral action.[37] In a recent case it is held that a municipal corporation may forfeit the right of a street or interurban railway company to use a street for failure to comply with the ordinance granting the right, where the ordinance so provides, and that such action is of an exercise of the police power and not judicial in character, but that relief might be had in equity from such a forfeiture in an inequitable and oppressive manner.[38] Ordinarily, however, at least where there is no such provision in the ordinance it is held that there must be a judicial determination of some sort and not merely arbitrary action by the municipality without giving the company an opportunity to be heard.[39] In a recent case in New

[36] Dulaney v. United Rys. &c. Co., 104 Md. 423, 65 Atl. 45. It has been held that while a city may regulate the speed the city cannot by penal ordinance compel an interurban railway company to stop its cars and take on and discharge passengers. Townsend v. Circleville, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. (N S.) 914. See also Village of Excelsior v. Minneapolis &c. R. Co., 108 Minn. 407, 122 N. W. 486, 24 L. R. A. (N. S.) 1035.

[37] See generally ante, § 58, et seq.; 975, et seq.; 1164, et seq.; Hine v. Bay Cities Consol. Ry. Co., 115 Mich. 204, 73 N. W. 116; State ex rel. Griffet v. Williams, 227 Mo. 32, 127 S. W. 52; Newport News &c. R. Co. v. Hampton Roads &c. Co., 102 Va. 795, 47 S. E. 839.

[38] Wheeling &c. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321. See also Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Stewart v. Ashtabula, 98 Fed. 516; Brooklyn &c. R. Co., Matter of, 72 N. Y. 245; Millcreek Twp. v. Erie Ry. Co., 209 Pa. St. 300, 58 Atl. 613.

[39] Jersey City &c. Co. v. Passaic, 68 N. J. L. 110, 52 Atl. 242; North

York the question arose as to whether a provision in the general railroad law, to the effect that if any domestic railroad corporation should not, within five years after the filing of its certificate of incorporation, begin the construction of its road, its corporate existence and powers should cease, applied to a so-called street railroad company, and the court held that it did, and that it was self-executing and worked a forfeiture without any proceedings for that purpose, notwithstanding a statute applying only to street railways provided that in case any street railway company should not commence the construction of its road within one year after the consent of the local authorities and property owners its rights and franchises in respect thereto might be forfeited.[40]

§ 1510 (1096bk). Collateral attack.—As elsewhere shown, the general rule is that the corporate organization cannot be collaterally attacked,[41] and, in many jurisdictions, the legality of the incorporation of a de facto railroad corporation cannot be questioned even in condemnation proceedings.[42] So, it has been held that the right of an interurban railroad company to carry freight without the consent of municipal authorities cannot be questioned in an action for injuries to a person run into by one of the company's cars while such person was using a city street.[43]

Jersey St. R. Co. v. South Orange Twp., 58 N. J. Eq. 83, 43 Atl. 53; Akron &c. R. Co. v. Bedford, 6 Ohio N. P. 276; Knickerbocker Trust Co. v. Kalamazoo, 182 Fed. 865. See generally as to when there may or may not be a forfeiture or loss of rights by failure to perform condition, Millcreek Twp. v. Erie &c. R. Co., 209 Pa. St. 300, 64 Atl. 901; Edwards v. Pittsburg &c. R. Co., 215 Pa. St. 597, 64 Atl. 798. In West Bloomfield Twp. v. Detroit &c. R. Co., 146 Mich. 198, 109 N. W. 258, a company was compelled by mandamus proceedings to comply with its franchise to provide cars with water tanks and toilet rooms and sell tickets of a certain kind on the cars.

[40] Brooklyn &c. R. Co., In re, 185 N. Y. 171, 77 N. E. 994. In other words, the court held that such provisions of both statutes applied, one supplementing the other. See also Brooklyn &c. R. Co., Matter of, 72 N. Y. 245; Millcreek Twp. v. Erie &c. St. R., 209 Pa. St. 300, 58 Atl. 613.

[41] See ante, § 24, note, and § 26.

[42] Ante, § 1201. But see Brooklyn &c. R. Co., Matter of, 72 N. Y. 245.

[43] Roberts v. Terre Haute &c. Co., 37 Ind. App. 664, 76 N. E. 323.

And, in another case, which was an action to recover damages for injuries inflicted upon a child by a car operated by electricity, it was held that the question as to the right of the company to use such motive power and as to whether such operation of cars was contrary to its franchise could not be raised.[44]

§ 1511 (1096bl). Consolidation, leases and mortgages.—The general subjects of this section have been elsewhere treated in this work. We, therefore, refer to the chapter upon each of these subjects[45] for the general rules applicable here as elsewhere. It may be a matter of some doubt, however, as to whether the consolidation of interurban companies is authorized by a general corporation statute, a railroad statute or a street railway statute; and the same is true in regard to leases or the exercise of certain other powers. Under some statutes there is no question as to their applicability to interurban railroad companies. In other instances, we suppose the question must be determined largely by the language and purpose of the statute, the view taken in the particular jurisdiction of the nature of such companies, and the sense in which the terms "railroad" or "railroad company" and "street railway" or "street railway company" is used in the legislation of the state. It is often provided, both in the case of ordinary railroads and street railways, that the consolidation must not be of parallel competing lines.[46] In other states, as in Indiana, the right is given to any street railroad company, "or consolidated street railroad company organized under the laws of the state," operating any street railroad, interurban street railroad or suburban street railroad to intersect, join and unite its railroad with any other

[44] Hine v. Bay City &c. Co., 115 Mich. 204, 73 N. W. 116. See also Chicago &c. R. Co. v. Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734; Taylor v. Portsmouth &c. R., 91 Maine 193, 39 Atl. 560, 64 Am. St. 216. Compare also Fayetteville &c. R. Co. v. Aberdeen &c. R. Co., 142 N. Car. 423, 55 S. E. 345.

[45] See chapters XV, XVIII, XIX.

[46] See People v. Boston &c. R. Co., 12 Abb. N. C. (N. Y.) 230; Washington St. &c. R. Co., In re, 52 Hun 311, 5 N. Y. S. 355, 115 N. Y. 442, 22 N. E. 356; ante, § 370.

street railroad, interurban or suburban street railroad at such point as may be mutually agreed upon, and "to merge and consolidate" upon such terms as may be mutually agreed upon. But it has been held that the phrase, "such terms as they may agree upon," or the like, in a statute authorizing the consolidation of railroad companies, relates merely to administrative details, and confers no substantive powers.[47] The new corporation generally holds its property acquired by the consolidation in its own right and not in trust for the constituent companies,[48] and is generally liable, at least to the extent of the property turned over to it for the debts and obligations of the constituent companies.[49] An assignee or lessee company which accepts the franchises, powers, privileges and immunities of the lessor, and operates the road, is usually bound to perform the duties and obligations that rested upon the lessor, such, for instance, as providing a stated car service required by the statute or ordinance granting the franchise or right to use the street.[50] Where land belonging to a street railway

[47] Adams v. Yazoo &c. R. Co., 77 Miss. 194, 24 So. 200, 60 L. R. A. 33 and note.

[48] Greene v. Woodland Ave. &c. R. Co., 62 Ohio St. 67, 56 N. E. 642; Louisville &c. R. Co. v. Bouey, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435 and note.

[49] See Birmingham R. &c. Co. v. Cunningham, 141 Ala. 470, 37 So. 689; Camden &c. R. Co. v. Lee (Ky.), 84 S. W. 332; Wagner v. Atchison &c. R. Co., 9 Kans. App. 661, 58 Pac. 1018; Bohmer v. Haffen, 161 N. Y. 390, 55 N. E. 1047; Philadelphia v. Ridge Ave. &c. R. Co., 142 Pa. St. 484, 22 Atl. 695, 24 Am. St. 512. This was also stated to be the rule in Birmingham R. &c. Co. v. Enslen, 144 Ala. 343, 39 So. 74, but it was held, under the statute which also provided that pending suits should not abate, but should proceed in the name of the consolidated company, that, where there was a second consolidation after suit was brought under the name of the company causing the injury, the suit might proceed in that name. See, for case of attempt by minority stockholders to prevent consolidation, Tanner v. Lindell Ry Co., 180 Mo. 1, 79 S. W. 155, 103 Am. St. 534, and note. See, as to rate of fare, Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102.

[50] Reynolds v. Pacific Elec. R. Co., 146 Cal. 261, 80 Pac. 77; Potwin Place v. Topeka R. Co., 51 Kans. 609, 33 Pac. 309, 37 Am. St. 312 and note; Wallace v. Ann Arbor Elec. R. Co., 121 Mich. 588, 80 N. W. 572; Prospect Park &c. R. Co. v. Coney Island &c. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A.

company and used in its business was included in a mortgage of the whole plant and franchises of the company, and was leased by it for nine hundred and ninety-nine years, giving the lessee exclusive rights to the surface of a large portion of the plot and underground privileges, and the railroad reserved a portion of the plot for its surface system, and was entitled to maintain elevated tracks thereon according to the plan accompanying the lease and contract, it was held that the mortgagee might demand relief against the mortgagor or his assigns, owners of the mortgaged premises or lessees thereof, if their acts, if carried out according to their contracts and plans, would depreciate the value of the mortgage security.[51] In another case where a mortgage was antedated in accordance with a resolution of the board giving the authority to execute it, the court held that as between the mortgagor and mortgagee, it should be considered as a conveyance on the day it was dated, and would embrace rights acquired by lease after that date, where it recited the form of bonds it secured and stated that it covered all property, real or personal, and franchises, then owned or thereafter to be acquired by the mortgagor.[52]

610; Reeves v. Philadelphia Trac. Co., 152 Pa. St. 153, 25 Atl. 516. See also O'Reilly v. Brooklyn Heights R. Co., 89 N. Y. S. 41.

[51] Fidelity Trust Co. v. Hoboken &c. R. Co., 71 N. J. Eq. 14, 63 Atl. 273. It was also held that the mortgagee could not complain of a lease of part of the land on the ground that the company had thereby debarred itself from enlarging its terminal facilities, but that it could complain if the lease and plan adopted tended to diminish the power of the company to operate under its franchises with profit, and that, when the lease prevented it from so doing, and the lessee proposed to use the land in part to carry passengers in competition, the mortgagee was entitled to relief, notwithstanding some of the directors of the trust company (mortgagee) were also directors in the railway company executing the lease.

[52] Guaranty Trust Co. v. Atlantic Coast Elec. R. Co., 138 Fed. 517. See also generally as to leases, liens and mortgages, Central Trust Co. v. Warren, 121 Fed. 323; Mersick v. Hartford &c. R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. 977; Chicago Un. Trac. Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; Lincoln v. Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766; Minersville v. Schuylkill Elec. R Co., 205 Pa. St. 402, 54 Atl. 1053.

§ 1512 (1096bm). **Eminent domain.**—Street railway companies are not always given the right to exercise the power of eminent domain, and it is seldom necessary in the case of an ordinary street railway in a city.[53] It has also been held that even where a statute gives street railway companies the right to exercise the power of eminent domain where necessary, and an interurban railroad company is incorporated under the street railway law, such company cannot exercise the power to obtain a right of way, or part of a right of way, unnecessarily departing from a highway or the line of a highway so that it can not serve the local public.[54] As a rule, however, it has so

[53] It has been held that a statute authorizing condemnation proceedings by a corporation organized for the construction of "any railway" does not authorize the exercise of the power of eminent domain by a street and suburban railway operated for the carrying of passengers. Thompson-Houston Elec. Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86. Compare also F. W. Cook Irv. Co. v. Evansville Terminal R. Co., 125 Ind. 3, 93 N. E. 279; Galveston &c. R. Co. v. Houston Elec. Co., 57 Tex. Civ. App. 170, 122 S. W. 287.

[54] Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609, 71 N. E. 612, 618, where it is said: "In considering the rights of these companies we are not to look alone to that which will best promote their financial gain. They are asking for the power of the state to take private property, and it is only upon the theory of a public use that such right can be granted to them, and appellee, in its effort to save distance, and thereby save expense of construction, and in its desire to establish and maintain rapidity of transportation, is, as we think (taking the character of such roads into consideration), departing from the intention of the law-making branch of the government, by which such organizations were organized. So far as they are authorized to travel through the country districts, it is upon the theory that they will be of benefit to the rural inhabitants, and not that only those living in towns, where regular stations shall be maintained, shall be beneficiaries. As was said in the Harvey case, supra, they are presumed to follow the highways, making all the stops necessary for the accommodation of the people living along the highways. . . . If the country districts are so sparsely settled that the traffic along them will not support such roads following them, then their construction is not a public necessity, and the power of eminent domain, upon the theory that they are to exercise a public function, cannot be called into action in their behalf. If they seek to travel across the country, as do steam railroads, disregarding high-

far been found to the interest of such companies in great part to run along or parallel a highway, and the question in the case above referred to has not often arisen. Some statutes permit, or expressly authorize interurban railroad companies to condemn under a general condemnation or eminent domain act, and others contain provisions specifically applying to such companies. The general subject has already been treated, and the statutes vary so much in detail that we can add very little, of general importance, to the treatment elsewhere given the subject, but there are a few questions that may be considered with particular reference to interurban railroads. It has been held that a suburban electric railway company, authorized to condemn land for its "corporate purposes," cannot condemn a lot for a power house and coal pocket five miles from the nearest point of such railroad and in a city in which another company had the exclusive rights to run cars.[55] Other cases involving the question of the right to condemn or the amount that may be taken under particular circumstances, are cited below.[56] The existence of the statutory requirements should be shown, and must usually be alleged in the petition.[57] Inability to agree

ways, and disregarding the interests and conveniences of the country people, let them organize under the law regulating steam railroads, and be subject to the regulations of the statute and the burdens cast upon such railroads." See also Harvey v. Aurora &c. R. Co., 174 Ill. 295, 51 N. E. 163; South Beach R. Co., In re, 119 N. Y. 141, 23 N. E. 486. But see as to what is a sufficient showing of necessity, Aurora &c. R. Co. v. Harvey, 178 Ill. 477, 53 N. E. 331. A steam commercial railroad company has been held not authorized to appropriate land for an interurban railway company. Miller v. Cincinnati &c. Elec. St. R. Co., 43 Ind. App. 540, 88 N. E. 102.

[55] Rhode Island Suburban R. Co. In re, 22 R. I. 591, 48 Atl. 591.

[56] New York &c. R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070; Dewey v. Chicago &c. R. Co., 184 Ill. 426, 56 N. E. 804; Chicago &c. R. Co. v. Chicago &c. R. Co., 211 Ill. 352, 71 N. E. 1017; Kansas City Interurban R. v. Davis, 197 Mo. 669, 95 S. W. 881; Williamson v. Gordon Heights R. Co., 8 Del. Ch. 192, 40 Atl. 933; Chicago &c. R. Co. v. Oshkosh, 107 Wis. 192, 83 N. W. 294.

[57] Colorado &c. R. Co. v. Allen, 13 Colo. 229, 22 Pac. 605; Chicago &c. R. Co. v. Chicago, 132 Ill. 372, 23 N. E. 1036; Rochester R. Co. v. Robinson, 133 N. Y. 242, 30 N. E. 1008; Ames v. Union Co., 17 Ore. 600, 22 Pac. 118. But see Martin v.

with the landowner must usually be shown as in other cases, but it has been held that where one cotenant assumes to act for all and refuses an offer made by the company, inability to agree is sufficiently shown.[58] Under the Indiana statute it is held that damages, in case of condemnation by an interurban railroad company, are to be assessed as in case of the appropriation of land for the use of a commercial railroad company,[59] and that damages should be assessed for the entire tract of which part is actually taken, and no deduction should be made for benefits to the landowner from the construction and operation of the road.[60]

§ 1513 (1096bn). Fences—Killing stock.—In some states, interurban railroad companies are expressly required by statute to fence their tracks or right of way. In others, however, there is no such statute expressly referring to them, and the question arises as to whether they are within such a statute relating to railroad companies generally. Of course it cannot well be contended that such a company must fence the streets along which its road runs or even country highways in all cases. But

Chicago &c. Elec. R., 220 Ill. 97, 77 N. E. 86, with which compare, however, Chicago &c. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758. A petition showing that the land is to be used as a right of way for a regularly chartered and organized railroad is held sufficient to show the public use. Kansas City Interurban Ry. Co. v. Nelson, 193 Mo. 297, 91 S. W. 1036.

[58] Trotier v. St. Louis &c. R. Co., 180 Ill. 471, 54 N. E. 487.

[59] Carrell v. Muncie &c. R. Co., 38 Ind. App. 700, 78 N. E. 254. See also Toledo &c. R. Co. v. Wagner, 171 Ind. 185, 85 N. E. 1025; Indianapolis &c. Trac. Co. v. Larrabee, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003; Abbott v. Milwaukee &c. Traction Co., 126 Wis. 634, 106 N. W. 523, 4 L. R. A. (N. S.) 202.

[60] Union Traction Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052 (citing Elliott Railroads, §§ 1261, 1334); Indianapolis &c. Traction Co. v. Dunn, 37 Ind. App. 248, 76 N. E. 269; Indianapolis &c. Traction Co. v. Ramer, 37 Ind. App. 264, 76 N. E. 808. As to the procedure under such statute, see Morrison v. Indianapolis &c. R. Co., 166 Ind. 511, 76 N. E. 961 (also holding that a de facto corporation may exercise the power, and citing numerous authorities to that effect); Douglas v. Indianapolis &c. Traction Co., 37 Ind. App. 332, 76 N. E. 892. See also generally, Lake Shore &c. R. Co. v. Chicago &c. Ry. Co., 48 Ind. App. 584, 92 N. E. 989, 95 N. E. 596.

it is held in several cases that a statute requiring all railroad companies to fence applies to interurban railroad companies,[61] and in one of the most recent cases upon the subject, it is held, in a carefully considered opinion, that such a company is not relieved of this duty even where the road runs along the edge of a country highway and was so built on the right of way of the public road by permission of the county authorities.[62] In Indiana there is a specific statute requiring interurban railroad companies to fence their tracks, and it has been held that to this extent, except that it specifies interurban railroads, it is practically a copy of the statute relating to railroad companies generally, and should be given the same construction.[63] But such statute expressly declares that its provisions requiring fences shall not apply to certain situations, including streets in cities and all public highways on which the road is built, and that nothing contained in the act shall "in any manner affect or change the liability of railroad corporations . . . for stock killed or injured upon their railroad; but such liability shall exist and be governed by laws now in force." In the case referred to, which was an action to recover for injury to a horse that entered upon the right of way and track at a place where there was no suitable fence as required by statute, the court held that the one of the paragraphs of the complaint based on negligence was good but that the paragraph based

[61] Hannah v. Street Railway Co., 81 Mo. App. 78; Riggs v. St. Francois &c. Ry. Co., 120 Mo. App. 335, 96 S. W. 707; Iola Elec. R. Co. v. Jackson, 70 Kans. 791, 79 Pac. 662. See also Hartzel v. Alton &c. Trac. Co., 263 Ill. 205, 104 N. E. 1080, 1082 (citing text); Shea v. Cleveland &c. R. Co. 250 Ill. 97, 95 N. E. 63; Indianapolis &c. Trac. Co. v. Smith, 42 Ind. App. 605, 86 N. E. 498 (statute expressly mentions and applies to interurban railroad companies but company is not bound to keep gate shut at private farm crossings).

[62] Riggs v. St. Francois County Ry. Co., 120 Mo. App. 335, 96 S. W. 707. One judge, however, dissented, without writing any opinion, and it seems questionable whether the court did not go too far in holding that a fence should be, or even could be, placed in the highway.

[63] Campbell v. Indianapolis &c. Traction Co., 39 Ind. App. 66, 79 N. E. 223. See also Indianapolis &c. Traction Co. v. Smith, 42 Ind. App. 685, 86 N. E. 498.

on the statutory liability if good, was not sustained because there was no proof, as required by the statute of an actual striking of the horse by the car.[64] In Arkansas it has been held that the statute making railroad companies responsible for all damages to property caused by the running of trains

[64] Campbell v. Indianapolis &c. Traction Co., 39 Ind. App. 66, 79 N. E. 226. In the course of the opinion it is said: "In our opinion, it is also true, that, by force of the statutes we have been considering, the common law is further modified in relation to railroads, effective to make them liable for injuries to stock negligently inflicted, where, without such statutes, they would be liable only for injuries wantonly and wilfully inflicted. Elliott on Railroads, § 1695. Or, in other words, the effect of our conclusion upon the statutory provision here involved, under the theory of this paragraph, is such that appellant's horse cannot be treated as unlawfully upon appellee's track, so as to relieve appellee from the exercise of that care, caution, and diligence which a prudent person would employ to avoid injuring property of others thus exposed to danger. New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. 534; Newman v. Vicksburg &c. R. Co., 64 Miss. 115, 8 So. 172; French v. Western &c. R. Co., 72 Hun 469, 25 N. Y. S. 229; Railway Co. v. Trotter, 37 Ark. 593; Kerwhaker v. Cleveland &c. R. Co., 3 Ohio St. 172, 62 Am. Dec. 214. Under this paragraph, the failure of appellee to fence its track is not alone sufficient to create liability, as would be the case if this were an action under the statute; for the reason, in the latter case, it is unnecessary to aver or prove that the injury was inflicted negligently. . . . While in the case at bar, the plaintiff must also aver and prove the negligent doing of an act by the company, other than its failure to fence, but for which, and without his fault, the injury would not have happened. Southern Indiana R. Co. v. Messick, 35 Ind. App. 676, 74 N. E. 1097; Princeton C. & M. Co. v. Roll, 162 Ind. 115, 118; Duffy v. Gleason, 26 Ind. App. 180, 58 N. E. 729. . . . Upon the theory that the second paragraph is sufficient, as a statutory action, it was incumbent upon appellant to introduce evidence, at least tending to prove that the injury complained of was caused by an actual striking of the horse with the car." It is not altogether certain, but it seems that the court decided, or at least assumed, that the general statute referred to, using the term "any railroad" in creating the statutory liability, includes interurban railroads. And there is additional reason for this view in that such statute makes "any person or corporation" running, controlling or operating the road, liable for stock killed or injured by the "locomotives, cars, or other carriages."

does not apply to street railways,[65] and there is no presumption of negligence on the part of such a company from the mere killing, but it may be held liable in a proper case for negligently killing stock.[66]

§ 1514 (1096bo). When traveler may use track—Relative rights and duties.—Where tracks are laid in a street, no matter whether they are the tracks of an ordinary commercial railroad, an interurban railroad, or a street railway, they may be used by travelers upon the street as part of the street. The rights of the company and of such travelers are in a general sense, mutual, reciprocal, and equal; but the company, at least between crossings has the right of way of passage, and persons on the track must give way, in a proper case; until the train or car has passed.[67] Each must act with due regard to the rights of the other.[68] So, where a track is laid in a country highway,

[65] Little Rock &c. Co. v. Newman (Ark.), 92 S. W. 864.

[66] Little Rock &c. Co. v. Hicks, 79 Ark. 248, 96 S. W. 385; Little Rock &c. Co. v. Newman, 77 Ark. 599, 92 S. W. 864. These cases also hold that permitting stock to run at large outside the "stock limit" is not contributory negligence. See also Iola Electric R. Co. v. Jackson, 70 Kans. 791, 79 Pac. 662.

[67] Ante, §§ 1443, 1492. See also Thatcher v. Central Traction Co., 166 Pa. St. 66, 30 Atl. 1048, 45 Am. St. 645 and note; Moore v. Kansas City &c. R. Co., 126 Mo. 265, 29 S. W. 9, 11; Kerr v. Boston &c. R. Co., 188 Mass. 434, 74 N. E. 669.

[68] Ante, § 1444. See also United Rys. &c. Co. v. Watkins, 102 Md. 264, 62 Atl. 234; Garrett v. People's R. Co., 6 Pen. (Del.) 29, 64 Atl. 254; Beers v. Metropolitan St. R. Co., 93 N. Y. S. 278; Nashville R. Co. v. Norman, 108 Tenn. 324, 67 S. W. 479; Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30. See also as to rights of company and a manufacturing company also having a right to cross the street with cars from its plant one side to part of the plant on the other side. Camden &c. Ry. Co. v. United States &c. Co., 68 N. J. Eq. 279, 59 Atl. 523. The subject of injuries to travelers upon a street by electric railways is considered in the chapter on street railways, but we also cite the following recent cases as to collision with animals or vehicles or persons on or near the track in addition to the crossing cases hereinafter cited: Strode v. St. Louis Transit Co. (Mo. App.), 87 S. W. 976; Anniston Elec. &c. Co. v. Elwell, 144 Ala. 317, 42 So. 45; Indianapolis St. R. Co. v. Slifer, 35 Ind. App. 700, 74 N. E. 19; Indiana Un. Trac. Co. v. Pheanis, 42 Ind. App. 653, 85 N. E. 1040;

travelers upon the highway may go upon the track without becoming trespassers or mere licensees, and it has been held that one may walk along an electric car track on a country highway,[69] but he must exercise reasonable care under the circumstances in so doing, and it has held that he is bound to be ordinarily vigilant with eye and ear to know of the approach of a car, and to get out of its way, so as not to stop it, or even make it slow up.[70] Where, however, the track of an interurban railroad company is laid on its own private right of way, and not in a highway, we think travelers who walk along it or use it for their own convenience, without any invitation from the company, are trespassers or bare licensees, and that the same rules, in general, apply in such case as in the case of an ordinary commercial railroad constructed on the private right of way of the company.[71]

Haynes v. Waterville &c. Co., 101 Maine 335, 64 Atl. 614; Garvich v. United Rys. &c. Co., 101 Md. 239, 61 Atl. 138; Jordan v. Old Colony &c. Co., 188 Mass. 124, 74 N. E. 315; Sexton v. West Roxbury &c. R. Co., 188 Mass. 139, 74 N. E. 315; Hennessey v. Forty-Second St. &c. R. Co., 92 N. Y. S. 1058.

69 Neary v. Citizens' R. &c. Co., 110 App. Div. 769, 97 N. Y. S. 420. See also Klockenbrink v. St. Louis &c. R. Co., 172 Mo. 678, 72 S. W. 900; Brown v. St Louis &c. Co., 108 Mo. App. 310, 83 S. W. 310.

70 Neary v. Citizens' R. &c. Co., 110 App. Div. 769, 97 N. Y. S. 420. See also West Chicago St. Ry. Co. v. Schwartz, 93 Ill. App. 387.

71 See Floyd v. Paducah R. &c. Co., 23 Ky. L. 1077, 64 S. W. 653; Montgomery v. Alabama &c. R. Co., 97 Ala. 305, 12 So. 170; Haley v. Kansas City &c. R. Co., 113 Ala. 640, 21 So. 357; Camden &c. R. Co. v. Young, 60 N. J. L. 193, 37 Atl. 1013; post, § 1785, et seq. But compare Williams v. Metropolitan St. R. Co., 114 Mo. App. 1, 89 S. W. 59; Booth v. Union &c. R. Co., 126 Iowa 8, 101 N. W. 147. In a recent case in Missouri it was held that, in an action for personal injuries received by one walking along the track, an officer of the company may testify that it was a private right of way acquired by purchase; and it was also held that a motorman in such case, running over a private right of way, was not bound to keep a lookout for trespassers, although it would be otherwise if from past use and experience trespassers or licensees should have been anticipated. Many of the Missouri decisions are cited, and in that state and a few others the so called "humanitarian" doctrine is sometimes applied in the case of all classes of railroads when it would not be applied in other jurisdictions.

§ 1515 (1096bp). Crossing other roads or highways—Signals. —It has been held, in a jurisdiction in which an interurban railroad is regarded as in the nature of a street railway and not an additional burden, that the right of such a railroad to cross the tracks of an ordinary commercial railroad upon a highway, whether a city street or a country road, is subject to no conditions other than those to which the general public may be subject in traveling over the highway, and that the commercial railroad company cannot maintain an injunction on that account, but may itself be enjoined from interfering where the interurban company is proceeding to construct a proper crossing at its own expense.[72] It is evident, however, that even if this rule applies to crossings on country roads, it does not follow that an interurban railway can cross an ordinary commercial railroad,[73] or vice versa, where neither is on a public highway, without agreement, compensation, or the

[72] Chicago &c. Ry. Co. v. Whiting &c. St. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. 264, 26 L. R. A. 337; Chicago &c. R. Co. v. Hammond &c. R. Co., 151 Ind. 577, 46 N. E. 999; Pittsburgh &c. R. Co. v. Muncie &c. Traction Co., 174 Ind. 167, 91 N. E. 600. See also Chicago &c. R. Co. v. West Chicago &c. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485n; General Elec. R. Co. v. Chicago &c. R. Co., 184 Ill. 588, 56 N. E. 963; Pittsburgh &c. R. Co. v. West Chicago &c. R. Co., 156 Ill. 385, 40 N. E. 1014; South East &c. R. Co. v. Evansville &c. Elec. Ry. Co., 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916 (and numerous other cases there cited in opinion); Central Pass. R. Co. v. Philadelphia &c. R. Co., 95 Md. 428, 52 Atl. 752 (street railway company must pay expense of crossing it makes but railroad company is not entitled to any compensation as for an additional burden); Pennsylvania Co. v. Lake Erie &c. R. Co., 146 Fed. 447 (but it cannot change the grade); Atchison &c. R. Co. v. General Elec. R. Co., 112 Fed. 689; Cleveland &c. Ry. Co. v. Urbana &c. R. Co., 26 Ohio Cir. Ct. R. 180. See also Consolidated &c. Co. v. South Orange &c. Co., 56 N. J. Eq. 569, 40 Atl. 15; Southern R. Co. v. Atlanta R. &c. Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125. But compare New York &c. R. Co. v. Bridgeport &c. Co., 65 Conn. 410, 32 Atl. 935, 29 L. R. A. 367.

[73] See Northern Cent. R. Co. v. Harrisburgh &c. Co., 177 Pa. St. 142, 35 Atl. 624, 6 Am. Elect. Cas. 187. And compare also Birmingham Trac. Co. v. Birmingham R. &c. Co., 119 Ala. 129, 24 So. 368; New York &c. R. Co. v. Fair Haven &c. R. Co., 70 Conn. 610, 40 Atl. 607, 41 Atl. 169.

exercise of the power of eminent domain. This is generally provided for by statute, and the manner of crossing, the use of interlocking appliances, or the like, is usually left largely to railroad commissioners[74] or to some court,[75] although it is held in a recent case in Ohio that the statute authorizing the court of common pleas on application of a railroad to prescribe the manner of crossing does not apply to an electric railroad crossing another street railroad, but applies only to steam railroads.[76] But in Kentucky a statute, or rather, a constitutional provision of a similar character has been held, as in other jurisdictions, to apply to street railways.[77] We suppose that interurban cars should be required to stop at the crossings of ordinary commercial railroads, where there are no safety devices, the same as the latter may be required to stop before crossing another commercial railroad, and that courts should be inclined to "stretch a point," if necessary, to bring the interurban railroad within a statute applying to "railroads." It has been held that a city ordinance, requiring street cars to stop before crossing any railroad track, includes any such track, whether main line or spur.[78] So, it has been held that a statute requiring a stop at railroad crossings, or signals at highway crossings, applies to an electric railroad or a railroad with a dummy engine running into the country.[79]

[74] See Chicago &c. R. Co. v. Indianapolis &c. Traction Co., 165 Ind. 453, 74 N. E. 513; Louisville &c. R. Co. v. Bowling Green Ry. Co., 110 Ky. 788, 63 S. W. 4; Board of Ry. Comrs. v. Market St. R. Co., 132 Cal. 677, 64 Pac. 1065.

[75] See Mercer County Traction Co. v. United &c. Co., 68 N. J. Eq. 715, 61 Atl. 461. As to consent of local authorities, see Geneva &c. R. Co. v. New York &c. R. Co., 163 N. Y. 228, 57 N. E. 498, and New Jersey case above cited.

[76] Dayton &c. R. Co. v. Dayton &c. Traction Co., 26 Ohio Cir. Ct. R. 1.

[77] Louisville &c. R. Co. v. Bowling Green R. Co., 110 Ky. 788, 63 S. W. 4.

[78] Galveston &c. Ry. Co. v. Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279. But see Bartholomaus v. Milwaukee &c. Co., 129 Wis. 388, 109 N. W. 143.

[79] Louisville &c. R. Co. v. Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. 116; Birmingham &c. R. Co. v. Jacobs, 92 Ala. 187, 9 So. 320, 12 L. R. A. 830; Birmingham R. &c. Co. v. Baylor, 101 Ala. 488, 13 So. 793; Montgomery St. R. Co. v. Lewis, 148 Ala. 134, 41 So. 736. See also Birmingham &c. R. Co. v.

§ 1516 (1096bq). Duty of traveler in crossing—Whether look and listen rule applies.—There is some conflict among the authorities as to whether the strict rule requiring travelers to look and listen as a matter of law before crossing an ordinary commercial railroad track applies with the same strictness to travelers crossing electric railway tracks in a city. In many jurisdictions it is held that the duty of a traveler about to cross an electric railway on a highway is not precisely the same as in the case of a commercial railroad, and that there is no absolute rule of law requiring him in all cases to look and listen and conclusively presuming, in case of injury by collision with a car, that he saw and heard what he might have seen and heard or did not exercise such care as the law requires, but that his duty is simply to use ordinary and reasonable care such as a reasonably prudent man would use under the circumstances.[80] But in a number of jurisdictions the rule is the same

Powell, 136 Ala. 232, 241, 33 So. 875. But compare Dean v. State, 149 Ala. 34, 43 So. 24.

[80] Los Angeles Traction Co. v. Conneally, 136 Fed. 104; Kernan v. Market St. R. Co., 137 Cal. 326, 70 Pac. 87; Capital City Traction Co. v. Lusby, 12 App. (D. C.) 295; Indianapolis St. R. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945, 946; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; Louisville R. Co. v. Poe, 24 Ky. L. 1700, 72 S. W. 6; Fairbanks v. Bangor &c. R. Co., 95 Maine 78, 49 Atl. 421; Marden v. Portsmouth &c. Ry. Co., 100 Maine 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. 476; Robbins v. Railway Co., 165 Mass. 30, 42 N. E. 334; Kelly v. Railway Co., 175 Mass. 331, 56 N. E. 285; Finnich v. Boston &c. St. R. Co., 190 Mass. 382, 77 N. E. 500; Holingren v. St. Paul &c. R. Co., 61 Minn. 85, 63 N. W. 270; Smith v. Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16; Newark &c. Ry. Co. v. Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374; Connelly v. Trenton &c. Ry. Co., 56 N. J. L. 700, 29 Atl. 438, 44 Am. St. 424; Hall v. Ogden &c. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. 726; Roberts v. Spokane St. Ry. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184. See also Cincinnati &c. St. R. Co. v. Whitcomb, 66 Fed. 915; South Chicago &c. Ry. Co. v. Kinnare, 216 Ill. 451, 75 N. E. 179; Evansville St. R. Co. v. Gentry, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. 421; Cincinnati &c. St. R. Co. v. Stahle, 37 Ind. 539, 76 N. E. 551, 77 N. E. 363; Union Traction Co. v. Howard (Ind. App.), 87 N. E. 1103 (automobile); Shea v. Railway Co., 50 Minn. 395, 52 N. W. 902; McGrath v. Metropolitan St. R. Co., 93 N. Y. S. 519; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207,

as in the case of ordinary commercial railroads and the traveler is required by a rule of law to at least look and listen.[81] In jurisdictions in which this latter view is taken, it seems clear that it must be applied in the case of interurban railroads to substantially the same extent as in the case of ordinary commercial railroads, no matter whether the crossing is in the city or in the country; but in jurisdictions in which the first view is taken, namely, that there is no absolute rule of law requiring travelers in all cases to look and listen and making it negligence per se to fail to do so, it would seem that the locality and surroundings may have a very important bearing upon the determination of the question. Where, therefore, the crossing of the interurban railroad is in the country, especially if it is where the company has its own right of way and does not run along a highway, we think the same rule that is applied

32 L. R. A. 276. Many other cases to this effect are reviewed or cited in the note to Pilmer v. Boise Traction Co., 14 Idaho 327, 94 Pac. 432, in 15 L. R. A. (N. S.) 254, 259; also in White's Supp. Thomp. Corp. § 1443 and see post, § 1534.

[81] Young v. Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142 (but see Indiana cases cited in last preceding note); Hoelzel v. Crescent City R. Co., 49 La. Ann. 1302, 22 So. 330, 38 L. R. A. 708; Snider v. New Orleans &c. R. Co., 48 La. Ann. 1, 18 So. 695; Dieck v. New Orleans &c. R. Co., 51 La. Ann. 262, 25 So. 71; McNab v. United Railways &c. Co., 94 Md. 719, 51 Atl. 421; McGee v. Consolidated St. Ry. Co., 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300 and note, 47 Am. St. 507; Hornstein v. United Rys. Co., 195 Mo. 440, 92 S. W. 884, 887, 889; Rissler v. St. Louis Transit Co., 113 Mo. App. 120, 87 S. W. 578; Cawley v. La Crosse City R. Co., 101 Wis. 145, 77 N. W. 179 (in country at least). See also Cincinnati St. R. Co. v. Whitcomb, 66 Fed. 915; Highland Ave. R. Co. v. Sampson, 112 Ala. 425, 20 So. 566; Davidson v. Denver &c. Co., 4 Colo. App. 283, 35 Pac. 920; Citizens St. R. Co. v. Helvie, 22 Ind. App. 515, 53 N. E. 191; Kansas City &c. R. Co. v. Gallagher, 63 Kans. 424, 75 Pac. 469, 64 L. R. A. 344; Hickey v. St. Paul &c. R. Co., 60 Minn. 119, 61 N. W. 893; Read v. Brooklyn &c. R. Co., 53 N. Y. S. 209; Fancher v. Fonda &c. R. Co., 97 N. Y. S. 666; Smith v. Railroad Co., 29 Ore. 539, 46 Pac. 136, 780; Ehrisman v. East Harrisburg &c. R. Co., 150 Pa. St. 180, 24 Atl. 596, 17 L. R. A. 448; Wheelahan v. Philadelphia Traction Co., 150 Pa. St. 187, 24 Atl. 688; Omslaer v. Traction Co., 168 Pa. St. 519, 32 Atl. 50, 47 Am. St. 901; Keenan v. Union Traction Co., 202 Pa. St. 107, 58 L. R. A. 217; Electric R. Co. v. Boddy,

in ordinary commercial railroad crossings should, and probably would, be applied in all jurisdictions.[82]

§ 1517 (1096br). Crossing tracks—Miscalculation of chances.—A traveler who sees a rapidly approaching car yet voluntarily and unnecessarily attempts to cross the track in front of it upon a nice calculation of chances assumes the risk, or may be held guilty of contributory negligence, in a proper case, and we suppose the same rule usually applies in substance, especially in the country, in the case of an interurban railroad as in the case of an ordinary commercial railroad.[83] But if the car

105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885; Cable v. Spokane &c. R. Co., 23 L. R. A. (N. S.) 1224, and note, and also note in 15 L. R. A. (N. S.) 255 where nearly all the authorities on both sides are cited.

[82] Robinson v. Rockland &c. St. R. Co., 99 Maine 47, 58 Atl. 57; Cable v. Spokane &c. R. Co., 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224 and note. In Woiska v. St. Paul City R. Co., 80 Minn. 364, 83 N. W. 386, this distinction was noted, and it was held that while the absolute rule as to looking and listening did not apply in populous parts of a city, the duty to look and listen, as in case of an ordinary commercial railroad crossing, did exist at an interurban railroad crossing in a suburban and sparsely settled part of the city where the street was practically a country road. Other decisions also recognize a difference in the relative rights and duties of such companies and of travelers in sparsely settled or country districts from those in populous parts of cities. See Indianapolis St. R. Co. v. Bolin, 39 Ind. App. 169, 78 N. E. 210, 212; Indianapolis St. Ry. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663; Phillips v. Washington &c. Ry. Co., 104 Md. 455, 65 Atl. 422, 10 Ann. Cas. 334; McNab v. United R. &c. Co., 94 Md. 719, 51 Atl. 421 (noting this distinction and showing its limits); Folkmire v. Michigan United R. Co., 157 Mich. 159, 121 N. W. 811. Compare also Heitman v. Pacific Elec. R. Co., 10 Cal. App. 397, 102 Pac. 15. But see Keenan v. Union Tract. Co., 202 Pa. St. 107, 51 Atl. 742, 58 L. R. A. 217.

[83] See Griffith v. Denver &c. Co., 14 Colo. App. 504, 61 Pac. 46; McKeon v. Connecticut Co., 83 Conn. 53, 75 Atl. 139; Metz v. St. Paul City R. Co., 88 Minn. 48, 92 N. W. 502; O'Brien v. St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805; Gilliland v. Middlesex &c. Traction Co., 67 N. J. L. 542, 52 Atl. 693; Brown v. Elizabeth &c. R. Co., 68 N. J. L. 618, 54 Atl. 824; Furlong v. Metropolitan St. R. Co., 92 N. Y. S. 1008; Lazar v. New York &c. R. Co., 94 N. Y. S. 9; Jaffa v. Nassau Elec. R. Co., 131 App. Div. 852, 116 N. Y. S. 324; Norton v. Interurban St. R. Co., 98 N. Y. S. 216; Criss v. Seattle Elec. Co., 38 Wash. 320, 80

is a sufficient distance away and the circumstances are such that an ordinarily prudent man might attempt to cross in the exercise of reasonable care, the court can not well say as a matter of law that the risk was assumed and the traveler was guilty of contributory negligence. In cities especially, where cars are run more slowly and their speed is usually limited by ordinance, and they must be run with reference to the rights of those using the streets, and kept under control, and the like, the question of contributory negligence in crossing in front of a car approaching at some distance must usually be left to the jury.[84] And it has been held that the traveler usually has the right to presume that the car will be run in obedience to a governing speed ordinance,[85] and that a jury may well say

Pac. 525. See also Los Angeles Trac. Co. v. Conneally, 136 Fed. 104; Riley v. Shreveport Tract. Co., 114 La. Ann. 135, 38 So. 83; Dechene v. Greenfield &c. R. Co., 188 Mass. 423, 74 N. E. 600; Quinn v. Boston &c. R. Co., 188 Mass. 473, 74 N. E. 687; Freeman v. Brooklyn Heights R. Co., 81 N. Y. S. 828.

[84] Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545; Chicago City R. Co. v. Nelson, 116 Ill. App. 609; Chicago Union Tract. Co. v. Jacobson, 118 Ill. App. 383, affirmed in 217 Ill. 404, 409, 75 N. E. 508; Indianapolis St. R. Co. v. Bolin, 39 Ind. App. 169, 78 N. E. 451; Ward v. Marshalltown &c. R. Co., 132 Iowa 578, 108 N. W. 323; Kansas City &c. R. Co. v. Gallagher, 63 Kans. 424, 75 Pac. 469, 64 L. R. A. 344; United Rys. &c. Co. v. Watkins, 102 Md. 264, 62 Atl 234; La Londe v. Traction Co., 145 Mich. 77, 108 N. W. 365; Smith v. Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16; Hovarke v. St. Louis Transit Co., 191 Mo. 441, 90 S. W. 1142; Omaha St. Ry. Co. v. Mathiesen, 73 Nebr. 820, 103 N. W. 666; Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100; Franco v. Brooklyn Heights R. Co., 95 N. Y. S. 476. See also Philbin v. Denver City Tramway Co., 36 Colo. 331, 85 Pac. 630; Ward v. Marshalltown &c. R. Co., 132 Iowa 578, 108 N. W. 323; Hobel v. Mahoning &c. R. Co., 229 Pa. St. 507, 79 Atl. 119. But compare O'Brien v. St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805.

[85] Eckard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602. See also Bresee v. Los Angeles Tract. Co., 149 Cal. 131, 85 Pac. 152. 5 L. R. A. (N. S.) 1059; Indiana Union Tract. Co. v. Schwinge, 46 Ind. App. 525, 93 N. E. 35; Lundien v. Ft. Dodge &c. Ry. Co., 166 Iowa 85, 147 N. W. 358; Vrooman v. North Jersey St. R. Co., 70 N. J. L. 818, 59 Atl. 459; Seattle Elec. Co. v. Hooden, 190 Fed. 7. An ordinance limiting speed to six miles an hour has been held reasonable. Cincinnati &c. St. R. Co. v. Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363.

that he also has a right to assume that it is furnished with means of stopping or reducing its speed.[86]

§ 1518 (1096bs). Duty after traveler's peril is discovered.—We have elsewhere considered the question as to the liability of railroad companies for wilfulness and their duties after the peril of a traveler is discovered, or after it ought to have been discovered. We have also considered the question as to the duty of motormen and employes in such cases in running street cars, and the liability of the company under the doctrine of the "last clear chance." It is sufficient, therefore, in this connection to merely call attention to the more recent decisions upon the subject.[87]

[86] Kansas City &c. R. Co. v. Gallagher, 63 Kans. 424, 75 Pac. 469, 64 L. R. A. 344, 347, 348. See also Murphy v. Boston El. R. Co., 204 Mass. 229, 90 N. E. 398; Dallas &c. R. Co. v. Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455.

[87] Cases in which company was held liable or the question for the jury; Williams v. Metropolitan St. R. Co., 114 Mo. App. 1, 89 S. W. 59; Birmingham &c. Co. v. Clarke, 148 Ala. 673, 41 So. 829; Birmingham R. &c. Co. v. Jones, 153 Ala. 157, 45 So. 177; Kramm v. Stockton &c. R. Co., 86 Cal. App. 738, 86 Pac. 738; Stein v. United Rys., 159 Cal. 368, 113 Pac. 663; Hawley v. Columbia R. Co., 25 App. D. C. 1; Indianapolis St. R. Co. v. Bolin, 39 Ind. App. 169, 78 N. E. 210; Indianapolis Tract. &c. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663 and cases cited; Burns v. Worcester Consol. St. R. Co., 193 Mass. 63, 78 N. E. 740; Waddell v. Metropolitan St. R. Co., 113 Mo. App. 765, 88 S. W. 765; Jager v. Metropolitan St. R. Co., 114 Mo. App. 10, 89 S. W. 62; Bruening v. Metropolitan St. Ry. Co., 181 Mo. App. 264, 168 S. W. 247; Hanson v. Manchester St. R. Co., 73 N. H. 395, 62 Atl. 595. Cases in which company was not liable, Abbott v. Kansas City &c. R. Co., 121 Mo. App. 582, 97 S. W. 198; Indianapolis &c. Tract. Co. v. Crawley, 51 Ind. App. 357, 96 N. E. 392; Evansville &c. Tract. Co. v. Johnson, 54 Ind. App. 601, 97 N. E. 176; Stalenan v. Atlanta Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, 63 Am. St. 698; Taylor v. Houston &c. Co., 38 Tex. Civ. App. 432, 85 S. W. 1019; Tishacek v. Milwaukee &c. Co., 110 Wis. 417, 85 N. W. 971. See generally Louisville R. Co. v. Edelens (Ky.), 96 S. W. 901; South Covington &c. Ry. Co. v. Herrklotz, 104 Ky. 400, 47 S. W. 265; Hafner v. St. Louis Transit Co., 197 Mo. App. 196, 94 S. W. 291; Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856.

§ 1519 (1096bt). Carriers—Rights, duties and liabilities.—Interurban railroad companies are common carriers of passengers, and, as such, are subject to the duties and liabilities of such carriers. Whether such a company is a common carrier of freight or not must usually depend upon the statute of the particular jurisdiction and the charter and franchises of the particular company, but it may be held liable as a common carrier of goods where it has held itself out as such and has customarily carried such goods.[88] Under some statutes they are expressly authorized to carry property as well as persons.[89] And in New York it was said some years ago that companies might be legally formed under the general railroad act for the transportation of passengers or freight, or both, over railroads in the streets of cities even with horses as the motive power.[90] So, under the New York law granting to street surface railroads the power to convey "persons and property in cars for compensation" it is held that they have the right to convey not only passengers with property, or, in other words, passengers and their baggage, but also both passengers and freight, and that they may operate cars designed and intended exclusively for the purpose of carrying express matter and freight.[91] Under the

[88] See Levi v. Lynn &c. R. Co., 11 Allen (Mass.) 300, 87 Am. Dec. 713; Thompson-Houston &c. Co. v. Simon, 20 Orc. 60, 25 Pac. 147, 47 Am. & Eng. R. Cas. (N. S.) 300, 10 L. R. A. 251, 23 Am. St. 86.

[89] Roberts v. Terre Haute &c. Co., 37 Ind. App. 664, 76 N. E. 323. See also State v. Dayton Traction Co., 64 Ohio St. 272, 60 N. E. 291; Diebold v. Kentucky Traction Co., 117 Ky. 146, 77 S. W. 674, 63 L. R. A. 637, 111 Am. St. 230 (holding that it is a commercial railroad rather than a street railway when it carries freight from a city or town to another). In a number of the cases cited in the section discussing the question as to whether an interurban railroad company is an additional burden, it appeared that the company carried freight as well as passengers, and the effect of that fact was there considered.

[90] Washington St. &c. R. Co., In re, 115 N. Y. 442, 22 N. E. 356. See also Transit Co. v. Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728.

[91] De Graaw v. Long Island &c R. Co., 60 N. Y. S. 163, affirmed in 163 N. Y. 597, 57 N. E. 1108, and approved in Stillwater &c. St. R. Co., Re, 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489. See also Aycock v. San Antonio Brewing Assn., 26 Tex. Civ. App. 341, 63 S. W. 953;

Ohio statute giving interurban companies the right to agree with urban street railway companies for the use of their tracks, in getting into and passing through a municipality, it has been held that the interurban company cannot be compelled to accept a transfer given to a passenger of the urban company and good upon the cars of such urban company passing over routes which are in part traversed by the cars of the interurban company.[92] But in Indiana, a street railway company, operating under an agreement with the city to give transfers to all passengers who boarded its cars within the city whose destination might be at any other point upon any of its lines within the city, was held bound to carry a passenger, who tendered a proper transfer, to his destination on its line, although such destination was a place in territory annexed to the city after the agreement between such company and the city was made, and was on the company's interurban lines on which it had a franchise entitling it to charge an additional fare outside the city limits as they existed before the annexation.[93] Interurban railroad companies, as carriers of passengers, owe to their passengers the duty of exercising the same high degree of care required of other carriers of passengers.[94] But, as in other

Nichols v. Ann Arbor &c. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371. But compare South &c. R. Co. v. Highland Ave. &c. R. Co., 119 Ala. 105, 24 So. 114.

92 Interurban &c. R. Co. v. Cincinnati, 75 Ohio St. 196, 79 N. E. 240.

93 Indiana R. Co. v. Hoffman, 161 Ind. 593, 69 N. E. 399.

94 Pell v. Joliet &c. R. Co., 238 Ill. 510, 87 N. E. 542; Interurban R. Co. v. Hancock, 75 Ohio St. 88, 78 N. E. 964. See also West Chicago St. R. Co. v. Kromshinsky, 185 Ill. 92, 56 N. E. 1110; Chicago &c. Traction Co. v. Schritter, 222 Ill. 364, 78 N. E. 820; Wabash River Tract. Co. v. Baker, 167 Ind. 262, 78 N. E. 196; Leonard v. Brooklyn Heights R. Co., 67 N. Y. S. 985; Nichols v. Lynn &c. R. Co., 168 Mass. 528, 47 N. E. 427; Robinson v. Helena Light &c. R. Co., 38 Mont. 222, 99 Pac. 837; Reynolds v. Richmond &c. R. Co., 92 Va. 400, 23 S. E. 770. And it has been held that a court will take judicial notice that a domestic company organized and operating a street railway under the laws of the state is a carrier of passengers. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978. As to when one becomes a passenger on an interurban car before entering it, see Karr v. Milwaukee Light &c. Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283,

cases, a passenger cannot ordinarily recover where his own negligence is the proximate cause of his injury. Although some courts seem to apply a more liberal rule in case of passengers who allow some part of their body to project outside of a street car,[95] than that which is applied in most jurisdictions in the case of steam railroads, yet we think it is correctly held, in a recent case, that substantially the same rule applies in this respect in the case of interurban railroads as in the case of steam railroads, and that it is negligence for a passenger upon a rapidly moving interurban car to intentionally and needlessly project his arm, or a part thereof out of the window of the car.[96] So, as shown in the third section of this chapter, it is held in Ohio that, while it may not be negligence to stand on the platform of a street car or even of an interurban car in the city, it is negligence to so stand on the platform of a rapidly moving interurban car in the country. But standing in the vestibule, in compliance with a rule of the company, has been held not to be contributory negligence precluding a recovery where the passenger is thrown down and injured by a collision of the car with another of the company's cars.[97] It has been said that a street railway company, having no control of a street, is not responsible for its safety, and where a passenger

122 Am. St. 1017. And compare Palfrey v. United Rys. Co., 162 Mo. App. 470, 142 S. W. 773.

[95] See Summers v. Crescent City R. Co., 34 La. Ann. 139, 44 Am. Rep. 419; Dahlberg v. Minneapolis St. R. Co., 32 Minn. 404, 21 N. W. 545; 50 Am. Rep. 585; Gardner v. Metropolitan St. R. Co., 223 Mo. 389, 122 S. W. 1068; Miller v. St. Louis &c. Co., 5 Mo. App. 471; Federal St. &c. Co. v. Gibson, 96 Pa. St. 83. Compare also Georgetown &c. R. Co. v. Smith, 25 App. D. C. 259, 5 L. R. A. (N. S.) 274; Pell v. Joliet &c. R. Co., 238 Ill. 510, 87 N. E. 542; Cincinnati &c. R. Co. v. Lorton, 33 Ky. L. 689, 110 S. W. 857; Kuttner v. Central R. Co., 80 N. J. L. 11, 77 Atl. 470.

[96] Interurban &c. Co. v. Hancock, 75 Ohio St. 88, 78 N. E. 964, 6 L. R. A. (N. S.) 997.

[97] Goodloe v. Metropolitan &c. Ry. Co., 120 Mo. App. 194, 96 S. W. 482. But see as to trespasser, Graham v. Chicago &c. Ry. Co., 131 Iowa 741, 107 N. W. 595. And see Heinze v. Interurban Ry. Co., 139 Iowa 189, 114 N. W. 534 (where company was held not negligent in suddenly accelerating the speed of a car which had slowed down and a passenger was thrown from the platform step there being nothing to mistake him and no employe knowing that he was there).

was injured in alighting, by stepping into an ordinary gutter, it was held that the company was not liable for failure of the conductor to warn the passenger of its existence.[98] But where a car is stopped for a passenger to alight, he usually has a right to assume, in the absence of anything to the contrary, that it is at a place where he can alight in the exercise of due care, and if it is at a dangerous place as the company knows or ought to know, it is usually the duty of the company to warn him even if it has no control of the street.[99] And this is especially true where it is upon the company's own private right of way.[1]

§ 1520 (1096bu). Power to make traffic arrangements—Connections with other roads.—In a comparatively recent case in

[98] Thompson v. Gardner &c. Ry. Co., 193 Mass. 133, 78 N. E. 854, 118 Am. St. 459, citing Creamer v. West End St. R., 156 Mass. 320, 321, 31 N. E. 391, 14 L. R. A. 490, 32 Am. St. 456, and Bigelow v. West End St. Ry., 161 Mass. 393, 37 N. E. 367. See also Indianapolis Tract. &c. Co. v. Pressell, 39 Ind. App. 472, 77 N. E. 357; Quinlan v. Newton &c. St. R. Co., 191 Mass. 58, 77 N. E. 486; Wilson v. Detroit United Ry. Co., 167 Mich. 107, 132 N. W. 762; Robertson v. West Jersey &c. R. Co., 79 N. J. L. 186, 74 Atl. 300.

[99] Indiana Union Tract. Co. v. Jacobs, 167 Ind. 85, 78 N. E. 325; Tilden v. Rhode Island Co., 27 R. I. 482, 63 Atl. 675; West Chicago St. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958; Bass v. Concord St. R., 70 N. H. 170, 46 Atl. 1056. For other cases as to injuries received in boarding or alighting, see Davis v. Camden &c. R. Co., 73 N. J. L. 415, 63 Atl. 843; Scott v. Bergen Co. T. Co., 63 N. J. L. 407, 43 Atl. 1060; Moore v. Woonsocket St. R. Co., 27 R. I. 450, 63 Atl. 313 (evidence as to the customary stopping place and the like held admissible); South Covington &c. Ry. Co. v. Core, 29 Ky. L. 836, 96 S. W. 562, note in 38 L. R. A. 786, et seq.; Henry v. Grant St. El. R. Co., 24 Wash. 88, 64 Pac. 137, 85 Am. St. 942; Wabash River Tract. Co. v. Baker, 167 Ind. 262, 78 N. E. 196; Hilborn v. Boston &c. R. Co., 191 Mass. 14, 77 N. E. 646; Colorado Springs &c. Ry. Co. v. Petit, 37 Colo. 326, 86 Pac. 121

[1] Joslyn v. Milford &c. St. Ry. Co., 184 Mass. 65, 67 N. E. 866. See also Colorado Springs &c. R. Co. v. Petit, 37 Colo. 326, 86 Pac. 121; White v. Lewiston &c. R. Co., 107 Maine 412, 78 Atl. 473. For other cases of injury to passengers on interurban railroads, see generally, Indiana Union Tract. Co. v. McKinney, 39 Ind. App. 86, 78 N. E. 203; Cumberland &c. Ry. Co. v. Thompson, 102 Md. 193, 62 Atl. 243; Verrone v. Rhode Island Suburban R. Co., 27 R. I. 370, 62 Atl. 512; Abel v. Northampton Tract. Co., 212 Pa. St. 329, 61 Atl. 915.

Ohio it is said that in view of recent developments and the legislation of that state treating interurban as well as city railway companies as street railways and authorizing them to carry freight as well as passengers and to make traffic arrangements, the mere fact that street railway companies have usually been considered as carriers of passengers and not of freight does not show how that they cannot carry freight under the statute, and it is held that, under such statute an electric railway company owning and operating a road upon a city street and an interurban railway company having a terminus at such place may make a valid traffic arrangement for the carriage of merchandise for hire upon such street.[2] So, in New York it has been held that electric railways are entitled to track connections with interesting commercial steam railroad companies where the statute gives such right to "every railroad corporation," especially where the incorporation of both classes of roads is provided for in the same statute containing such provision.[3] And in another

[2] State v. Dayton Traction Co., 64 Ohio St. 272, 60 N. E. 291.

[3] Stillwater &c. St. R. Co. v. Boston &c. R. Co., 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489. The electric railway company in this case was organized under the general railroad law with the right to transport both passengers and freight, and the road extended from one city or town to another. In the course of the opinion it was said: "If one electric road were seeking a connection with another road operated by the same power, it would hardly be claimed that the provisions of sec. 12 did not apply. It is practically conceded that electric roads may be united with other roads of the same character, and operated by the same power. But the statute has not limited the courts to the requiring if intersections and connections between roads of the same character. Very likely, electric roads tendering cars to steam roads for transportation should only offer those properly equipped with brakes and couplers, so that they may be taken and transported readily and safely. It may be that additional regulations will become necessary in order that equal privileges, accommodations, and facilities may be afforded in connecting and intersecting roads, but all this may be controlled by the board of railroad commissioners. It is said that the rights of the public in the streets and highways of our cities, towns, and villages should be protected, and that cars loaded with merchandise and freight should not be permitted to be run over street surface railroads. It may be that additional regulations should be provided, either by statute or by ordinance, limiting the time in which

Ohio case it is held that the right given by statute to "urban and interurban street railroad companies" to agree as to the use by the latter of tracks of the former to enter and pass through the city is not conditional upon an exchange of transfers.[4]

§ 1521 (1096bv). Action for death caused by negligence of employe—Statute applied to electric railroads.—In Missouri a statute provides that whenever any person shall die from an injury resulting from, or occasioned by, the negligence of any servant or employe while running, conducting or managing any locomotive, car or train of cars the corporation in whose employ such servant or employe shall be at the time the injury is committed shall forfeit and pay for every person so dying the sum of five thousand dollars. This statute has been held to include and apply to interurban or street railroads.[5] It has also been held that the negligence may be either negligence as defined at common law or that arising from a failure to discharge a duty imposed by statute or municipal ordinance.[6] The ordinary statutes modeled on Lord Campbell's act also apply in the case of interurban railroad companies as in other cases, and recent decisions in such cases relating to interurban or electric railway companies are cited below.[7]

cars of this character should be permitted to run over street surface railroads, especially in cities and large villages; but that the power exists to run such cars is no longer an open question in this court."

[4] Interurban R. &c. Co. v. City of Cincinnati, 75 Ohio St. 196, 79 N. E. 240. But see Indiana R. Co. v. Hoffman, 161 Ind. 593, 69 N. E. 399.

[5] McQuade v. St. Louis &c. R. Co., 200 Mo. 150, 98 S. W. 552; Higgins v. St. Louis &c. R. Co., 197 Mo. App. 300, 95 S. W. 863. See also Ruppel v. United Rys., 1 Cal. App. 666, 82 Pac. 1073; Lynch v. Railroad, 112 Mo. 420, 441, 20 S. W. 642. But compare Drolshagen v. Union R. Co., 186 Mo. 258, 85 S. W. 344. The statute has since been amended so as to expressly apply to such companies, but the court held that it so applied before the amendment.

[6] McQuade v. St. Louis &c. R. Co. (Mo. App.), 98 S. W. 552.

[7] Ruppel v. United Railroads, 1 Cal. App. 666, 82 Pac. 1073; North Chicago St. R. Co. v. Brodie, 156 Ill. 317, 40 N. E. 942; Oliver v. Houghton County St. Ry. Co., 138 Mich. 242, 101 N. W. 530; Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346; Dillon v. Hudson &c. Electric R. Co., 73 N. H. 367, 62

§ 1522 (1096bw). **Employes and injuries to them—Employer's liability acts.**—The doctrines and rules applicable in other railroad cases as between master and servant apply in general as between interurban railway companies and their employes. So does the common law doctrine of fellow servants. It will be sufficient, therefore, to merely refer to a few recent cases of actions by employes against electric railroad companies for damages for personal injuries,[8] in addition to the treatment of the great subject elsewhere in this work. But the question arises as to whether employer's liability acts, making changes in the fellow servant doctrine, apply to such companies. As elsewhere shown, it is generally held that such statutes do not apply to street railway companies.[9] There is, perhaps, a little more reason for applying them to interurban railroad companies; but most of such statutes were passed before electric railroads, and especially interurban railroads, were known, and the "mischief to be remedied" was the peculiar danger arising from the operation of commercial steam railroads; and the danger from coupling cars in long trains, switching, running freight trains, and the general method of operation, is not apparently the same, either in kind or degree, in the case of interurban railroads as generally operated at the present day. For these reasons, among others, it would seem that employer's liability acts, relating merely to "railroads," do not ordinarily apply to interurban electric railroads.[10] Certainly, some of the provisions usually

Atl. 93; Austin v. Metropolitan St. R. Co., 95 N. Y. S. 740; Abel v. Northampton Traction Co., 212 Pa. St. 329, 61 Atl. 915; Morris v. Spartanburg R. &c. Co., 70 S. Car. 279, 49 S. E. 854; Halverson v. Seattle Elec. Co., 35 Wash. 600, 77 Pac. 1058.

[8] Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Ladd v. Brockton &c. R. Co., 180 Mass. 454, 62 N. E. 730; Cole v. Transit Co., 183 Mo. 81, 81 S. W. 1, 138; Moore v. Transit Co., 193 Mo. 411, 91 S. W. 1060; Lincoln St. R. Co. v. Cox, 48 Nebr. 807, 67 N. W. 740; Pierce v. Camden &c. R. Co., 58 N. J. L. 400, 35 Atl. 286; Sullivan v. Metropolitan St. Ry. Co., 65 N. Y. S. 842.

[9] See ante, §§ 5, 7, and post, § 1929.

[10] Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Sams v. St. Louis &c. R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475; Johnson v. Metropolitan St. R. Co., 104 Mo. App. 588, 78 S. W. 275. See also Riley v. Galveston &c. R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826; Funk v. St. Paul City

found in such acts cannot apply, and an electric car upon such a road is not a "locomotive engine" or "train upon a railway," within the meaning of such a statute.[11] The Federal Employer's Liability Act, however, which supersedes state laws where it is applicable, seems to apply to interurban railways engaged in interstate transportation.[12]

§ 1523. Miscellaneous—An interurban railway company doing an interstate business has also been held subject to the interstate commerce law in regard to rates and such matters;[13] but a recent decision of the Supreme Court of the United States seems to be to the contrary,[14] although it may possibly be distinguished on the ground that in the case referred to the company in question was incorporated as a street railway with tracks almost wholly on public streets and did only a passenger business. The Federal Safety Appliance Act does not apply to cars of such a railroad, so as to require automatic

R. Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. 608; Hughes v. Indiana Un. Tract. R. Co., 57 Ind. App. 202, 105 N. E. 537; Indianapolis Tract. Co. v. Kinney, 171 Ind. 612, 85 N. E. 954; McLeod v. Chicago &c. R. Co., 125 Iowa 270, 101 N. W. 77. But see Savannah &c. R. v. Williams, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249; Edge v. Southwest Mo. Ry. Co., 206 Mo. 471, 104 S. W. 90. And compare also Louisville &c. R. Co. v. Anchors, 114 Ala. 492, 22 So. 492.

[11] Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Fallon v. West End St. R. Co., 171 Mass. 249, 50 N. E. 536; Norfolk &c. Traction Co. v. Ellington, 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117. See also Whatley v. Zenida Coal Co., 122 Ala. 118, 26 So. 124.

[12] McAdow v. Kansas City &c. Ry. Co. (Mo. App.), 164 S. W. 188. See also Edge v. Southwest Mo. Elec. R. Co., 206 Mo. 471, 104 S. W. 90 (state statute held to apply to interurban railway before passage of Federal Employers' Liability Act); Howard v. Illinois Cent. R. Co., 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. 297; South Covington Street R. Co. v. Finans, 153 Ky. 340, 155 S. W. 742.

[13] Chicago &c. Elec. Ry. Co. v. Illinois Cent. R. Co., 13 Int. Com. Rep. 20; Wilson v. Rock Creek R. Co., 7 Int. Com. Rep. 83; Beall v. Washington &c. R. Co., 20 Int. Com. Rep. 406.

[14] Omaha &c. St. Ry. Co. v. Interstate Com. Com., 230 U. S. 324, 33 Sup. Ct. 890, 57 L. ed. 1501, 46 L. R. A. (N. S.) 385. See also Act of Congress of June 18, 1910 (36 Stat. at Large, 552, ch. 309).

couplers, where the cars are not used in a train.[15] And a speed ordinance relating to railroad trains has been held inadmissible in evidence in an action against an interurban electric railway company for damages for injuries in collision with the plaintiff's automobile at a street crossing.[16] It has also been held that a general mechanic's lien statute giving a lien to one who builds or furnishes material for a house or structure does not give such a lien to one who constructs a power plant for an electric railroad and installs machinery therein so that it becomes an integral and permanent part of the railroad system.[17] And the tracks and right of way of such a company on a street have been held not to be subject to assessment for the construction of a sewer.[18]

[15] Campbell v. Spokane &c. R. Co., 188 Fed. 516.

[16] Texas Trac. Co. v. Wiley (Tex. Civ. App.), 164 S. W. 1028.

[17] Detroit Trust Co. v. Detroit &c. Ry. Co., 159 Mich. 442, 124 N. W. 45.

[18] Indiana Union Tract. Co. v. Gough, 54 Ind. App. 438, 102 N. E. 453, and cases there cited.

CHAPTER XLVII.

STREET RAILWAY NEGLIGENCE.

Sec.
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1553. Making change and giving transfers.
1554. Transfers — Statutes and rules and regulations.
1555. Liability for wilful acts of employes.
1556. Care as to persons at work on streets.
1557. Deaf, blind and aged persons on the track.

§ 1525 (1096ca). Generally—Scope of chapter.—The general duty of street railway companies as to the repair and use of

streets has already been considered. Attention has been called in a general way to the relative rights of the company and of travelers using the streets and a few illustrative cases have been cited as to the liability of the company for negligence causing injuries to travelers.[1] In this chapter an outline of the duties and liabilities of street railway companies to travelers will first be given, and the liabilities of such companies and the rights and duties of travelers under particular circumstances will then be considered somewhat in detail, to which will be added a consideration of the duties and liabilities of such companies as carriers of passengers.

§ 1526 (1096cb). Care required generally—Liability for injury to persons using street.—It is the duty of a street railway company to exercise ordinary or reasonable care and diligence not to injure persons lawfully traveling the street or road occupied by its tracks. It is bound to know that the public may use the entire street or road when not in actual use by its cars, and it must employ reasonable means to prevent injury to those who it knows may rightfully so use the road or street, for this knowledge requires that it shall exercise care and diligence to make it reasonably safe to travel the highway in the ordinary mode,[2] or, in other words, that the company shall exercise care

[1] See ante, §§ 1442-1445.

[2] Government St. R. v. Hanlon, 53 Ala. 70; Shea v. Potrero &c. R. Co., 44 Cal. 414; Swain v. Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829; Muncie St. R. Co. v. Maynard, 5 Ind. App. 372, 32 N. E. 342, 346 (citing text); Citizens St. R. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 729; Rascher v. East Detroit &c. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. 447; Anderson v. Minneapolis St. R. Co., 42 Minn. 490, 44 N. W. 518, 18 Am. St. 525; Bremer v. St. Paul City Ry. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. (N. S.) 887 and note; Winters v. Kansas City R. Co., 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536 and note, 17 Am. St. 591; Railroad Co. v. Norton, 24 Pa. St. 465, 64 Am. Dec. 672; Hall v. Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. 726, 732 (quoting text). See also Montgomery St. R. Co. v. Smith, 146 Ala. 316, 39 So. 757; Milton v. Bangor Ry. &c. Co., 103 Maine 218, 68 Atl. 826, 125 Am. St. 293, 15 L. R. A. (N. S.) 203 and note; Cleveland v. Boston El. R. Co., 211 Mass. 75, 97 N. E. 623. But it is not ordinarily to maintain parts of the street not occupied by it. Indianapolis Tract. &c. Co.

and diligence to so lay its track and maintain and operate its road as not to endanger travelers in their proper use of the streets.[3] If the company omits to exercise ordinary care, and thus causes injury to a person in rightful and careful use of the street or road, it must respond in damages. In one case the court instructed the jury that a street railway company "had no right to so occupy the street and use the same with its cars as to make it extremely dangerous to cross the streets at all times," and it was held on appeal that the company could not successfully complain of the instruction.[4] It was also held in the same case that the plaintiff had a right to select a point at which to cross, and that "he had a right to go where he chose." It is held that it is the duty of those in charge of a car to give notice or warning of its approach.[5] In one case it was said to be "gross negligence" for a driver to twist the lines upon the brake, turn his back and give his attention to other matters.[6] Where the ordinance requires a street railway company to keep "a lookout," a negligent failure to comply with

v. Pressell, 39 Ind. App. 472, 77 N. E. 357. And a mere accurate statement of the rule would perhaps be that the company is under a duty to use such care to not render the highway unsafe for such travel. See Fielders v. North Jersey St. R. Co., 68 N. J. L. 343, 53 Atl. 404, 54 Atl. 822, 96 Am. St. 552, 59 Atl. 455.

[3] Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545; Groves v. Louisville R. Co., 109 Ky. 76, 58 S. W. 508, 52 L. R. A. 448 and note; Fash v. Third Ave. R. Co., 1 Daly (N. Y.) 148; Bradwell v. Pittsburg &c. R. Co., 153 Pa. St. 105, 25 Atl. 623; Goldrick v. Union R. Co., 20 R. I. 128, 37 Atl. 635; Houston St. R. Co. v. Delesdernier, 84 Tex. 82, 19 S. W. 366. See also O'Leary v. Brockton St. R. Co., 177 Mass. 187, 58 N. E. 585.

[4] McClain v. Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062.

[5] Johnson v. Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375 and note; Mitchell v. Tacoma &c. Co., 9 Wash. 120, 37 Pac. 341; Consolidated Tract. Co. v. Chenowith, 61 N. J. L. 554, 35 Atl. 1067. See Lenkewicz v. Wilmington City Ry. Co., 7 Del. 14, 74 Atl. 11; Welsh v. Jackson &c. Co., 81 Mo. 466.

[6] Mangam v. Brooklyn City R. Co., 36 Barb. 230 (affirmed, 38 N. Y. 455, 98 Am. Dec. 66 and note). See also Montfort v. Schmidt, 36 La. Ann. 750; Citizens' St. R. Co. v. Carey, 56 Ind. 396; Baltimore Trac. Co. v. Wallace, 77 Md. 435, 26 Atl. 518; Schnur v. Citizens' Tract. Co., 153 Pa. St. 29, 25 Atl. 650, 34 Am. St. 680; Commonwealth v. Metropolitan R. Co., 107 Mass. 236.

the requirement will make the company liable to one who, without fault on his part, thereby sustains an injury,[7] and, indeed, there may be a liability even in the absence of such an ordinance. So, where an ordinance prohibits a street railway company from running its cars at a greater rate of speed than that prescribed, a disobedience at least furnishes evidence of negligence,[8] but disobedience of such an ordinance has been held in some jurisdictions not to be conclusive evidence of negligence on the part of the company.[9] The Supreme Court of Nebraska has held that the driver of a horse-car on a street railway must sit or stand on the front platform or place provided for him, must keep control of the horse and car, and must exercise a reasonable degree of watchfulness and care to prevent injury to persons traveling on or crossing the street.[10]

[7] Hays v. Gainesville &c. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. 624. See also Denver City Tramway Co. v. Martin, 44 Colo. 324, 98 Pac. 836; Indianapolis St. Ry. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; Bremer v. St. Paul City Ry. Co., 105 Minn. 326, 120 N. W. 382, 21 L. R. A. (N. S.) 887; Fath v. Tower Grove &c. R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74.

[8] Baltimore &c. R. Co. v. McDonell, 43 Md. 534; Citizens' St. R. Co. v. Steen, 42 Ark. 321, 19 Am. & Eng. R. Cas. 30. See also Weber v. Kansas City &c. R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819 and note, 18 Am. St. 541, and note in 53 Am. Rep. 52; Spencer v. St. Louis Trac. Co., 222 Mo. 310, 121 S. W. 188 (negligence per se). In many jurisdictions it is regarded as negligence per se, and this seems to be the better rule if it does not mean actionable negligence which includes the further element of proximate cause.

[9] Hanlon v. South Boston &c. R. Co., 129 Mass. 310. Compare however Highland Ave. &c. R. Co. v. Sampson, 112 Ala. 425, 20 So. 566; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; Cogswell v. West &c. R. Co., 5 Wash. 46, 31 Pac. 411. Whether such a violation of a statute or ordinance is negligence per se or merely evidence of negligence is a qustion that will be more fully considered in another connection. See also note in 49 L. R. A. (N. S.) 737 and 8 L. R. A. (N. S.) 1093.

[10] Brooks v. Lincoln Street R. Co., 22 Nebr. 816, 36 N. W. 529. The cases upon the general subject are quite numerous, and exhibit many peculiar features and disclose some conflict of opinion, but we cannot comment upon them in detail. Hyland v. Yonkers &c. R. Co., 51 Hun 643, 4 N. Y. S. 305; Liddy v. St. Louis &c. R. Co., 40

The duty of a street railway company, as indicated by what has already been said, is not simply to use ordinary care and diligence to avoid injury by collisions with vehicles moving upon the road or street, or with persons walking on the highway, but it must also exercise ordinary care and diligence in conducting its business and in maintaining its tracks so as to prevent injury to persons rightfully using the road or street. If it makes a street dangerous by its own negligent act it is liable; so, if it places objects alongside of its tracks which are likely to frighten horses, it may be compelled to respond in damages to one who sustains an injury from its wrong.[11] It is not held to an extraordinary degree of care in the conduct of its business, but it is held to the exercise of ordinary care.[12]

Mo. 506; Dunn v. Cass Avenue &c. R. Co., 98 Mo. 652, 11 S. W. 1009; Meyer v. Lindell St. R. Co., 6 Mo. App. 27; Lamb v. St. Louis &c. R. Co., 33 Mo. App. 489; Unger v. Forty-second St. R. Co., 51 N. Y. 497; Cordes v. Third Avenue R. Co., 21 N. Y. St. 461, 4 N. Y. S. 439; Brown v. Seventy-third Avenue R. Co., 21 N. Y. St. 475, 4 N. Y. S. 192; Wright v. Third Avenue R. Co., 23 N. Y. St. 483, 5 N. Y. S. 707; Gallagher v. Coney Island R. Co., 24 N. Y. St. 746, 4 N. Y. S. 870; Pendleton Street R. Co. v. Shires, 18 Ohio St. 255; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1, 19. See generally Buzby v. Philadelphia &c. Co., 126 Pa. St. 559, 17 Atl. 895, 12 Am. St. 919; Griveaud v. St. Louis &c. R. Co., 33 Mo. App. 458; Watson v. St. Paul &c. R. Co., 42 Minn. 46, 43 N. W. 904. As to what damages may be recovered, see Chicago &c. R. Co. v. Ingraham, 131 Ill. 659, 23 N. E. 350. In Mathews v. London St. Tramways Co., 60 L. T. R. 47, a passenger in an omnibus was injured by a collision with a car, and the court held that there might be a recovery notwithstanding the negligence of the driver of the omnibus.

[11] In Smith v. Nashua St. R. Co., 69 N. H. 504, 44 Atl. 133, the company was held liable to one who was thrown out of his sleigh by a pile of snow which the company had left at the side of its track. See also Haynes v. Waterville &c. St. R. Co., 101 Maine 335, 64 Atl. 614; Dix v. Old Colony St. Ry. Co., 202 Mass. 518, 89 N. E. 109; McMahon v. Lynn &c. R. Co., 191 Mass. 295, 77 N. E. 826 (company held liable where sleigh was overturned by ridge of snow between tracks).

[12] McKenna v. Metropolitan &c. R. Co., 112 Mass. 55; Osgood v. Lynn &c. R. Co., 130 Mass. 492; Isaackson v. Duluth St. R. Co., 77 Minn. 27, 77 N. W. 433, 434 (citing text). Lowrey v. Brooklyn City R. Co., 4 Abbott's New Cases (N. Y.) 32; McMahon v. Second Ave. R. Co., 11 Hun (N. Y.) 347; Gray

The quantum of care or the precaution to be taken may vary with the circumstances of the particular case,[13] but, while it is sometimes said that a higher or lower degree of care is required under certain circumstances, we think that all that is meant is what we have just stated, and that the degree of care required as to travelers upon the street is still ordinary or reasonable care under the circumstances.[14]

v. Second Ave. R. Co., 65 N. Y. 561; Wooley v. Grand &c. R. Co., 83 N. Y. 121; Citizens' Passenger R. Co. v. Ketcham, 122 Pa. St. 228, 15 Atl. 733; Lee v. Union R. Co., 12 R. I. 383, 34 Am. Rep. 668; Fitts v. Cream City R. Co., 59 Wis. 323, 18 N. W. 186, 15 Am. & Eng. R. Cas. 462.

[13] See Cincinnati St. R. Co. v. Whitcomb, 66 Fed. 915; Citizens' St. R. Co. v. Steen, 42 Ark. 321; Brown v. Wilmington City R. Co., 1 Pennew. (Del.) 332, 40 Atl. 936; West Chicago St. R. Co. v. Petters, 196 Ill. 298, 63 N. E. 662; Indianapolis Tract. &c. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347; Winters v. Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536 and note, 17 Am. St. 591; Stafford v. Chippewa Valley Elec. R. Co., 110 Wis. 331, 85 N. W. 1036.

[14] In the recent case of Rubinovitch v. Boston El. R. Co. (Mass.), 77 N. E. 895, 896, it is said: "While a common carrier of passengers is held to the highest degree of care commensurate with his undertaking, this principle is applicable only to his conduct towards those who are being transported, or to whom he sustains this relation. Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700. The defendant, who was lawfully using the street for the operation of its railway, did not owe this duty to the plaintiff, who was a traveler upon a public way, although each owed to the other, while concurrently using the street, the reciprocal obligation of due care. O'Brien v. Blue Hill St. R. Co., 186 Mass. 446, 71 N. E. 951. Consequently it has been said that a motorman in charge of a car which is passing through a street, even if the motive power is electricity, stands on the same footing in regard to his due care, or negligence toward other travelers, as the driver of any vehicle. Scannel v. Boston &c. R. Co., 176 Mass. 170, 173, 57 N. E. 341. Occasions may arise where, in the performance of this duty, the apparent danger of severe bodily injury or death to pedestrians, or travelers by carriage, or other vehicles, may demand of him the exercise of a high degree of care, but even then the requirement in degree is only such prudence and foresight as the jury, upon the evidence, may determine to have been reasonably required under the circumstances. Uggla v. West End St. R. Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. 481; O'Leary v. Brockton St. R. Co., 177 Mass. 187, 58 N. E. 585. The imperative duty of safe transpor-

§ 1527 (1096cc). Injuries caused by obstructions or failure to repair.—The authority lawfully given to a street railway company to construct its track in a street carries with it the right to temporarily obstruct the ordinary use of the street so far as the laying of the track requires it to be done.[15] But due care must be exercised in doing and guarding the work so as not to negligently injure travelers in the proper use of the street.[16] The company is liable for injuries proximately caused to travelers without fault or negligence on their part by obstructions unlawfully or negligently placed or left by it in the street.[17] It is required to use reasonable care not only in constructing its railway[18] but also to maintain it in a rea-

tation owed to passengers, which a common carrier operating a street railway engages to perform, from the very nature of the undertaking, does not extend to travelers along the route, and the instructions given accurately and fully stated the true rule, that the measure of care required of the defendant's servant was that of the ordinarily prudent and careful man, when called upon to act under the conditions disclosed by the evidence. Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334."

[15] See Shepherd v. Baltimore &c. R. Co., 130 U. S. 426, 433, 9 Sup. Ct. 598, 601, 32 L. ed. 970. See also Cowan v. Muskegon R. Co., 84 Mich. 583, 48 N. W. 166.

[16] Thomas v. Consolidated Tract. Co., 62 N. J. L. 36, 42 Atl. 1061. See also Donovan v. Oakland &c. Co., 102 Cal. 245, 36 Pac. 516; Lowe v. Metropolitan St. R. Co. (Mo. App.), 130 S. W. 119; Morhart v. North Jersey St. R. Co., 64 N. J. L. 236, 45 Atl. 812; Indianapolis St. R. Co. v. Walton, 29 Ind. App. 368; 64 N. E. 630; Union Tract. Co. v. Barnett, 31 Ind. App. 467, 67 N. E. 205.

[17] West Chicago St. R. Co. v. O'Connor, 85 Ill. App. 278; Ford v. Charles Warner Co., 1 Marv. (Del.) 88, 37 Atl. 39; Slayton v. West End St. R. Co., 174 Mass. 55, 54 N. E. 351; Newport News &c. R. Co. v. Bradford, 100 Va. 231, 40 S. E. 900. But see, as to temporary and reasonable obstruction, and as to the question being one of fact, Adams v. Metropolitan St. R. Co., 82 App. Div. 354, 81 N. Y. S. 553; Mueller v. Milwaukee St. R. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721; George v. Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. 184; Laroe v. Northampton St. R. Co., 189 Mass. 254, 75 N. E. 255 (not liable for slight raise in grade of track reasonably necessary for proper construction).

[18] Delzell v. Indianapolis &c. R. Co., 32 Ind. 45; Kane v. West End St. R. Co., 169 Mass. 64, 47 N. E. 501; Carpenter v. Central Park &c. R. Co., 11 Abb. Pr. N. S. (N. Y.) 416; Schild v. Central Park &c. R.

sonably safe condition.[19] Thus, it should so lay its tracks and ties and keep them free from projecting spikes, slivers, and the like as not to negligently obstruct travel and injure travelers in the proper use of the street.[20] And it is also held, although there is some conflict in regard to the proposition, that the company is liable for an injury caused to a traveler by a rail projecting above the level of the street or by a hole worn by travel notwithstanding the defect is caused by travel or the natural wearing away or sinking of the street from the rails.[21]

Co., 133 N. Y. 446, 31 N. E. 327, 28 Am. St. 658; Wagner v. Pittsburg &c. R. Co., 158 Pa. St. 419, 27 Atl. 1008; Houston City St. R. Co. v. Delesdernier, 84 Tex. 82, 19 S. W. 366; note in 52 L. R. A. 448. See also note to Blair v. Seattle Elec. Co., 67 Wash. 465, in Ann. Cas. 1913D, 529, 532.

[19] Citizens' St. R. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 729; Birmingham Un. R. Co. v. Alexander, 93 Ala. 133, 9 So. 525; Worster v. Forty-second St. &c. R. Co., 50 N. Y. 203; Houston City &c. R. Co. v. Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028; Bradwell v. Pittsburg &c. R. Co., 153 Pa. St. 105, 25 Atl. 623; note in 52 L. R. A. 448; 2 Thomp. Neg. § 1353. See also Pugh v. Texarkana Light &c. Co., 86 Ark. 36, 109 S. W. 1019.

[20] Cline v. Crescent City R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. 187; Houston City St. R. Co. v. Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028; Schild v. Central Park &c. R. Co., 133 N. Y. 446, 31 N. E. 327, 28 Am. St. 658; Bradwell v. Pittsburg &c. R. Co., 153 Pa. St. 105, 25 Atl. 623. See also Stratton v. Central &c. St. R. Co., 95 Ill. 25; Bangs v. Lewiston &c. R. Co., 89 Maine 194, 36 Atl. 73; Central R. Co. v. State, 82 Md. 647, 33 Atl. 265; Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213 and note, 14 Am. St. 427; McKillop v Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739; Halifax St. R. Co. v. Joyce, 22 Can. Sup. Ct. 258. See also Chicago Un. Tract. Co. v. Fitzgerald, 138 Ill. App. 520. In Blair v. Seattle Elec. Co., 67 Wash. 465, 122 Pac. 358, Ann. Cas. 1913D, 529, the company was held liable where a horse caught its foot between the main rail and the guard rail.

[21] Groves v. Louisville R. Co., 109 Ky. 76, 58 S. W. 508, 52 L. R. A. 448, and note reviewing authorities on both sides; Citizens' St. R. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 729; Houston City St. R. Co. v. Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028; McLaughlin v. Philadelphia Tract. Co., 175 Pa. St. 565, 34 Atl. 863. See also Citizens' St. R. Co. v. Marvel, 161 Ind. 506, 67 N. E. 921; Huff v. St. Joseph Ry. &c. Co., 213 Mo. 495, 111 S. W. 1145; Shelton v. Northern Texas &c. Co., 32 Tex. Civ. App. 507, 75 S. W. 338. But see Rockford City R. Co. v. Matthews, 50 Ill. App.

This would seem to be the true rule at least where the company is under obligation by its charter or contract to keep up such repairs and negligently fails to do so. It is also held in a recent case that even without an ordinance to that effect a street railway company when it takes possession of a portion of a public street for the purpose of building and operating a railway under its franchise, necessarily assumes a duty to the public to keep that part of the street occupied by it free from pitfalls and in a safe condition; and that "the fact that the city engineer is overlooking work done by a street railway in a public street in the course of repairing its tracks does not relieve the railway from the duty resting on it to keep such part of the street in a safe condition."[22] Street railway companies have likewise been held liable for injuries caused by holes between the tracks,[23] and for an injury caused by an improper and negligently constructed cable slot.[24]

267; Eagan v. Forty-second St. R. Co., 19 N. Y. St. 676, 4 N. Y. S. 530; Kelly v. Metropolitan St. R. Co., 25 Misc. 194, 54 N. Y. S. 173; Lowery v. Brooklyn City &c. R. Co., 76 N. Y. 28; Galveston City R. Co. v. Nolan, 53 Tex. 139; Eddy v. Ottawa City Pass. R. Co., 31 U. C. Q. B. 569.

[22] Montgomery St. R. Co. v. Smith, 146 Ala. 316, 39 So. 757. See also Delzell v. Indianapolis &c. R. Co., 32 Ind. 45; Kessel v. Butler, 53 N. Y. 612. But compare Campbell v. Frankford &c. R. Co., 139 Pa. St. 522, 21 Atl. 92; Citizens' Pass. R. Co. v. Ketcham, 122 Pa. St. 228, 15 Atl. 733; Snell v. Rochester R. Co., 64 Hun 476, 19 N. Y. S. 496; Gray v. Washington &c. Co., 30 Wash. 665, 71 Pac. 206. And compare Hayden v. Fair Haven &c. R. Co., 76 Conn. 355, 56 Atl. 613.

[23] Fox v. Wharton, 64 N. J. L. 453, 45 Atl. 793; Worster v. Forty-second St. R. Co., 50 N. Y. 203. See also Kraut v. Frankford &c. R. Co., 160 Pa. St. 327, 28 Atl. 783.

[24] Keitel v. St. Louis Cable R. Co., 28 Mo. App. 657. In Indianapolis Tract. &c. Co. v. Lee (Ind.), 118 N. E. 959, the company was held liable where it allowed a hole to remain in its pavement and a pedestrian was injured by a truck running into the hole, causing the driver to lose control and run into the pedestrian. See also Brown v. Metropolitan St. R. Co., 60 App. Div. 184 (affirmed in 171 N. Y. 699, 64 N. E. 1119); Humbert v. Brooklyn Cable R. Co., 12 N. Y. St. 172. And for injury caused by fall of rotten poles or electric wire or improperly hung wire, Evansville &c. Tract. Co. v. Montgomery, 50 Ind. App. 528, 98 N. E. 73; Quatfasel v. New York &c. R. Co., 151 App. Div. 61, 135 N. Y. S. 765

§ 1528 (1096cd). Duty as to employment of servants and equipment of cars.—A street railway company is under a duty to employ or use reasonable care to have a sufficient number of competent servants or employes to operate and control its cars, and may be held liable, in a proper case, to travelers upon the street for injuries caused to them by its negligent failure in this regard.[25] So, it must exercise reasonable care to equip its cars with appliances to control the same and to keep such cars and appliances in proper condition, and for injury caused to those properly using the street by its neglect to do so it may be held liable.[26] But the question as to whether the company had a sufficient number of servants on the car to control it properly is usually one of fact, and neither the insufficiency nor incompetency of servants[27] nor lack of some appliance nor defect

(sagging wire); United Elec. R. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863 (improperly hung wire). See generally as to duty to insulate wires and liability for injury caused by live wires, notes in 31 L. R. A. 568; 22 L. R. A. (N. S.) 1170; Wood v. Wilmington City R. Co., 5 Pen. (Del.) 369, 64 Atl. 246.

[25] See Swain v. Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829; South Covington &c. St. R. Co. v. Herrklotz, 104 Ky. 400, 47 S. W. 265; Rice v. Crescent City R. Co., 51 La. Ann. 108, 24 So. 791; Flourroy v. Shreveport &c. R. Co., 50 La. Ann. 635, 23 So. 465; Crisman v. Shreveport Belt R. Co., 110 La. Ann. 640, 34 So. 718, 62 L. R. A. 747; Holman v. Union St. R. Co., 114 Mich. 208, 72 N. W. 202; Wall v. Helena St. R. Co., 12 Mont. 44, 29 Pac. 721; Todd v. Second Ave. Tract. Co., 192 Pa. St. 587, 44 Atl. 337.

[26] Little Rock Tract. &c. Co. v. Morrison, 69 Ark. 289, 62 S. W. 1045; McCartney v. Peoples R. Co., 2 Boyce (Del.) 191, 78 Atl. 771; Chicago City R. Co. v. Mayer, 185 Ill. 336, 56 N. E. 1058; Warren v. Manchester St. R. Co., 70 N. H. 352, 47 Atl. 735; Musser v. Lancaster City St. R. Co., 176 Pa. St. 621, 35 Atl. 206; Thompson v. Salt Lake &c. Co., 16 Utah 281, 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. 621; Roberts v. Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184. See also Louisville &c. Tract. Co. v. Short, 41 Ind. App. 570, 83 N. E. 265; Uggla v. West End St. R. Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. 481.

[27] See Dunn v. Cass Ave. &c. R. Co., 21 Mo. App. 188; Christensen v. Union Trunk Line R. Co., 6 Wash. 75, 32 Pac. 1018; Cunningham v. Los Angeles R. Co., 115 Cal. 561, 47 Pac. 452; Philadelphia City R. Co. v. Henrice, 92 Pa. St. 431, 37 Am. Rep. 699 and note.

therein[28] would render the company liable for an injury of which it was not the proximate cause but which resulted wholly from some other cause. Nor is such a company obliged to use appliances that are new and untried and not in general use even though they may ultimately prove to be the best.[29]

§ 1529 (1096ce). Speed, lookout, signals and warnings.—In the absence of any statute or ordinance regulating the rate of speed, the company has, in general, the right to run its cars at any speed not dangerous to the public,[30] and what is or is not an improper rate of speed depends largely upon the circumstances of the particular case.[31] But it has been held in

[28] Snider v. New Orleans &c. R. Co., 48 La. Ann. 1, 18 So. 695; Gannon v. New Orleans &c. R. Co., 48 La. Ann. 1002, 20 So. 223. See also Tecker v. Seattle &c. R. Co., 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842.

[29] Atlantic Ave. R. Co. v. Van Dyke, 72 Fed. 458; Currie v. Consol. R. Co., 81 Conn. 383, 71 Atl. 356; Mullen v. Springfield St. R. Co., 164 Mass. 450, 41 N. E. 664; Lorimer v. St. Paul City R. Co., 48 Minn. 391, 51 N. W. 125; Hogan v. Citizens' St. R. Co., 150 Mo. 36, 51 S. W. 473; Richmond R. &c. Co. v. Garthright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. 839. See also Fitzgebbons v. Galveston Elec. Co. (Tex. Civ. App.), 136 S. W. 1186; Spiking v. Consol. R. Co., 33 Utah 313, 93 Pac. 838. The measure of care, when not determined by statute or ordinance, is ordinary or reasonable care. Columbus R. Co. v. Connor, 27 Ohio Civ. Ct. 229. See, as to complying with ordinance as to appliance, Platt v. Albany Ry., 170 N. Y. 115, 62 N. E. 1071; Ashley v. Kanawha Val. Tract. Co., 60 W. Va. 306, 55 S. E. 1016.

[30] See Citizens' St. R. Co. v. Steen, 42 Ark. 321; Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354. Compare Adolph v. Central Park &c. R. Co., 76 N. Y. 530. In Furey v. Worcester &c. St. Ry. Co., 203 Mass. 434, 89 N. E. 531, 24 L. R. A. (N. S.) 1304, it was held that the mere fact that the clothing of a woman walking near the track was drawn towards a passing car by the current of air caused by the car and thus caught so that she was injured was not sufficient to show such unreasonable speed as to constitute actionable negligence.

[31] See Anniston &c. Elec. Co. v. Elwell, 144 Ala. 317, 42 So. 45; Cook v. Los Angeles Ry. Corp., 169 Cal. 113, 145 Pac. 1013; Rack v. Chicago City R. Co., 69 Ill. App. 656; Chicago City R. Co. v. Roach, 76 Ill. App. 496; Donelson v. East St. Louis &c. R. Co., 235 Ill. 625, 85 N. E. 914; Stanley v. Cedar Rapids &c. R. Co., 119 Iowa 526, 93 N. W. 489; Trigg v. Water &c. Trans. Co., 215 Mo. 521, 114 S. W. 972, 20 L. R. A. (N. S.) 987; Consolidated Tract. Co. v. Glynn, 59 N. J. L. 432, 37 Atl. 66; Bittner v. Cross-

numerous cases to constitute negligence to run its cars at a speed so great that they cannot be controlled so as to avoid injury to those rightfully and properly using the street.[32] So, the violation of a valid statute, ordinance, or charter limitation as to speed is at least prima facie evidence of negligence,[33] and, according to many authorities, is negligence per se.[34] It

town St. R. Co., 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. 588; Clancy v. New York City R. Co., 115 App. Div. 569, 100 N. Y. S. 1046; Gilmore v. Federal St. &c. R. Co., 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. 682.

[32] Tacoma R. &c. Co. v. Hays, 110 Fed. 496; Birmingham R. &c. Co. v. City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. 955; Lininger v. San Francisco &c. R. Co., 18 Cal. App. 411, 123 Pac. 235; Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; Chicago City R. Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126 and note, 11 Am. St. 87; Chicago &c. R. Co. v. Wanic, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. (N. S.) 1167; Union Tract. Co. v. Howard (Ind. App.), 87 N. E. 1103, 88 N. E. 967; Dieckman v. Louisville &c. Tract. Co., 46 Ind. App. 11, 89 N. E. 909; Louisville &c. R. Co. v. Sheehan, 146 Ky. 168, 142 S. W. 221; Baltimore Consol. R. Co. v. Rifcowiz, 89 Md. 338, 43 Atl. 762; Carlson v. Lynn &c. R. Co., 172 Mass. 388, 52 N. E. 520; Rascher v. East Detroit &c. R. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. 447; Walker v. St. Paul City R. Co., 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632; Winters v. Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536 and note, 17 Am. St. 591; Newark Pass. R. Co. v. Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374; Camden &c. R. Co. v. United States &c. Co., 68 N. J. Eq., 279, 59 Atl. 523; Silberstein v. Houston &c. R. Co., 117 N. Y. 293, 22 N. E. 951; Harper v. Philadelphia Tract. Co., 175 Pa. St. 129, 34 Atl. 356; Wilson v. Citizens' St. R. Co., 105 Tenn. 74, 58 S. W. 1066; Richmond R. &c. Co. v. Garthright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. 839; Little v. Superior &c. R. Co., 88 Wis. 402, 60 N. W. 705; Ewing v. Toronto R. Co., 24 Ont. R. 649. See also Terre Haute &c. Tract. Co. v. Ellsbury (Ind. App), 121 N. E. 299.

[33] Atlanta Consol. St. R. Co. v. Foster, 108 Ga. 223, 33 S. E. 886; Hanlon v. South Boston &c. R. Co., 129 Mass. 310; Mahan v. Union Depot &c. Co., 34 Minn. 29, 24 N. W. 293; Oates v. Union R. Co., 27 R. I. 499, 63 Atl. 675; Hall v. Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. 726. In Kentucky such an ordinance is held inadmissible. Ford v. Paducah City Ry., 124 Ky. 488, 99 S. W. 355, 8 L. R. A. (N. S.) 1093. But this is contrary to the general rule and in Riska v. Union Depot R. Co., 180 Mo. 168, 79 S. W. 445, it is expressly held that it binds the company whether accepted or not.

[34] Highland Ave. &c. R. Co. v.

is also the duty of the company to keep a reasonably careful lookout ahead,[35] and, in some instances it seems, in other

Sampson, 112 Ala. 425, 20 So. 566; Clarke v. Bennett, 123 Cal. 275, 55 Pac. 908; Bresee v. Los Angeles Tract. Co., 149 Cal. 131, 85 Pac. 152; Williams v. Iola Elec. R. Co., 102 Kans. 268, 170 Pac. 397 (violation of speed ordinance is negligence per se). Omaha St. R. Co. v. Duvall, 40 Nebr. 29, 58 N. W. 531; San Antonio &c. R. Co. v. Watzlavzick (Tex. Civ. App.), 28 S. W. 115; Cogswell v. West &c. R. Co., 5 Wash. 46, 31 Pac. 411. It may also be the duty of the motorman, under particular circumstances, to slacken the speed or stop. Citizens' St. R. Co. v. Lowe, 12 Ind. App. 47, 39 N. E. 165; Ellis v. Boston &c. R. Co., 160 Mass. 341, 35 N. E. 1127; Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. 446. See also Simoneau v. Pac. Elec. Ry. Co., 166 Cal. 264, 136 Pac. 544, 49 L. R. A. (N. S.) 737; Quincy Horse R. Co. v. Gnuse, 38 Ill. App. 212. Many of these and other authorities on both sides are cited in the note in 8 L. R. A. (N. S.) 1093, 1095.

[35] Swain v. Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829; Duncan v. Rome St. R. Co., 99 Ga. 98, 24 S. E. 953; Beck v. Indianapolis Tract. &c. Co. (Ind. App.), 119 N. E. 528; Indianapolis St. Ry. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663; 72 N. E. 479; Indianapolis St. R. Co. v. Hackney, 39 Ind. App. 372, 77 N. E. 1048; Welsh v. Tri-City R. Co., 148 Iowa 200, 126 N. W. 1118; South Covington &c. St. R. Co. v. Herrklotz, 104 Ky. 400, 47 S. W. 265; Greene v. Louisville R. Co., 119 Ky. 862, 84 S. W. 1154; Baltimore Tract. Co. v. Wallace, 77 Md. 435, 26 Atl. 518; Levin v. Metropolitan St. R. Co., 140 Mo. 624, 41 S. W. 968; Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969; Draper v. Kansas City Ry. Co., 199 Mo. App. 485, 203 S. W. 646 (such a lookout as will enable the motorman to see the first appearance of danger); North Hudson &c. R. Co. v. Isley, 49 N. J. L. 468, 10 Atl. 665; Colabel v. Metropolitan St. R. Co., 74 App. Div. 505, 77 N. Y. S. 584; Harkins v. Pittsburg &c. Tract. Co., 173 Pa. St. 149, 33 Atl. 1045; Hays v. Gainsville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. 624; Thorsen v. La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. 64. See also Mobile Light & R. Co. v. Drooks (Ala.), 66 So. 824; Birmingham R. Co. v. Fuqua, 174 Ala. 631, 56 So. 578; Engvall v. Des Moines City Ry. Co., 145 Iowa 560, 121 N. W. 12; O'Brien v. Lexington &c. St. R. Co., 205 Mass. 182, 91 N. E. 204; Austin v. Vicksburg Tract. Co., 95 Miss. 867, 50 So. 632 (case varies according to time, place and circumstances); Palmer v. Portland R. &c. Co., 56 Ore. 262, 108 Pac. 211. And there ought to be some kind of a light at night to enable the motorman to see. Currie v. Consol. Ry. Co., 81 Conn. 383, 71 Atl. 356.

directions as well,[36] and the fact that the attention of employes

[36] In 2 Thomp. Neg. § 1382, the rule is laid down broadly—perhaps too broadly to be taken without some qualification—that, "in view of the great danger which is liable to follow from an omission of it, the law exacts nothing less than that the driver, the motorman, or the gripman shall keep a constant lookout, not only ahead, but also to the right and left, so as to discover persons upon the track in dangerous proximity to the approaching car, or persons approaching the track without discovering or taking heed of the approaching car." Swain v. Fourteenth Street R. Co., 93 Cal. 179, 28 Pac. 829; Citizens' St. R. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014; Barnes v. Shreveport &c. R. Co., 47 La. Ann. 1238, 17 So. 782, 49 Am. St. 400 and note; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534, 552 (where this duty is strongly enforced); citing Baltimore Tract. Co. v. Wallace, 77 Md. 435, 26 Atl. 518; Anderson v. Minneapolis St. R. Co., 42 Minn. 490, 44 N. W. 518, 18 Am. St. 525, 43 Am. & Eng. R. Cas. 294; Strutzel v. St. Paul City R. Co., 47 Minn. 543, 50 N. W. 690, 11 Rail. & Corp. L. J. 132; Pope v. Kansas City &c. R. Co., 99 Mo. 400, 12 S. W. 891, 43 Am. & Eng. R. Cas. 290; Winters v. Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. 591, 40 Am. & Eng. R. Cas. 261; Senn v. Southern R. Co., 108 Mo. 142, 18 S. W. 1007; Schmidt v. Steinway &c. R. Co., 55 Hun 496, 29 N. Y. St. 200, 8 N. Y. S. 664 and 9 N. Y. S. 939; Wells v. Brooklyn City R. Co., 58 Hun 389, 34 N. Y. St. 636, 12 N. Y. S. 67; Mason v. Atlantic Ave. R. Co., 4 Misc. 291; 53 N. Y. St. 454, 24 N. Y. S. 139; Lahey v. Central Park &c. R. Co., 51 N. Y. St. 589, 22 N. Y. S. 380; Jones v. Greensburg &c. St. R. Co., 9 Pa. Sup. Ct. 65, 43 W. N. C. 298; Schnur v. Citizens' Traction Co., 153 Pa. St. 29, 25 Atl. 650, 34 Am. St. 680, 23 Pitts. L. J. (N. S.) 437; Owens v. People's Pass. R. Co., 155 Pa. St. 334, 26 Atl. 748, 32 W. N. C. 313; Kestner v. Pittsburgh &c. Tract. Co., 158 Pa. St. 422, 27 Atl. 1048; Dallas Rapid Transit R. Co. v. Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455; Dallas &c. Transit Co. v. Dunlap, 7 Tex. Civ. App. 471, 26 S. W. 877; Thoresen v. La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. 64. See also Collins v. South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; El Paso Elec. Ry. Co. v. Benjamin (Tex. Civ. App.), 202 S. W. 996. It is also said that this duty is especially imperative in case of a cable or electric car. Schnur v. Citizens' Tract. Co., 153 Pa. St. 29, 25 Atl. 650, 34 Am. St. 680; Gilmore v. Federal St. R. Co., 153 Pa. St. 31; 25 Atl. 651, 34 Am. St. 682. But see as to what will excuse temporary failure to perform it. Citizens' St. R Co. v. Carey, 56 Ind. 396, 405; Johnson v. Reading R. Co., 160 Pa. St. 647, 28 Atl. 1001, 40 Am. St. 752; Boland v. Missouri R. Co., 36 Mo. 484; Culbertson v. Metropolitan St R. Co., 140 Mo. 35, 36 S. W. 834. And see, as to qualification of Judge Thompson's rule, Macon &c. St. R. Co. v. Holmes, 103 Ga. 655, 30 S. E. 563.

is attracted or directed to other matters does not ordinarily excuse the company where injury is inflicted by failure to perform this duty.[37] Signals and warnings must also be given, by sounding the gong or bell, or the like, in a proper case,[38] and this is frequently prescribed by statute or ordinance.[39] But the rate of speed, or the failure to give a signal or warning will not make the company liable if it was not a proximate cause

[37] Montgomery v. Johnson, 22 Ky. L. 596, 58 S. W. 476; Barnes v. Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. 400 and note; Anderson v. Minneapolis St. R. Co., 42 Minn. 490, 44 N. W. 518, 18 Am. St. 525; Saare v. Un. R. Co., 20 Mo. App. 211; Dahl v. Milwaukee City R. Co., 65 Wis. 371, 27 N. W. 185. See also Commonwealth v. Metropolitan St. R. Co., 107 Mass. 236. But compare Johnson v. Reading City &c. R. Co., 160 Pa. St. 647, 28 Atl. 1001, 40 Am. St. 752; Culbertson v. Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834, showing that momentary diversion of attention may sometimes be excused. See also Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354.

[38] Murphy v. Derby St. R. Co., 73 Conn. 249, 253, 47 Atl. 120; Schmidt v. St. Louis R. Co., 163 Mo. 645, 63 S. W. 834; J. F. Conrad &c. Co. v. St. Louis &c. R. Co., 89 Mo. App. 391; Stewart v. Omaha &c. St. R. Co., 88 Nebr. 209, 129 N. W. 209, 129 N. W. 440, Am. Cas. 1912B, 861; Consolidated Tract. Co. v. Chenowith, 61 N. J. L. 554, 35 Atl. 1067; Kleiner v. Third Ave. R. Co., 162 N. Y. 193, 56 N. E. 497; Davis v. Durham Tract. Co., 141 N. Car. 134, 53 S. E. 617; Acton v. Fargo &c. St. R. Co., 20 N. Dak. 434, 129 N. W. 225; Welsh v. United Tract. Co., 202 Pa. St. 530, 51 Atl. 1026; Citizens' R. Co. v. Holmes, 19 Tex. Civ. App. 266, 46 S. W. 116; Norfolk &c. Tract. Co. v. O'Neill, 109 Va. 670, 64 S. E. 948; Burian v. Seattle Elec. Co., 26 Wash. 606, 67 Pac. 214. See also Birmingham R. &c. Co. v. Fox, 174 Ala. 657, 56 So. 1013; Birmingham &c. R. Co. v. Morris, 163 Ala. 190, 50 So. 198; Denver City Tramway Co. v. Norton, 141 Fed. 599. But see Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354; McCreery v. United R. Co., 221 Mo. 18, 120 S. W. 24 It is usually negligent to run a car after dark without a headlight. Currie v. Consol. R. Co., 81 Conn. 383, 71 Atl. 356; Carter v. McDennott, 29 App. D. C. 145, 10 L. R. A. (N. S.) 1103; Indianapolis St. R. Co. v. Taylor, 39 Ind. App. 592, 80 N. E. 436; Cox v. Schuylkill &c. Tract. Co., 214 Pa. St. 223, 63 Atl. 599.

[39] See Driscoll v. Market St. &c. R. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. 203; San Antonio &c. R. Co. v. Mechler (Tex. Civ. App.), 29 S. W. 202; Chouquette v. Southern Elec. R. Co., 152 Mo. 257, 53 S. W. 897; Bly v. Nassau St. R. Co., 67 N. H. 474, 32 Atl. 764, 30 L. R. A. 303, 88 Am. St. 681.

of the injury,[40] as, for instance, where the injured party already had ample notice of the approach of the car and the rate of speed or failure to give warning had nothing to do with causing the injury.[41]

§ 1530 (1096cf). Violation of ordinances.—As elsewhere shown,[42] there is conflict among the authorities as to whether the violation of an ordinance is negligence per se or merely evidence of negligence. It is at least evidence of negligence, and may justify a recovery where the plaintiff has a right to rely on the ordinance and is injured as the proximate cause thereof without fault on his part; but, as elsewhere pointed out, the violation of an ordinance is not actionable negligence in such a sense as to authorize a recovery unless it was a proximate cause of the injury complained of. The general subject is so fully considered elsewhere, however, and so many illustrative cases are referred to in other sections of this chapter, that it will be sufficient here to merely cite a few of the more recent decisions.[43] A rule of a street railway company, merely for

[40] Hoffman v. Syracuse &c. Co., 50 N. Y. App. Div. 83, 63 N. Y. S. 442; Anderson v. Metropolitan St. R. Co., 30 Misc. 104, 61 N. Y. S. 899; Molyneaux v. Southwest &c. R. Co., 81 Mo. App. 25; Heintz v. St. Louis Trans. Co., 115 Mo. App. 667, 92 S. W. 353; Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. 871 and note; Trumbo v. City St. Car Co., 89 Va. 780, 17 S. E. 124. See also Dubosi v. New Orleans R. &c. Co., 123 La. Ann. 1029, 49 So. 696; Plinkiewisch v. Portland R. &c. Co., 58 Ore. 499, 115 Pac. 151.

[41] Hot Springs St. Ry. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245; Chicago Un. Tract. Co. v. Daly, 129 Ill. App. 519; Jager v. Coney Island &c R Co., 84 Hun 307, 32 N. Y. S. 304; Mackey v. Philadelphia &c. Tract. Co., 227 Pa. St. 482, 76 Atl. 201. It is also held, in the case first cited, that there is no presumption in case of collision as to which party negligently caused the injury.

[42] See ante, § 842, and post § 1877.

[43] Bain v. Ft. Smith &c. Ry. Co., 116 Ark. 125, 172 S. W. 843; Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 Pac. 680; Indianapolis Tract. &c. Co. v. Hensley, 186 Ind. 479, 488 (violation of ordinance requiring users of street to yield to passage of fire engines, etc., is negligence per se); Heebe v. New Orleans &c. Co., 110 La. Ann. 970, 35 So. 251; Baltimore City &c. Co. v. McDonnell, 43 Md. 534; Wright v. Malden &c. R. Co., 4 Allen (Mass.) 283; Donovan v. Connecticut Val. St. Ry., 213 Mass.

its employes, that cars shall not pass engine houses at a speed in excess of four miles an hour does not add to its obligations to the public so as to constitute negligence as to a traveler in case of a collision with his vehicle, and make the company liable therefor when it would not otherwise be liable.[44] And where an ordinance fixed the maximum rate of speed at eight miles an hour, but also required the cars to be operated according to the provisions of the charter, it was held that a company whose franchise provided that its cars might be run at a greater rate of speed was entitled to so run them and that the franchise must be considered part of the charter.[45] There are also some instances in which an ordinance was held not to create any liability or operate in favor of persons injured from or by the failure of the company to obey it.[46]

99, 99 N. E. 956, Ann. Cas. 1913E, 1099 and note citing cases on both sides; Fortin v. Bay City Tract. &c. Co., 154 Mich. 316, 117 N. W. 741; Hutchinson v. Missouri Pac. R. Co., 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. 710; Latson v. St. Louis Trans. Co., 192 Mo. 449, 91 S. W. 109; Spencer v. St. Louis Trans. Co., 222 Mo. 310, 121 S. W. 108; Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133; Deitring v. St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Denison &c. Ry. Co. v. Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054; Hall v. Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. 726; Mueller v. Milwaukee St. R. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721; Natalie v. Chicago Ry. Co., 160 Wis. 583, 149 N. W. 697 (must be proximate cause). For a case in which the violation of an ordinance by the plaintiff did not defeat a recovery, see Laethem v. Ft. Wayne &c. R. Co., 100 Mich. 297, 58 N. W. 996.

[44] McKernan v. Detroit Citizens' St. R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347. See also Fonda v. St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. 341. But compare Dublin &c. R. Co. v. Slattery (L. R.), 3 App. Cas. 1115; Kern v. Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451.

[45] Ruschenberg v. Southern &c. Co., 161 Mo. 70, 61 S. W. 626. But there may be negligence, under particular circumstances, even in running at the ordinance rate. Schmidt v. St. Louis R. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. 380; Beier v. St. Louis Trans. Co., 197 Mo. 215, 94 S. W. 876; Quincy Horse &c. Co. v. Gnuse, 38 Ill. App. 212; Heinzle v. Metropolitan St. Ry. Co., 182 Mo. 528, 81 S. W. 848.

[46] Rockford City R. Co. v. Blake, 173 Ill. 354, 50 N. E. 1070, 64 Am. St. 122; Ford v. Paducah City Ry., 124 Ky. 488, 99 S. W. 355, 8 L. R. A. (N. S.) 1093; Holwerson v. St.

§ 1531 (1096cg). Injuries by collision between cars and vehicles or travelers on street—Generally.—A street railway company is not bound, as to other travelers upon the street, to use the highest possible degree of care in selecting its employes and appliances and in running its cars, but it should act with reference to the fact that travelers have, in general, equal right to use the street and are to be expected upon it, and should use reasonable care, under the circumstances and in view of the danger to be expected, to have competent servants and appliances and to so run its cars as to avoid collisions and injuries to vehicles and travelers upon the street.[47] As already shown, a proper lookout should be kept, and the car should not be run at a dangerous, unusual and unnecessary rate of speed. It should not exceed the ordinance or statute rate of speed, and

Louis &c. R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; Riska v. Union Depot R. Co., 180 Mo. 168, 79 S. W. 445. But compare Gebhart v. St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448; McLain v. St. Louis &c. R. Co., 100 Mo. App. 374, 73 S. W. 909. See Caswell v. Boston &c. R. Co., 190 Mass. 527, 77 N. E. 380. And see Jenree v. Metropolitan St. R. Co., 86 Kans. 479, 121 Pac. 510, Ann. Cas. 1913C, 214, 217, citing many cases to the effect that a company bound by contract or ordinance to keep street in repair for the public is liable to a traveler for injury caused by failure to perform such duty. City ordinances regulating speed are generally held inapplicable to vehicles of the fire department on their way to a fire. Indianapolis Tract. Co. v. Hensley, 186 Ind. 479, 486, 115 N. E. 934.

[47] See Mock v. Los Angeles Tract. Co., 139 Cal. 616, 73 Pac. 455; Zimmerman v. Denver &c. Co., 18 Colo. App. 480, 72 Pac. 607; Niles v. Boston Elev. Ry. Co., 230 Mass. 316, 119 N. E. 752; Dougherty v. Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; Unger v. Forty-second St. R. Co., 51 N. Y. 497; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1; Ackerman v. Union Tract. Co., 205 Pa. St. 477, 55 Atl. 16; Memphis St. R. Co. v. Kartright, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. 807; Hall v. Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. 726. As to liability to laborers and workmen on street, see Little Rock R. &c. Co. v. Sledge, 108 Ark. 95, 158 S. W. 1096; Pittsburg Elec R. Co. v. Kelly, 57 Kans. 514, 46 Pac. 945; Owens v. People's Pass. R. Co., 155 Pa. St. 334, 26 Atl. 748; Schmidt v. Steinway &c. R. Co., 132 N. Y. 566, 30 N. E. 389; Third Ave. R. Co. v. Kransz, 112 Fed 379.

even that rate may be negligent under particular circumstances. So, care should be exercised not to collide with vehicles or persons on or near the track or about to cross it. And where one is discovered to be in danger precautions may be required or some act may be demanded, even to constitute reasonable care under the circumstances, that might not be necessary under other circumstances. The subject of collisions with vehicles or persons upon the street, under varying circumstances will be considered more in detail in the following sections.

§ 1532 (1096ch). Vehicles going in same direction—Running down vehicles from behind.—There are many cases in which vehicles have been run into from behind by street cars going in the same direction. As already stated, one is not a trespasser merely because he is driving along that part of a street occupied by a street railway track, and, indeed, it is often necessary to drive along a street railway track for a short distance to avoid an obstruction or the like. One who does so has a right, within limits to suppose or assume that a car will not approach dangerously near him from the rear at a high rate of speed, or without a lookout or warning,[48] for the company cannot under ordinary

[48] Indianapolis St. Ry. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945, where it is said: "A permission granted by the authorities to an electric railroad company to lay tracks on a public street and operate electric cars along the same does not amount to an abandonment in favor of the company of the space occupied by the tracks. As the cars can not turn out, and as their speed is usually greater than that of many other conveyances, they are entitled to the precedence which the necessity of the situation requires, but their movements should be regulated with a due regard to the situation of the drivers of other vehicles. Com. v. Temple, 14 Gray (Mass.) 69, 78; Vincent v. Norton &c. St. R. Co., 180 Mass. 104, 61 N. E. 822; Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. 446; Marden v. Portsmouth &c. R. Co., 100 Maine 41, 60 Atl. 530, 69 L. R. A. 300; Greene v. Louisville Railway Co., 119 Ky. 862, 84 S. W. 1154; v. Louisville R. Co., 119 Ky. 862, 84 S. W. 1154; Ablard v. Detroit United Railway, 139 Mich. 248, 102 N. W. 741; Memphis Street Railway Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374. See Stringer v. Frost, 116 Ind. 477, 19 N. E. 331, 2 L. R. A. 614, 9 Am. St. 875." Compare Deitsch v. Trans. St. Moreys Tract. Co., 155 Mich. 15, 118 N. W.

circumstances run him down without being guilty of negligence or wilful wrong,[49] and while he, himself must exercise reasonable or ordinary care,[50] he is not required to keep a constant lookout behind.[51] "The very fact that a street car drives upon a vehicle which is proceeding ahead of it in the same direction," says Judge Thompson, "furnishes cogent evidence of negligence capable of explanation in very few cases."[52] The driver of the vehicle cannot perform his duty of driving so as to avoid injury to his team, to his load, or to pedestrians or other vehicles on the street, and at the same time constantly look behind him to watch for approaching cars, and he is not required to constantly look behind, but may usually expect the customary signal, and, under ordinary circumstances where he could be easily seen by the motorman it is said, that the driver of a vehicle may be presumed to have known that he could only be run down by care-

489. See also Beck v. Indianapolis Trac. &c. Co. (Ind. App.), 119 N. E. 528.

[49] Vincent v. Norton &c. Co., 180 Mass. 104, 61 N. E. 822; Richmond &c. Co. v. Allen, 103 Va. 532, 49 S. E. 656. See also Garfield v. Hartford &c. R. Co., 80 Conn. 260, 67 Atl. 890; Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523. And it can not be ruled contributory negligence as matter of law to drive so near the track that a car going in the same direction might strike the wagon or team. Logan v. Old Colony St. Ry. Co., 190 Mass. 115, 76 N. E. 510; Manley v. Bay State Ry. Co., 220 Mass. 124, 107 N. E. 409.

[50] See Hot Springs St. Ry. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245; Seele v. Boston &c. St. Ry. Co., 187 Mass. 248, 72 N. E. 971; Adams v. Boston &c. St. R. Co., 191 Mass. 486, 78 N. E. 117; Union Biscuit Co. v. St. Louis Transit Co., 108 Mo. App. 297, 83 S. W. 288 (must look back at intervals); Schleicher v. Interurban St. R. Co., 91 N. Y. S. 356 (same); Adolph v. Central Park &c. R. Co., 76 N. Y. 530 (same); Mey v. Seattle Elec. Co., 47 Wash. 497, 92 Pac. 283. And the company is held to have a preferential right. McKennare v. Omaha &c. St. R. Co., 95 Nebr. 643, 146 N. W. 1014.

[51] Merrill v. Scheffield Co., 169 Ala. 242, 53 So. 219; Fay v. Hertford &c. St. R. Co., 82 Conn. 471, 74 Atl. 779; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687, 68 N E. 609; Ablard v. Detroit United Ry., 139 Mich. 248, 102 N. W. 741; Richmond &c. Co. v. Allen, 103 Va. 532, 49 S. E. 656; Richmond Tract. Co. v. Clark, 101 Va. 382, 43 S. E. 618. And compare Mayes v. Metropolitan St. Ry. Co., 121 Mo. App. 614, 97 S. W. 612; Acton v. Fargo &c. St. R. Co., 20 N. Dak. 434, 129 N. W. 225; Grimm v. Milwaukee &c. Ry. Co., 138 Wis. 44, 119 N. W. 833.

[52] 2 Thomp. Neg. (2nd ed.), § 1404.

lessness or willfulness on the part of the company or its employes.[53] "Sometimes," said Judge Thompson,[54] "the structure of his vehicle or of his load is such as would prevent him from seeing a car approaching him from behind. He is not driving toward the source of danger, as is generally the case where car and vehicle collide at a street crossing, but he is receding from it and it is pursuing him. On the other hand, the driver, motorman, or gripman in charge of the car is propelling the instrument of danger, and his duty of keeping a lookout in front, and his knowledge based upon his experience, skill, and competency, of the distance within which he can stop his car so as to avoid a collision, tend strongly to put upon him the responsibility in case a collision takes place. When he sees a vehicle on the street a short distance in front of him, it is, therefore, his duty to reduce his car to control, and so to manage it as to avoid a collision if this can be done by the exercise of reasonable promptness and energy.[55] He may not rightfully increase the speed of the car, where the person driving in front of him has not left the track upon the sounding of the gong, where he knows or ought to know that such person is not aware of his approach.[56] Nor will he be justified in increasing the speed of his car, after having it under full control, when but a few feet ahead of him is a wagon loaded with bales, and so close to the track as to be rubbed by the car in passing it.[57] Negli-

[53] Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687, 696, 68 N. E. 609; Tunison v. Weadock, 130 Mich. 141, 89 N. W. 703; Vincent v. Norton &c. St. R. Co., 180 Mass. 104, 61 N. E. 822. See also Conway v. New Orleans &c. R. Co., 51 La. Ann. 146, 24 So. 780.

[54] 2 Thomp. Neg. (2nd ed.), § 1404.

[55] Citing Flannagan v. St. Paul &c. R. Co., 68 Minn. 300, 71 N. W. 379; Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135. See also South Chicago City R. Co. v. Kinnare, 96 Ill. App. 210; Wilflin v. Des Moines City R. Co., 176 Iowa 642, 156 N. W. 842; Louisville R. Co. v. Hutchcraft, 32 Ky. L. 429, 105 S. W. 983; Baltimore Tract. Co. v. Appeal, 80 Md. 603, 31 Atl. 964; Prendenville v. St. Louis Trans. Co., 128 Mo. App. 596, 107 S. W. 453; Bruss v. Metropolitan St. Ry. Co., 66 App. Div. 554, 73 N. Y. S. 256.

[56] Citing Wilkins v. Omaha &c. R. Co., 96 Iowa 668, 65 N. W. 987.

[57] Citing Blakeslee v. Consolidated St. R. Co., 112 Mich. 63, 70 N. W. 408; 29 Chic. Leg. News, 257, 3 Det. L. N. 844. See also Knoll v. Third Ave R. Co., 46 App. Div. 527, 62 N. Y. S. 16.

gence may be imputed to him in failing to stop his car at once upon seeing the wheels of a heavily loaded wagon in front of the car slip on the track while the driver is attempting to get out of the way.[58] To drive upon a vehicle proceeding in front of his car in the same direction without giving any signal, is an act from which a jury will obviously be allowed to infer negligence.[59] . . . Where he makes no effort to avoid a collision with the person driving in front of him, although he knows of the danger, it will be no defense on the part of the company that the driver of the vehicle failed to observe the approach of the car.[60] Whether he was negligent in attempting to pass a horse and wagon driving in the same direction on a narrow bridge, where the space between the car and the wagon was very small, though sufficient if the horse had not swerved, —will present a question for the jury.[61] But negligence is not necessarily imputed to him for following with his cable car after a buggy, which is only two or three feet ahead of him and traveling at the same rate of speed, when he has his car under perfect control, and a collision is caused by a temporary check in the rate of speed of the buggy which the gripman could not foresee."[62] And it has been held that the motorman ordinarily has the right to assume that where warning is duly given or there is an unobstructed view the driver of the vehicle will get out of the way,[63] but he is not always justified in acting on such

[58] Citing Bush v. St. Joseph &c. R. Co., 113 Mich. 513, 71 N. W. 851, 4 Det. L. N. 377.

[59] Citing Fishbach v. Steinway R. Co., 11 App. Div. 152, 42 N. Y. S. 883; Louisville &c. R. Co. v. Stammers, 47 S. W. 341, 20 Ky. L. 688 (not to be rep.). See also Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687, 68 N. E. 609; North Chicago St. R. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812; Adams v. Camden &c. R. Co., 69 N. J. 424, 55 Atl. 254; Hanlon v. Milwaukee &c. R. Co., 118 Wis. 210, 95 N. W. 100.

[60] Citing Wilkins v. Omaha &c. R. Co., 96 Iowa 668, 65 N. W. 987.

[61] Citing Reilly v. Troy City R. Co., 32 App. Div. 131, 52 N. Y. S. 611.

[62] Citing Hicks v. Citizens' Street R. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508. See also Chicago City R. Co. v. Ashler, 107 Ill. App. 397.

[63] Morrisey v. Bridgeport Tract. Co., 68 Conn. 215, 35 Atl. 1126; Gessner v. Metropolitan St. Ry. Co., 137 Mo. App. 47, 119 S. W. 528; Pantages v. Seattle Elec. Co., 55 Wash. 453, 104 Pac. 629; Cawley v. La Crosse City R. Co., 106 Wis. 239, 82 N. W. 197.

assumption nor in failing to make an effort to stop after he discovers that the signal is not heeded.[64]

§ 1533 (1096ci). Injuries to persons crossing tracks.—At street intersections and crossings there is especial reason for keeping a lookout, running at a proper rate of speed, giving signals or warnings, and having the car under control.[65] The car and travelers upon the street are said to have an equal right to cross, and each must exercise it with reference to that fact and use reasonable care to avoid collision and not to interfere with the right of the other.[66] In a recent text book the

[64] White v. Worcester Consol. St. R. Co., 167 Mass. 43, 44 N. E. 1052; Bedell v. Detroit &c. R. Co., 131 Mich. 668, 92 N. W. 349; North Chicago St. R. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812. See also Denver City Tramway Co. v. Wright, 47 Colo. 366, 107 Pac. 1075, 1076. As to whether the "law of the road" applies to an automobile passing a street car going in the same direction. See Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913E, 1116.

[65] See Lininger v. San Francisco &c. R. Co., 18 Cal. App. 411, 123 Pac. 235; White v. Wilmington City R. Co., 6 Pen. (Del.) 105, 63 Atl. 931; Suburban R. Co. v. Cooper, 32 App. D. C. 550; Chicago City R. Co. v. Jennings, 157 Ill. 274, 41 N. E. 629; West Chicago St. R. Co. v. McCallum, 169 Ill. 240, 48 N. E. 424; Stoker v. Tri-City Ry. Co., 182 Iowa 1090, 165 N. W. 30, L. R. A. 1918F, 515; Peterson v. New Orleans Ry. &c. Co., 142 La. 835, 77 So. 647; Gray v. St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; Smith v. Public Service Corp., 78 N. J. L. 478, 75 Atl. 937; Bernhart v. Rochester R. Co., 68 Hun 369, 22 N. Y. S. 821; Reiner v. New York Rys. Co., 103 Misc. 669, 171 N. Y. S. 53; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276; Hall v. Ogden &c. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. 726; Haight v. Hamilton St. R. Co., 29 Ont. Rep. 279; Long v. Toronto Ry. Co., 50 Can. Sup. Ct. 224, Ann Cas. 1915A, 203 (duty of motorman under circumstances to anticipate traveler would attempt to cross and to have car under control).

[66] See Chicago City Ry. Co. v. Mertensen, 100 Ill. App. 306; Cole v. Central R. Co., 103 Ill. App. 160; Strutzel v. St. Paul City P. Co., 47 Minn. 543, 30 N. W. 690; Omaha St. R. Co. v. Cameron, 43 Nebr. 297, 61 N. W. 606; Chapman v. Atlantic Ave R. Co., 14 Misc. 384, 70 N. Y. St. 753, 35 N. Y. S. 1045; O'Neil v. Dry Dock &c. R. Co., 129 N. Y. 125, 130, 29 N. E. 84, 26 Am. St. 512; Traver v. Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284. A driver crossing a track diagonally should usually leave it when he knows of a car approaching, but in

following is laid down as a general rule upon the subject: "At the intersection of two streets a pedestrian or the driver of a vehicle has the right to cross the tracks of a street surface railroad, notwithstanding a car is in sight, provided there is a reasonable opportunity to do so without obstructing the passage of the car unnecessarily; and if for that purpose, it is necessary for the person having charge of the motive power of the car to check its speed, or even to entirely stop the car for a short period, it is his duty to do so, and the person crossing the track has the right, without being necessarily chargeable with contributory negligence, to assume that that duty will be performed; the rights of the pedestrian or the driver of the vehicle and of the person in charge of the motive power of such car, under these circumstances, are reciprocal, and each is bound to use diligence to avoid a collision."[67] The question of negligence and

an action for damages for running into a hearse in a funeral procession an instruction to that effect is erroneous when there is a known and admitted custom of the company to give funeral processions the right of way. Beck v. Indianapolis Tract. &c. Co. (Ind. App.), 119 N. E. 528. See also Harrington v. Dunham, 273 Mo. 414, 202 S. W. 1066.

[67] West Chicago St. R. Co. v. McCallum, 169 Ill. 240, 48 N. E. 424; Stanley v. Union Depot R. Co., 114 Mo. 606, 21 S. W. 832; Piercy v. Metropolitan St. R. Co., 30 Misc. 612, 62 N. Y. S. 867; Schoener v. Metropolitan St. R. Co., 72 App. Div. 23, 76 N. Y. S. 157; Baltimore Tract. Co. v. Wallace, 77 Md. 435, 26 Atl. 518, and other New York cases. See also Laufer v. Bridgeport Tract. Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; Metropolitan St. R. Co. v. Slayman, 64 Kans 722, 68 Pac. 624. That the traveler has a right to assume that a motorman coming from behind will give him time to cross after he has started to do so, see Williamson v. Old Colony St. R. Co., 191 Mass. 144, 77 N. E. 655, 656, and other Massachusetts cases there cited; also Public Utilities Co. v. Iverson (Ind. App.), 121 N. E. 33; Patterson v. Pittsburgh Ry. Co., 260 Pa. St. 214, 183 Atl. 547. And see as to right of motorman to assume that traveler will not attempt to cross in front of rapidly moving car. Kuehler v. Milwaukee Elec. &c. Co., 157 Wis. 107, 146 N. W. 1133, and cases there cited. A motorman, it is held, can not act too long on the presumption that a traveler will keep or get out of the way, but should have his car under control and be prepared to act before it is too late. Denver City &c. Co. v. Wright, 47 Colo. 366, 107 Pac. 1075, 1079; Moore v. Transit Co., 194 Mo. 1, 92 S. W. 390. Compare also Williamson v. Old Colony Ry. Co., 191 Mass. 144, 77 N. E. 655.

contributory negligence in such cases depends largely upon the relative distance of the car and vehicle attempting to cross, as to which first makes the attempt, and other circumstances of the particular case.[68] The traveler must not attempt to cross upon a nice calculation of chances,[69] but if he reaches the crossing first and apparently has ample time to cross in safety he is not necessarily guilty of contributory negligence in attempting to cross even though he may see the car a comparatively short distance away,[70] and the company may be liable in any event if the motorman discovers his danger in time to avoid injury and does not make reasonable effort to do so; but the company otherwise free from fault is not liable for mere error of judgment on the part of a motorman at a critical

[68] See Metropolitan St. R. Co. v. Slayman, 64 Kans. 722, 68 Pac. 628; Ryan v. Detroit Citizens' St. R. Co., 123 Mich. 597, 82 N. W. 278; Flannagan v. St. Paul City R. Co., 68 Minn. 300, 71 N. W. 379; Creavin v. Newton St. R. Co., 176 Mass. 529, 57 N. E. 994; North Jersey St. R. Co. v. Schwartz, 66 N. J. L. 437, 49 Atl. 683; Buhrens v. Dry Dock &c. R. Co., 53 Hun (N. Y.) 571; Curry v. Union Elec. R. Co., 86 Hun (N. Y.) 559; Moore v. Charlotte Elec. R. Co., 128 N. Car. 455, 39 S. E. 57; Saunders v. City &c. R. Co., 99 Tenn. 130, 41 S. W. 1031; Teach v. Milwaukee Elec. R. &c. Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618. See also generally Birmingham R. &c. Co. v. McLain, 162 Ala. 656, 50 So. 149; Kern v. Des Moines City Ry. Co., 141 Iowa 620, 118 N. W. 451; McGahey v. Citizens' R. Co., 88 Nebr. 218, 129 N. W. 293; Peterfolo v. Public Service R. Co., 81 N. J. L. 390, 79 Atl. 307; Blake v. Rhode Island Co., 32 R. I. 213, 78 Atl. 834, Ann. Cas. 1912D, 852.

[69] De Lon v. Kokomo City St. R. Co., 22 Ind. App. 377, 53 N. E. 847; South Covington St. R. Co. v. Enslen, 18 Ky. L. 921, 38 S. W. 850; Stockton v. Philadelphia Rapid Transit Co., 260 Pa. St. 372, 103 Atl. 922; Goan v. Ogden &c. Ry. Co., 51 Utah 285, 169 Pac. 949. See also Ft. Smith &c. Tract. Co. v. Barnes, 80 Ark. 169, 96 S. W. 976; Hilts v. Foote, 125 Mich. 241, 84 N. W. 139; O'Brien v. St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805, 806; Rider v. Syracuse &c. R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Beeman v. Puget Sound Tract. &c. Co., 79 Wash. 137, 139 Pac. 1087.

[70] See Indianapolis St. R. Co. v. Bolin, 39 Ind. App. 169, 78 N. E. 210; Public Utilities Co. v. Iverson (Ind. App.), 121 N. E. 33; Hildebrandt v. Detroit United Ry., 200 Mich. 52, 167 N. W. 29 (a block away); Weinberger v. North Jersey St. R. Co., 73 N. J. 694, 64 Atl. 1059; Clancy v. New York City R. Co., 100 N. Y. S. 1046; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276; and cases cited in next to last preceding note.

moment.[71] A person is not a trespasser, nor is he necessarily guilty of contributory negligence, in crossing the track in the street either on foot or in a vehicle at some other place than a regular street intersection or crossing.[72] But where one suddenly and unexpectedly darts or turns his vehicle across or on to the track such conduct may and often does have an important, and, indeed, controlling bearing upon both the question of negligence and the question of contributory negligence.[73]

§ 1534 (1096cj). Crossing street railway tracks—Look and listen rule.—There is considerable conflict among the authorities as to whether the "look and listen" rule, adopted in most jurisdictions in regard to ordinary commercial railroad crossings, applies in the case of one crossing a street railway track. If one crosses directly in front of an approaching street car without looking and listening or if it appears that he must have seen or heard it in time to have avoided injury if he had looked and listened and paid proper attention, he cannot, ordinarily, recover for an injury received in crossing where the danger

[71] See Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, 63 Am. St. 698; Bittner v. Crosstown St. R. Co., 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. 588; Lewis v. Long Island R. Co., 162 N. Y. 52, 56 N. E. 548; Ackerman v. Union Trac. Co., 205 Pa. St. 477, 55 Atl. 16; Bishop v. Bell City R. Co., 92 Wis. 139, 65 N. W. 733.

[72] See Birmingham R. &c. Co. v. City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. 955; Wilman v. People's R. Co., 4 Pen. (Del.) 260, 55 Atl. 332; North Chicago St. R. Co. v. Smadraff, 189 Ill. 155, 59 N. E. 527; Vincent v. Norton &c. St. R. Co., 180 Mass. 104, 61 N. E. 822; McFarland v. Consolidated Tract. Co., 204 Pa. St. 423, 54 Atl. 308.

[73] Kessler v. Citizens' St. R. Co., 20 Ind. App. 427, 50 N. E. 891; Young v. Citizens' &c. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; Seele v. Boston &c. St. R. Co., 187 Mass. 248, 72 N. E. 971; Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. 871 and note; Funk v. Elec. Tract. Co., 175 Pa. St. 559, 34 Atl. 861; ante, § 1445. And see also Birmingham R. &c. Co. v. Clarke, 148 Ala. 673, 41 So. 829; De Presco v. Wilmington City R. Co., 4 Penn. (Del.) 527, 57 Atl. 906; Chicago &c. R. Co. v. Bowdy, 206 Ill. 615, 69 N. E. 570; Harrison v. North Jersey St. R. Co., 65 N. J. L. 547, 47 Atl. 803; Harbison v. Camden &c. R. Co., 76 N. J. L. 824, 71 Atl. 1134 (bicyclist); Austin Elec. Co. v. Faust, 63 Tex. Civ. App. 91, 133 S. W. 449; Henry v. Seattle Elec. Co., 55 Wash. 444, 104 Pac. 776.

was not or could not have been discovered by the motorman or employe of the company in time to avoid injury by the exercise of reasonable and ordinary care.[74] But the weight of authority is to the effect that the rule does not apply with full strictness as a rule of law measuring the quantum of care to those crossing or going upon street railroad tracks and that the failure to look and listen is not always contributory negligence as a matter of law.[75]

[74] Highland Ave. &c. R. Co. v. Maddox, 100 Ala. 618, 13 So. 615; Cain v. Macon &c. R. Co., 97 Ga. 298, 22 S. E. 918; Beem v. Tama &c. R. Co., 104 Iowa 563, 73 N. W. 1045; Warren v. Bangor &c. R. Co., 95 Maine 115, 49 Atl. 609; Robinson v. Rockland &c. St. R., 99 Maine 47, 58 Atl. 57; Hall v. West End St. R. Co., 168 Mass. 461, 47 N. E. 124; Mathes v. Lowell &c. R., 177 Mass. 416, 59 N. E. 77; Dooley v. Greenfield &c. St. R. Co., 184 Mass. 204, 68 N. E. 203; Ferguson v. Old Colony St. Ry. Co., 204 Mass. 340, 90 N. E. 535; McGee v. Consolidated St. R. Co., 102 Mich. 107, 60 N. W. 293, 47 Am. St. 507, 26 L. R. A. 300, and note; Doherty v. Detroit Citizens' St. R. Co., 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; Baly v. St. Paul City R. Co., 90 Minn. 39, 95 N. W. 757; Watson v. Mound City St. R. Co., 133 Mo. 246, 34 S. W. 573; Moore v. Lindell R. Co., 176 Mo. 528, 75 S. W. 672; Lawson v. Metropolitan St. R. Co., 36 Misc. 824, 74 N. Y. S. 885; Watkins v. Union Tract. Co., 194 Pa. St. 564, 45 Atl. 321; Griffith v. West Chester St. R. Co., 214 Pa. St. 293, 63 Atl. 740; Tesch v. Milwaukee &c. R. Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; Cawley v. La Crosse City R. Co., 106 Wis. 239, 82 N. W. 197. See also Ohnesberg v. Chicago City R. Co., 177 Ill. App. 134, aff'd in 259 Ill. 424, 102 N. E. 819; Shuler v. North Jersey St. Co., 75 N. J. L. 824, 69 Atl. 180, 127 Am. St. 834; Pittsburgh R. Co. v. Cluff, 149 Fed. 732, 79 C. C. A. 438. So, persons have been held guilty of contributory negligence who alighted from one car, or crossed behind one car and stepped upon an adjoining track without looking, and the like. Creamer v. West End St. R. Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. 456; Indianapolis St. R. Co. v. Lenner, 32 Ind. App. 311, 67 N. E. 1044; McCarthy v. Detroit Citizens' St. R. Co., 120 Mich. 400, 79 N. W. 631; Greengard v. St. Paul City R. Co., 72 Minn. 181, 75 N. W. 221; Blaney v. Electric Tract. Co., 184 Pa. St. 524, 39 Atl. 294; Burgess v. Salt Lake City R. Co., 17 Utah 406, 53 Pac. 1013; and note to Hornstein v. United R. Co., 195 Mo. 440, 92 S. W. 884, in 4 L. R. A. (N. S.) 729.

[75] Tacoma R. &c. Co. v. Hays, 110 Fed. 496; Detroit United R. Co. v. Nichols, 165 Fed. 289; Seattle Elec. Co. v. Hooden, 190 Fed. 7; Little Rock &c. R. Co. v. Sledge, 108 Ark. 95, 158 S. W. 1096, Ann. Cas. 1915B, 683, and cases cited in note; Driscoll v. Market St. Cable R. Co., 97 Cal.

§ 1535. Injury to person on street while car is rounding curve.—A street railway company is not ordinarily bound to keep a lookout or give warning to prevent people from coming

553, 32 Pac. 591, 33 Am. St. 203; Kernan v. Market St. R. Co., 137 Cal. 326, 71 Pac. 81; Pilmer v. Boise Tract. Co., 14 Idaho 237, 94 Pac. 432, 15 L. R. A. (N. S.) 254; North Chicago St. R. Co. v. Nelson, 79 Ill. App. 229; Evansville St. R. Co. v. Gentry, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. 421; Indianapolis St. R. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945, 946; Duetz v. Louisville &c. Tract. Co., 46 Ind. App. 692, 91 N. E. 622; Warren v. Bangor &c. R. Co., 95 Maine 115, 49 Atl. 609; Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338, 43 Atl. 762; Kelly v. Wakefield &c. R. Co., 175 Mass. 331, 56 N. E. 285; Smallwood v. Boston El. R. Co., 217 Mass. 375, 104 N. E. 748; Finnick v. Boston &c. St. Ry. Co., 190 Mass. 382, 77 N. E. 500; Terien v. St. Paul City R. Co., 70 Minn. 532, 73 N. W. 412; Morris v. St. Paul City Ry. Co., 105 Minn. 376, 117 N. W. 500, 17 L. R. A. (N. S.) 598; Mitchell v. Third Ave. R. Co., 62 App. Div. 371, 70 N. Y. S. 1118; Brown v. Twenty-third St. R. Co., 56 N. Y. Sup. Ct. 356, 4 N. Y. S. 192; Newark Pass. R. Co. v. Block, 55 N. J. L. 605, 37 Atl. 1067, 22 L. R. A. 374; McGrath v. North Jersey St. R. Co., 66 N. J. L. 312, 49 Atl. 523; Burian v. Seattle Elec. Co., 26 Wash. 606, 67 Pac. 214; Richmond v. Tacoma R. &c. Co., 67 Wash. 444, 122 Pac. 351; Chisholm v. Seattle &c. Co., 27 Wash. 237, 67 Pac. 601; and see article in 58 Cent. Law Jour. 222. But see Hooks v. Huntsville R. &c. Co., 147 Ala. 700, 41 So. 273; Bailey v. Market St. Cable Co., 110 Cal. 320, 42 Pac. 914; Truman v. Wilmington City R. Co., 7 Penn. (Del.) 192, 78 Atl. 636, aff'd in 7 Penn. (Del.) 197, 72 Atl. 983; Young v. Citizens' St. R. Co., 148 Ind. 54, 47 N. E. 142; Burns v. Metropolitan St. R. Co., 66 Kans. 188, 71 Pac. 244; Hoelzel v. Crescent City R. Co., 49 La. Ann. 1302, 22 So. 330, 38 L. R. A. 708; Dubose v. New Orleans R. &c. Co., 123 La. 1029, 49 So. 696; McGee v. Consolidated St. R. Co., 102 Mich. 107, 60 N. W. 107, 26 L. R. A. 300, and note; 47 Am. St. 507; Davis v. Detroit United R. Co., 162 Mich. 240, 127 N. W. 323; Reno v. St. Louis &c. R. Co., 180 Mo. 469, 79 S. W. 464; Deane v. St. Louis Transit Co., 192 Mo. 575, 91 S. W. 505; Daly v. New York City R. Co., 132 App. Div. 359, 116 N. Y. S. 698; Tucker v. Whitridge, 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. (N. S.) 683, Ann. Cas. 1913D, 1250; Wolf v. City &c. R. Co., 45 Ore. 446, 72 Pac. 329, 78 Pac. 668; Ehisman v. East Harrisburgh &c. R. Co., 150 Pa. St. 180, 24 Atl. 596, 17 L. R. A. 448; Riedel v. Wheeling Tract. Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123; Cable v. Spokane &c. R. Co., 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1225 (interurban railroad). The final test it is said is whether an ordinarily prudent person would have attempted to cross under the circumstances. Virginia Ry. &c. Co. v. Boltz, 122 Va. 649, 95 S. E. 467. Where one drove onto

into contact with the rear end of a car when rounding a curve. The employes are entitled to assume that persons in the street are aware of the well-known and obvious fact that the rear end of a car in rounding a curve necessarily projects outward beyond the rail, and such persons are charged with such knowledge and cannot ordinarily recover if they are injured by getting too close and failing to step back or the like.[76] But there are exceptional cases in which, because of the surroundings or particular circumstances, there may be a liability.[77]

a street occupied by a street railroad, and looked and was unable to see any street car approaching, his failure to look when he drove on the track a little later, relying on a warning being given by the motorman, and having poor eyesight, and being in a position where it was inconvenient for him to look, was held to render him guilty of contributory negligence as a matter of law, in Petersen v. St. Louis Transit Co., 114 Mo. App. 374, 89 S. W. 1042. But see McCarthy v. Consolidated R. Co., 79 Conn. 73, 63 Atl. 725. In Tognazzi v. Milford &c. St. R. Co., 201 Mass. 7, 86 N. E. 799, 21 L. R. A. (N. S.) 309, a driver who, on turning into a street looked for cars without seeing any and then drove three hundred feet beside the track and turned squarely across it without again looking was held guilty of contributory negligence as matter of law.

[76] Wood v. Los Angeles R. Corp., 172 Cal. 15, 155 Pac. 68; Gribbins v. Kentucky Terminal &c. Co., 150 Ky. 276, 150 S. W. 338; Miller v. Public Service Corp., 86 N. J. L. 631, 92 Atl. 343, L. R. A. 1915C, 604, (even though injured person is intending to board or had just left car); Hoffman v. Philadelphia Rapid Transit Co., 214 Pa. St. 87, 83 Atl. 409; Mignault v. Rhode Island Co., 41 R. I. 232, 103 Atl. 716; Gannaway v. Puget Sound &c. Tract. &c. Co., 77 Wash. 655, 138 Pac. 267 (injured person had just left car); Kuhn v. Milwaukee Elec. R. &c. Co., 158 Wis. 525, 149 N. W. 220, Ann. Cas. 1916E, 678 (person intending to board car); and note reviewing these and other authorities.

[77] White v. Connecticut Co., 88 Conn. 614, 92 Atl. 411, L. R. A. 1915C, 609; Schwartz v. New Orleans &c. R. Co., 110 La. Ann. 534, 34 So. 667; Mittleman v. New York City R. Co., 56 Misc. 599, 107 N. Y. S. 108; Wechsler v. Pittsburgh Rys. Co., 247 Pa. St. 96, 93 Atl. 19. Thus persons on sidewalks injured by a car rounding curve have been allowed to recover when they would probably have been defeated if they had been in the street between curbs. Brentlinger v. Louisville R. Co., 156 Ky. 688, 161 S. W. 1107; Fritch v. Pittsburgh Rys. Co., 239 Pa. St. 526; See also Bryant v. Boston El. R. Co., 212 Mass. 62, 98 N. E. 587, 40 L. R. A. (N. S.) 133. But compare Hayden v. Fair Haven &c. R. Co., 76 Conn. 355, 56 Atl. 613.

§ 1536 (1096ck). Collisions between street cars and railroad trains.—It may be said in a general way that where a street car line crosses an ordinary commercial railroad, the relative duties of the street railway company and of the railroad company to exercise care and avoid collision are the same as in the case of ordinary travelers crossing the railroad.[78] The negligence of either one is not imputed to its passengers.[79] There are many cases in which either or both companies may be sued and held liable to a passenger upon the cars of one of them where both companies are guilty of negligence proximately causing the injury complained of;[80] but the duty of a company to its passengers is generally higher than that of the other company to such persons who are not its passengers.[81] The cars of the com-

[78] See Baltimore &c. R. Co. v. Friel, 77 Fed. 126; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Baltimore &c. R. Co v. Breinig, 25 Md. 378, 90 Am. Dec. 49; New York &c. R. Co. v. New Jersey &c. R. Co., 60 N. J. L. 52, 37 Atl. 627, 38 L. R. A. 516; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; post, § 1675. See also Parker v. Des Moines City Ry. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas. 1913E, 174 and note.

[79] Little Rock &c. R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 115; East Tenn. &c. R. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281; Holsab v. New Orleans &c. R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; O'Rourke v. Lindell R. Co., 142 Mo. 342, 44 S. W. 254; O'Toole v. Pittsburgh &c. R. Co., 158 Pa. St. 99, 27 Atl. 737, 22 L. R. A. 606, 38 Am. St. 830; Gulf &c. R. Co. v. Pendry, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. 125. See also Chicago Consol. Tract. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820; Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. ed. 652; post, § 1675.

[80] See Chicago &c. R. Co. v. Hines, 183 Ill. 482, 56 N. E. 177; Parker v. Des Moines City R. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas. 1913E, 174; Tompkins v. Clay City St. R. Co., 66 Cal. 163, 4 Pac. 1165; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752, note in 75 Am. Dec 418; post, § 1675.

[81] Selma St. R Co. v. Owen, 132 Ala. 420, 31 So. 598; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610, affirmed in 154 Ill. 523, 39 N. E. 140; Hammond &c. Elec. R. Co. v. Spyzehalski, 17 Ind. App. 1, 46 N. E. 47; Parker v. Des Moines City R. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas 1913E, 174; Zimmer v. Third Ave. R. Co., 36 App. Div. 265, 55 N. Y. S. 308; Coddington v. Brooklyn &c. R. Co., 102 N. Y. 66, 5 N. E. 797; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91.

mercial railroad have the right of way at highway crossings,[82] and it is the duty of the motorman or those in charge of the street car to look and listen and in a proper case, to yield precedence to the railroad train.[83] In many jurisdictions it is also provided by statute or ordinance that the street car must be stopped, and, in some of them, that a man must be sent ahead to look for approaching trains. The violation of such a statute or ordinance is at least evidence of negligence, and, at least in the case of a statute, is generally held to be negligence per se justifying a recovery where it is the proximate cause of the injury complained of.[84] But, in the absence of a statute or ordinance requiring it, a street railway company is not obliged to maintain a watchman or flagman at the crossing,[85] and it has been held that the fact that the street car driver or motorman has been directed by the company to obey the signal of the

[82] Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Warner v. New York &c. R. Co., 44 N. Y. 465; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Black v. Burlington &c. R. Co., 38 Iowa 515.

[83] New York &c. R. Co. v. New Jersey Elec. R. Co., 60 N. J. L. 52, 37 Atl. 627, 38 L. R. A. 516; Gulf &c. R. Co. v. Pendrey, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. 125; Selma &c. R. Co. v. Owen, 132 Ala. 420, 31 So. 598. See also Washington &c. R. Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. ed. 1101; Forsythe v. Los Angeles R. Co., 149 Cal. 569, 87 Pac. 24; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610; Indianapolis Tract. &c. Co. v. Romans, 40 Ind. App. 184, 79 N. E. 1068; Parker v. Des Moines City Ry. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas. 1913E, 174 (and presence of a flagman does not excuse); Flournoy v. Shreveport Belt R., 50 La. Ann. 491, 23 So. 465; Tucker v. Brooklyn Heights R. Co., 131 App. Div. 97, 115 N. Y. S. 224; Martus v. Delaware &c. R. Co., 15 Misc. 248, 36 N. Y. S. 417.

[84] Cincinnati St. R. Co. v. Murray, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; Louisville &c. R. Co. v. Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. 116; Montgomery St. R. Co. v. Lewis, 148 Ala. 134, 41 So. 737; Mulding v. St. Louis &c. R. Co., 116 Mo. App. 655, and see post, §§ 1615, 1675. But compare Bartholomaus v. Milwaukee Elev. R. &c. Co., 129 Wis. 388, 109 N. W. 143. For case in which it was held that the ordinance did not require a complete stop between two tracks, see Bartholomaus v. Milwaukee &c. Co., 129 Wis. 388, 109 N. W. 143.

[85] Jacquin v. Grand Ave. Cable Co., 57 Mo. App. 320.

flagman of the commercial railroad does not make such flagman an agent of the street railway company so as to render the latter responsible for his negligence.[86]

§ 1537 (1096cl). Injuries to children.—It is sometimes said that a street railway company must exercise a greater or higher degree of care to look out for and prevent injury to children than for adults.[87] But while greater vigilance and caution may be required in such cases,[88] it would seem that the degree of care is still ordinary and reasonable care under the circumstances or in proportion to the danger to be expected or avoided.[89] The street railway employes have no right to

[86] Chicago St. R. Co. v. Volk, 45 Ill. 175. But it is otherwise, where he is jointly employed. Augustus v. Chicago &c. R. Co., 153 Mo. App. 572, 134 S. W. 23.

[87] See 2 Thomp. Neg. § 1424; Passamaneck v. Louisville R. Co., 98 Ky. 195, 32 S. W. 620. Compare also Hovaska v. St. Louis Trans. Co., 191 Mo. 441, 90 S. W. 1142.

[88] See Camden Interstate R. Co. v. Broom, 139 Fed. 595, 598; West Chicago St. R. Co. v. Schwartz, 93 Ill. App. 387; Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723; Elwood St. R. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535; Bergen Co. Tract. Co. v. Heitman, 61 N. J. L. 682, 40 Atl. 651; Koersen v. Newcastle &c. R. Co., 198 Pa. St. 30, 47 Atl. 851; Sample v. Consolidated &c. R. Co., 50 W. Va. 472, 40 S. E. 597, 57 L. R. A. 186.

[89] See San Antonio St. R. Co. v. Mechler, 87 Tex. 628, 30 S. W. 899; Gorman's Adm'r. v. Louisville Ry. Co., 24 Ky. L. 1938, 72 S. W. 760; Strutzel v. St. Paul &c. R. Co., 47 Minn. 543, 50 N. W. 690. And compare also Birmingham R. &c. Co. v. Jones, 153 Ala. 157, 45 So. 177; Kiley v. Boston Elec. Co., 207 Mass. 542, 93 N. E. 632, 31 L. R. A. (N. S.) 1153. In Hanley v. Ft. Dodge &c. Co., 133 Iowa 326, 107 N. W. 593, 594, it is said: "It is the argument that 'ordinary care is not the criterion where the life of an infant four years old is involved.' We do not so understand the law. The test of negligence in all such cases is ordinary care, or, as the same thought is frequently expressed, reasonable care. True, that which would be regarded as ordinary care in one case might fall far short of answering the test in another. The varying conditions and circumstances are to be considered, and these properly enough take in the age, apparent want of understanding, etc., of the complaining party. From this, and naturally enough, it follows that the expression is to be given interpretation in the light of and as dictated by the peculiar circumstances of each case as it presents itself. And in each case the ultimate question is, did the person complained of act as a person of

assume that a child too young to appreciate the danger will get out of the way or not go upon the track when seen closely

ordinary prudence and care would have acted under like or similar circumstances? Galloway v. Railway, 87 Iowa 458, 54 N. W. 447; Murphy v. Railway, 38 Iowa 539; Rusch v. Davenport, 6 Iowa 443; Barry v. Railway, 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; Gorman v. Railway, 72 S. W. 760, 24 Ky. L. 1938. In the case last cited it was said: 'Appellant complains because of a higher degree of care was not required of the motorman. He argues that, as to young children, a different and higher degree of care is owing than is to adults under similar circumstances. We believe that is true. We are also of the opinion that the instruction given by the court in defining 'ordinary care' fairly submitted that idea to the jury, viz.: Ordinary care means the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care. It might be impossible to lay down a general rule that would apply and minutely define the care to be exercised under every conceivable state of case. Nor would it be wise to attempt it. What would amount to ordinary care toward an adult, under similar circumstances, might be criminal negligence towards an infant of very tender years. So where the jury were instructed that the motorman must regulate his conduct in operating the car by the standard of conduct and caution usually exercised by ordinary careful and prudent persons in operating electric cars in such neighborhoods where small children were likely to be upon the streets, his full legal duty was stated.' If, as contended for by counsel for appellant, and with much force of reasoning, the tendency following the use of the expression 'ordinary care,' without further explanation, would be to mislead the jury 'by leading them to suppose that the street railway company discharges its duty to children on the street by extending to them the care which ordinary persons use under ordinary circumstances', still, we think every requirement was met in this case by the giving of the sixth instruction, wherein it was said to be the duty of the person operating the car in question to use ordinary care and diligence in doing all he reasonably could with the appliances at hand, after it was reasonably apparent, or would have been to a reasonably prudent and cautious man, that the child was about to cross the track in front of his car at such place or in such manner that it was reasonably probable that, unless the speed of the car was checked, or the car stopped, the car would collide with the child, to slacken the speed or stop the car to prevent a collision with such child.'"

approaching it,[90] and they must be careful in such cases to bring the car under control and stop it, if apparently necessary to avoid injury.[91] But if there is a mere error of judgment, and no willfulness or negligence, the company is not liable;[92] and where a child suddenly and unexpectedly runs upon the track is front of the car or so gets under it, the company is not generally liable.[93]

[90] Perryman v. Chicago City R. Co., 242 Ill. 269, 89 N. E. 980; Chicago City R. Co. v. Tuohy, 95 Ill. App. 314, affirmed in 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Nelson v. Crescent City R. Co., 49 La. Ann. 491, 21 So. 635; Tholen v. Brooklyn City R. Co., 30 N. Y. S. 1081; Jones v. United Tract. Co., 201 Pa. St. 344, 50 Atl. 826; Bamberger v. Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 28 L. R. A. 486, 49 Am. St. 909; Galveston City R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 49 Am. St. 909; Artusy v. Missouri &c. R. Co., 73 Tex. 191, 11 S. W. 177.

[91] Authorities cited in last preceding note; also, Fox v. Oakland &c. St. Ry., 118 Cal. 55, 50 Pac. 25, 62 Am. St. 216, 219, 220; Elwood St. R. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535; Louisville Ry. Co. v. Flannery, 134 Ky. 751, 121 S. W. 663, 24 L. R. A. (N. S.) 560; Simon v. Metropolitan St. R. Co., 231 Mo. 65, 132 S. W. 250. The alleged negligence must be the proximate cause of the injury complained of, and such, it has been held, as ought reasonably to have been anticipated. Johnston v. New Omaha &c. Co., 78 Nebr. 24, 110 N. W. 711.

[92] Bittner v. Crosstown St. R. Co., 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. 588; Slabenan v. Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, 63 Am. St. 698.

[93] Finley v. West Chicago St. R. Co., 90 Ill. App. 368; Louisville R. Co. v. Edelen, 29 Ky. L. 1125, 96 S. W. 901 (but compare Netter v. Louisville R. Co., 134 Ky. 678, 121 S. W. 636); Culbertson v. Crescent City R. Co., 48 La. Ann. 1376, 20 So. 902; Litolff v. New Orleans R. Co., 124 La. Ann. 278, 50 So. 105; Bulger v. Albany R. Co., 42 N. Y. 459; Kierzenkowski v. Phila. Tract. Co., 184 Pa. St. 459, 39 Atl. 220; Funk v. Elec. Tract. Co., 175 Pa. St. 559, 34 Atl. 861; Leitzel v. Harrisburg Tract. Co., 212 Pa. St. 608, 62 Atl. 102, 62 Cent. L. J. 23, 24; Sontgen v. Kittanning &c. St. R. Co., 213 Pa. St. 114, 62 Atl. 523; Trumbo v. City St. Car Co., 89 Va. 780, 17 S. E. 124; Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. 871 and note. See also Rack v. Chicago City R. Co., 173 Ill. 289, 50 N. E. 668, 44 L. R. A. 127; Siaick v. Northern Cent. R. Co., 92 Md. 213, 48 Atl. 149; Campbell v. New Orleans City R. Co., 104 La. Ann. 183, 28 So. 985; Gannon v. New Orleans R. Co., 48 La. Ann. 1002, 20 So. 223; Colomb v. Portland &c. R. Co., 100 Maine 418,

§ 1538 (1096cm). Injuries from wires or electricity.—A street railway company using electricity as a motive power is under a duty to use ordinary and reasonable care in view of the danger and circumstances to maintain as well as construct its plant so as not to cause injury to those who properly use the street. It should know the condition of its wires and make reasonable inspection to keep them properly insulated;[94] and, in some jurisdictions, it is held to even a higher degree of care, and the rule res ipsa loquitur is often applied in case of injury from fallen wires, or the like, charged with electricity.[95] A

61 Atl. 898; Collins v. South Boston &c. R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. R. 675; Bouthillner v. Old Colony St. R. Co., 189 Mass. 537, 75 N. E. 960. "Without doubt," says the court in Hanley v. Ft. Dodge &c. Co., 133 Iowa 326, 107 N. W. 593, 595, "the dictates of ordinary care demand increased watchfulness on the part of a motorman when operating his car along a street, or over public places where children are accustomed to play. But where the presence of a child is observed, and as the car approaches, such child, having crossed the track, is moving away from the zone of danger, there can be no reason why the motorman may not presume that he may go forward with his car in safety. To say otherwise, would be to forbid in a practical sense the operation of cars along such streets and over such places. True enough, it is possible that a child situated as implied in the instruction may suddenly change his course and dart back toward, or upon the track. But there is no consideration of ordinary care that makes requirement of the motorman that he presume that such will occur."

[94] Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; Commonwealth Elec. Co. v. Melville, 110 Ill. App. 242, affirmed in 210 Ill. 70, 70 N. E. 1052; Knowlton v. Light Co., 117 Iowa 451, 90 N. W. 818; Schweitzer's Adm'r. v. Citizen's &c. Co., 21 Ky. L. 608, 52 S. W. 830; Baltimore City &c. R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; Hamilton v. Bordentown &c. Co., 68 N. J. L. 85, 52 Atl. 290. Reasonable care under such circumstances however generally requires great precaution and is frequently said to be the utmost or highest degree of care. See also White's Supp. Thomp. Corp., § 797.

[95] See 1 Thomp. Neg. (2nd ed.), § 15; City Elec. St. R. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570 and note; 54 Am. St. 262; Wood v. Wilmington City R. Co., 5 Penn. (Del.) 369, 64 Atl. 246; Topeka City R. Co. v. Higgs, 38 Kans. 375, 16 Pac. 667, 5 Am. St. 754; Metropolitan St. R. Co. v. Gilbert, 70 Kans. 261, 78 Pac. 807; McLaughlin v. Elec. L. Co., 100

traveler upon a street generally has the right to assume that live and dangerous electric wires are not lying in it, and the mere fact that he comes into contact with such a wire lying in it, or suspended above it, is not, of itself, conclusive of contributory negligence.[96] The question is usually, but not always, one of fact for the jury.[97] A Missouri statute requires electric railway trolley wires to be maintained at a height of not less than twenty-two feet above a railroad track above which it crosses, and in a recent case, where a brakeman on a railroad train was injured by coming in contact with such a

Ky. 173, 37 S. W. 851, 34 L. R. A. 812; Hebert v. Lake Charles &c. Co., 111 La. Ann. 522, 35 So. 721, 100 Am. St. 505, and authorities cited in opinion and note; Walter v. Baltimore Elec. Co., 109 Maine 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178 (citing 2 Elliott Roads & Streets, 3rd ed., § 1076, and reviewing many of the cases); St. Louis v. Bay State R. Co., 216 Mass. 255, 103 N. E. 639, Ann. Cas. 1915B, 706; Trenton Pass. R. Co. v. Cooper, 66 N. J. L. 219, 37 Atl. 730, 64 Am. St. 592, 38 L. R. A. 637; Jones v. Union R. Co., 18 App. Div. 267, 46 N. Y. S. 321; Clarke v. Nassau Elec. R. Co., 9 App. Div. 51, 41 N. Y. S. 78; Boyd v. Portland &c. Co., 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; Memphis St. R. Co. v. Kartwright, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. 807; Norfolk R. and Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502. Compare also Valparaiso Light &c. Co. v. Tyler, 177 Ind. 278, 96 N. E. 768; Michigan City &c. Co. v. Dibka, 54 Ind. App. 248, 100 N. E. 877; Indianapolis &c. Co. v. Dolby, 47 Ind. App. 406, 92 N. E. 739; White's Supp. Thomp. Corp., § 797. But it is not an insurer. Harter v. Colfax &c. Co., 124 Iowa 500, 100 N. W. 508; Sullivan v. Brooklyn Heights R. Co., 117 App. Div. 784, 102 N. Y. S. 982; Citizens' R. Co. v. Gifford, 19 Tex. Civ. App. 631, 47 S. W. 1041. Evidence as to other horses having been killed in the same way has been held admissible. Vicksburg R. &c. Co. v. Miles, 88 Miss. 204, 40 So. 748.

[96] Brush Elec. &c. Co. v. Kelley, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250 and note; Suburban Elec. Co. v. Nugent, 58 N. J. L. 658, 34 Atl. 1069, 32 L. R. A. 700; Hovey v. Michigan &c. Co., 124 Mich. 607, 83 N. W. 600; Devlin v. Beacon Light Co., 192 Pa. St. 188, 43 Atl. 962.

[97] Lloyd v. City &c. R. Co., 110 Ga. 165, 35 S. E. 170; White's Supp. Thomp. Corp., § 808. See also Texarkana &c. Co. v. Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. 30; Regan v. Boston &c. Co., 167 Mass. 406, 45 N. E. 743; Proctor v. San Antonio &c. R. Co., 26 Tex. Civ. App. 148, 62 S. W. 938, 939; Thornburg v. City &c. R. Co., 65 W. Va. 379, 64 S. E. 358 (so is the question as to sufficiency of inspection).

wire it was held "palpable negligence" on the part of the street railway company to permit the wire to hang down so as to strike a brakeman on top of a train and that the jury properly found the brakeman free from contributory negligence.[98] But in another jurisdiction, where a brakeman, knowing the presence of the wire and that it was so low as to interfere with one standing on top of a car, attempted to pass from the top of one car to another, without any necessity, he was held guilty of contributory negligence.[99]

§ 1539 (1096cn). Frightening horses.—A street railway company is not liable, as a general rule at least, for injuries caused by horses becoming frightened at its cars or the usual and necessary noises incident to their proper operation.[1] But those

[98] Smedley v. St. Louis &c. R. Co., 118 Mo. App. 103, 93 S. W. 295. See also Quatfasel v. New York &c. R. Co., 151 App. Div. 61, 135 N. Y. S. 765. And as to injury from fall of electric wire, see Evansville &c. Tract. Co. v. Montgomery, 50 Ind. App. 528, 98 N. E. 731. As to when railroad commissioners have no power to require wire to be unnecessarily high, see Saginaw Un. &c. R. Co. v. Michigan Cent. R. Co., 91 Mich. 657, 52 N. W. 49.

[99] Danville St. Car Co. v. Watkins, 97 Va. 713, 34 S. E. 884. See as to when company is not negligent, Read v. City &c. R. Co., 115 Ga. 366, 41 S. E. 629; Gross v. South Chicago &c. R. Co., 73 Ill. App. 217; Ludwig v Metropolitan St. R. Co., 71 App. Div. 210, 75 N. Y. S. 667, reversed in 174 N. Y. 546, 67 N. E. 1084. When negligent, see Erslew v. New Orleans &c. R. Co., 49 La. Ann. 86, 21 So. 153; Johnston v Omaha &c. Co., 78 Nebr. 24, 110 N. W. 711; Stark v. Muskegon Tract. &c. Co., 141 Mich. 575, 104 N. W. 1100. As to injury to other companies or property owners, see Citizens' Tel. Co. v. Ft. Wayne &c. Ry. Co., 53 Ind. App. 230, 100 N. E. 309; Postal Tel. &c. Co. v. Chicago &c. R. Co., 49 Ind. App. 697, 97 N. E. 20; Lake Shore &c. R. Co. v. Chicago &c. R. Co., 48 Ind. App. 584, 92 N. E. 989; Cumberland &c. Co. v. Kranz, 48 Ind. App. 67, 95 N. E. 371; City of Logansport v. Smith, 47 Ind. App. 64, 93 N. E. 883; White's Supp. Thomp. Corp., §§ 804, 805; Elliott Roads & Streets (3rd ed.), §§ 1076, 1077. And as to liability for injury to trespasser or licensee from exposed third rail, see note to Riedel v. West Jersey St. R. Co., 177 Fed. 374, in 28 L. R. A. (N. S.) 98.

[1] Terre Haute Elec. R. Co. v. Yant, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. 376; Marion &c. R. Co. v. Dubois, 23 Ind. App. 342, 55 N. E. 266; Henderson v. Greenfield &c. St. R. Co., 172 Mass. 542, 52 N. E. 1080; Omaha St. R. Co. v. Du-

operating the car have no right to wilfully, or maliciously, and unnecessarily frighten horses, and if they see that a horse has become frightened and likely to cause injury they should take care to avoid it[2] and a duty may arise to even stop the car[3] or delay starting it,[4] or cease from sounding the gong[5] or the like. The question as to what should be done in the exercise of reasonable care and whether they have exercised it in such

vall, 40 Nebr. 29, 58 N. W. 531; Doster v. Charlotte St. R. Co., 117 N. Car. 651, 23 S. E. 449, 34 L. R. A. 481 and note; Coughtry v. Willamette St. R. Co., 21 Ore. 245, 27 Pac. 501; Hazel v. People's &c. Co., 132 Pa. St. 96, 18 Atl. 1116; Yingst v. Lebanon &c. St. R. Co., 167 Pa. St. 438, 31 Atl. 687; Hargis v. St. Louis &c. R. Co., 75 Tex. 23, 12 S. W. 953; Bishop v. Belle City St. R. Co., 92 Wis. 139, 65 N. W. 733. See also McDonald v. Toledo &c. St. R. Co., 74 Fed. 104; North Chicago St. R. Co. v. Harms, 59 Ill. App. 374; Wachtel v. East St. Louis &c. Co., 77 Ill. App. 465; Bottje v. Grand Rapids &c. R. Co., 157 Mich. 351, 122 N. W. 87; Hoag v. South Dover &c. Co., 192 N. Y. 412, 85 N. E. 667, Condry v. Wilkesbarre &c. Tract. Co., 228 Pa. St. 270, 77 Atl. 500; Fleherty v. Harrison, 98 Wis. 559, 74 N. W. 360.

[2] Muncie St. R. Co. v. Maynard, 5 Ind. App. 372, 32 N. E. 343; Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436, 49 N. E. 843; Ft. Scott Rapid Transit Co. v. Page, 10 Kans. App. 362, 59 Pac. 690; Owensboro City R. Co. v. Lydane, 19 Ky. L. 698, 41 S. W. 578; Lincoln Rapid Transit Co. v. Nichols, 37 Nebr. 332, 55 N. W. 872, 20 L. R. A. 853; Myers v. Brantford St. R. Co., 31 Ont. 209. See also East St. Louis &c. St. R. Co. v. Wachtel, 63 Ill. App. 181; Joliet R. Co. v. Eich, 96 Ill. App. 240; O'Brien v. Blue Hill St. R. Co., 185 Mass. 446, 71 N. E. 951.

[3] Richter v. Cicero &c. St. R. Co., 70 Ill. App. 196; Louisville &c. Ry. Co. v. Stanger, 7 Ind. App. 179, 34 N. E. 688; Gibbons v. Wilkesbarre &c. R. Co., 155 Pa. St. 279, 26 Atl. 417. See also North Ala. Tract. Co. v. Thomas, 164 Ala. 191, 51 So. 418; Evansville Elec. R. Co. v. Foly, 47 Ind. App. 58, 93 N. E. 866; Christy v. Des Moines City R. Co., 126 Iowa 428, 102 N. W. 194; McVean v. Detroit United R., 138 Mich. 263, 101 N. W. 527; Gould v. Merrill R. &c. Co. 139 Wis. 433, 121 N. W. 161. But compare Eastwood v. La Crosse City R. Co., 94 Wis. 163, 68 N. W. 651; Motley v. Southwest &c. R. Co., 123 Mo. App. 80, 99 S. W. 763.

[4] Philadelphia Tract. Co. v. Lightcap, 61 Fed. 762.

[5] Oates v. Metropolitan St. R. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447; Citizens' R. Co. v. Hair (Tex. Civ. App.), 32 S. W. 1050. See also Ellis v. Lynn &c. R. Co., 160 Mass. 341, 35 N. E. 1127; Sauter v. International R. Co., 128 App. Div. 400, 112 N. Y. S. 803.

cases however, is usually for the jury.[6] So, contributory negligence, when a proximate cause of the injury, may relieve the company from liability for mere negligence.[7] Unnecessary and unusual noises, calculated to frighten horses, made in the operation of a car may constitute negligence rendering the company liable for frightening horses and proximately causing injury to travelers, even though there is no malice or willfulness.[8] Thus, we suppose that negligence might at least be inferred where a trolley car is so run upon a highway at a place where it is likely to frighten horses and cause injury, as to emit sparks and making hissing and crackling noises; and where an electric car was run at the ordinary speed through a pool of water, causing a roaring and hissing noise, by reason of which a horse was frightened and caused to run away and injure the driver, it was held that the jury might infer negligence, and a verdict for the plaintiff was upheld.[9] There are also cases in which the company has been held liable for running a car on a highway with a sprinkler upon it on which waving black coats were hung, without taking any precautions,[10] or trolley poles were negligently so placed in the street that they were likely to, and did, cause injury where a horse shied at an approaching elec-

[6] Kankakee Elec. R. Co. v. Lade, 56 Ill. App. 454; Terre Haute Elec. R. Co. v. Yant, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. 376.

[7] Cornell v. Detroit Elec. R. Co., 82 Mich. 495, 46 N. W. 791; Gray v. Second Ave. R. Co., 65 N. Y. 561. So held where driver left his horse unhitched and unattended alongside track, in Stacey v. Haverhill &c. St. R. Co., 191 Mass. 326, 77 N. E. 714. But see Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. 446; Flewelling v. Lewiston &c. R. Co., 89 Maine 585, 36 Atl. 1056.

[8] Richmond R. &c. Co. v. Hudgins, 100 Va. 409, 41 S. E. 736. See Alabama &c. R Co. v. Fulton, 144 Ala. 332, 39 So. 282; Choctaw &c. R. Co. v. Coker, 77 Ark. 174, 90 S. W. 999; Hill v. Rome St. R. Co., 101 Ga. 66, 28 S. E. 631; Doran v. Cedar Rapids &c. R. Co., 117 Iowa 442, 90 N. W. 815; Foster v. East Jordan Lumber Co., 141 Mich. 316, 104 N. W. 617; Chicago &c. R. Co. v. Prouty, 55 Kans. 503, 40 Pac. 909; Sauter v. International R. Co., 128 App. Div. 400, 112 N. Y. S. 863.

[9] Ayars v. Camden &c. R. Co., 63 N. J. L. 416, 43 Atl. 678.

[10] McCann v. Consol. Tract. Co., 59 N. J. L. 481, 36 Atl. 388, 38 L. R. A. 236. See also Joyce v. Exeter &c. St. R. Co., 190 Mass. 304, 76 N. E 1054.

tric car;[11] but it has been held that the company is not liable for injury to a traveler caused by his horse becoming frightened at sudden and unusual noises made by passengers.[12]

§ 1540 (1096co). Contributory negligence.—Contributory negligence by a person using a street will defeat a recovery against a street railway company for personal injuries, the same as in other cases, although the company may have been negligent. The general principle is well settled and very easily stated, but the application of the principle is sometimes very difficult. The diversity of opinion as to what will or will not constitute such contributory negligence as will bar an action is so great that it is impossible to extract any general rule from the adjudged cases. It is, indeed, very doubtful whether it can be accurately said that there is any general rule, for the cases are decided, for the most part, upon their own particular facts. It may be said, to be sure, that a man must exercise such care as an ordinarily prudent person would exercise under like circumstances, but this general statement is not, it must be owned, of much real practical value, although it is one generally approved, nor does it go very far toward removing the difficulties that one encounters in exploring the decided cases. The best course, perhaps, that can be pursued is to ascertain and state what the courts have decided on this subject. Decisions as to contributory negligence in particular instances have already been referred to in other sections of this chapter and additional decisions are reviewed in the following section.

§ 1541 (1096cp). Illustrative cases on contributory negligence.—In an Illinois case it was held that crossing a street occupied by street railway tracks, without first stopping and looking, is not negligence as matter of law, and that is so "whether the cars accustomed to run thereon are horse-cars or grip-cars."[13] The New York rule has been said to be that a

[11] Cleveland v. Bangor St. R. Co., 86 Maine 232, 29 Atl. 1005.

[12] Boatwright v. Chester &c. Elec. R. Co., 4 Pa. Super. Ct. 279, 40 W. N. C. (Pa.) 330.

[13] Chicago City R. Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126 and note, 11 Am. St. 87, citing Chicago &c. R. Co. v. O'Conner, 119 Ill. 586, 9 N. E. 263. See

plaintiff is "not at liberty to take even doubtful chances of the consequences of crossing the track in the face of danger or in reliance upon the successful attempt of the driver to slack the speed of the horses."[14] In a Pennsylvania case a person alighted from a cable car, and without looking, turned sharply around the car, and was struck by a car on another track, and it was held that he was guilty of such contributory negligence as defeated a recovery.[15] The same court held in another case that it was contributory negligence for a man to step from a moving street car with his back towards the street.[16] In still another case in the same court it was adjudged that the plaintiff was guilty of contributory negligence in attempting to get on a car when he saw another approaching and near the one he was attempting to get upon.[17] It has been held that one

Deitring v. St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140.

[14] McClain v. Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062; Barker v. Savage, 45 N. Y. 191, 6 Am. Rep. 66; Belton v. Baxter, 54 N. Y. 245, 13 Am. Rep. 578; Davenport v. Brooklyn &c. R. Co., 100 N. Y. 632, 3 N. E. 305. See Moebus v. Hermann, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. 440. See also Denver City Tramway Co. v. Cobb, 164 Fed. 41; Daniels v. Bay City &c. Co., 143 Mich. 493, 107 N. W. 94; Heying v. United Rys. &c. Co., 100 Md. 281, 59 Atl. 667; Goldmann v. Milwaukee &c. Co., 123 Wis. 168, 101 N. W. 384; Hornstein v. Rhode Island Co., 26 R. I. 387, 59 Atl. 71. But compare Doherty v. Metropolitan St. R. Co., 91 N. Y. S. 19.

[15] Buzby v. Philadelphia &c. R. Co., 126 Pa. 559, 17 Atl. 895, 12 Am. St. 919. The court cited Schmidt v. McGill, 120 Pa. St. 412, 14 Atl. 484. See also Giardina v. St. Louis &c. R. Co., 185 Mo. 330, 84 S. W. 928; Hornstein v. United Rys. Co., 195 Mo. 440, 92 S. W. 884, 113 Am. St. 693, 4 L. R. A. (N. S.) 729, and cases there cited in note; Egan v. Jersey City R. Co., 74 N. J. L. 699, 67 Atl. 24, 11 L. R. A. (N. S.) 1058; Morice v. Milwaukee &c. Co., 129 Wis. 529, 109 N. W. 567. But compare Stack v. East St. Louis &c. R. Co., 245 Ill. 308, 92 N. E. 241, 137 Am. St. 318; Consolidated Tract. Co. v. Scott, 58 N. J. L. 882, 34 Atl. 1094, 33 L. R. A. 122; Nemer v. St. Paul City Ry. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. (N. S.) 887; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 270.

[16] Beattie v. Railroad Co. (Pa.), 1 Atl. 574. Compare also Carney v. Boston El. Ry., 219 Mass. 552, 107 N. E. 411 (bridge tender who faced in opposite direction and paid no attention to coming car held guilty of contributory negligence).

[17] Rose v. Railway Co. (Pa.), 12 Atl. 78. Compare Stager v. Railway Co., 119 Pa. St. 70, 12 Atl. 821.

who stands on the railing of a street car and is struck by a passing car is not necessarily guilty of such contributory negligence as will bar a recovery, but upon this point there is much conflict among the authorities.[18] By some of the courts it is held that, as the cars can not give and take the road, the presumption in cases of collisions where the vehicle is moving side by side with the car is that the plaintiff was guilty of contributory negligence.[19] This presumption certainly cannot be regarded as a conclusive one, for, as we think, the only force that can justly be assigned it is that where no explanatory evidence is given the inference is that the plaintiff was in fault, but when explanatory evidence is adduced the question usually becomes one of fact to be submitted to the jury under proper instructions.[20] It is laid down by many of the cases that the same care is not necessarily required of persons crossing or passing along street railway tracks that is required in the case of persons crossing or walking along the tracks of ordinary railroads;[21] in a Pennsylvania case it was held that where the

And see Paul v. United R. Co., 160 Mo. App. 599, 140 S. W. 1196; Henke v. Milwaukee Elec. R. Co., 147 Wis. 661, 133 N. W. 1107.

[18] Geitz v. Milwaukee City R. Co., 72 Wis. 307, 39 N. W. 866; City Railway Co. v. Lee, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. 798; Railway Co. v. Lauderbach (Pa.), 3 Atl. 672; Dahlberg v. Railway Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585 and note. Neslie v. Railroad Co., 113 Pa. St. 300, 6 Atl. 72. In Brown v. Broadway &c. R. Co., 50 N. Y. Super. 106, it was held that the rule of contributory negligence applies to a man marching in a procession. The cases which follow illustrate many and various phases of the general subject. Tanner v. Louisville &c. R. Co., 60 Ala. 621; Howland v. Union &c. R. Co., 150 Mass. 86, 22 N. E. 434; Omaha Horse R. Co. v. Doolittle, 7 Nebr. 481; Connolly v. Knickerbocker &c. R. Co., 114 N. Y. 104, 21 N. E. 101, 11 Am. St. 617; Weil v. Dry Dock Co., 5 N. Y. S. 833; Philadelphia &c. R. v. Bernheimer, 125 Pa. St. 615, 17 Atl. 477.

[19] Suydam v. Grand St. &c. R. Co., 41 Barb. (N. Y.) 375; Siegel v. Eisen, 41 Cal. 109. See also Waters v. United Trac. Co., 114 App. Div. 275, 99 N. Y. S. 763.

[20] Lynam v. Union &c. R. Co., 114 Mass. 83. See also Louisville &c. Trac. Co. v. Lottich, 59 Ind. App. 426, 106 N. E. 903; Indianapolis Trac. &c. Co. v. Taylor, 55 Ind. App. 309, 103 N. E. 812; Logan v. Old Colony St. R. Co., 190 Mass. 115, 76 N. E. 570; Mertens v. St. Louis Trans. Co., 122 Mo. App. 304, 99 S. W. 512.

[21] Hoff v. Los Angeles &c. Co.,

owner of a horse carelessly unhitched it he could not recover, although it was frightened by a cable car and caused to run away and come into collision with the car.[22] It is the duty of a street railway company to run its cars with a due regard to the rights of infirm persons, aged persons and children of tender years, for all classes of citizens have a right to freely use the public streets, and as this is the duty of the company it is liable if it does not use due care to prevent injury to the various classes of persons that may lawfully use the streets. This principle finds its most frequent illustration in case of injuries to children, and it is quite well agreed that the same care is not to be expected from children as from persons of mature years.[23]

158 Cal. 596, 112 Pac. 53; Union Trac. Co. v. Howard (Ind. App.), 87 N. E. 1103; Mentz v. Second Ave. R. Co., 3 Abb. App. Dec. (N. Y.) 274; Spiking v. Consolidated R. Co., 33 Utah 313, 93 Pac. 838; Lynam v. Union &c. R. Co., 114 Mass. 83. Compare Kelly v. Hendrie, 26 Mich. 255.

[22] Philadelphia Traction Co. v. Bernheimer, 125 Pa. St. 615, 17 Atl. 477. It was held in the case cited that the statement of the plaintiff that: "I think the gripman could have stopped the car," was a mere expression of opinion. The court cited upon this point, Fischer v. Ferry Co., 124 Pa. St. 154, 16 Atl. 635.

[23] Indianapolis St. R. Co. v. Schomberg (Ind. App.), 71 N. E. 237, 164 Ind. 111, 72 N. E. 1041; Moore v. Metropolitan &c. R. Co., 2 Mackey (D. C.) 437; Collins v. South Boston &c. R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. R. 675, 26 Am. & Eng. R. Cas. 371; Maschek v. St. Louis R. Co., 71 Mo. 276; Winters v. Kansas Cable R. Co., 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536 and note, 17 Am. St. 591; Farris v. Cass Avenue R. Co., 8 Mo. App. 588; Mullin v. St. Louis Trans. Co., 196 Mo. 572, 94 S. W. 288; Silberstein v. Houston &c. R. Co., 52 Hun 611, 4 N. Y. S. 843; Etherington v. Prospect Park &c. Co., 84 N. Y. 641, 4 Am. & Eng. R. Cas. 617; Mallard v. Ninth Avenue R. Co., 7 N. Y. S. 66; Hestonville R. Co. v. Connell, 88 Pa. St. 520, 32 Am. Rep. 472; Smith v. Hestonville Passenger R. Co., 92 Pa. St. 450, 37 Am. Rep. 705; Dahl v. Milwaukee &c. Co., 62 Wis. 652, 22 N. W. 755, 19 Am. & Eng. R. Cas. 121. See, upon the general subject, Rock v. Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. 92; Fisk v. Central Pacific R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. 22; Brazil Block Coal Co. v. Young, 117 Ind. 520, 20 N. E. 423, post. Chap. XXXIV.

Other decisions and illustrative cases upon the question of contributory negligence are cited below.[24]

§ 1542 (1096cq). Proximate cause—Last clear chance.—The negligence alleged must be the proximate cause of the injury complained of.[25] But it has been held that although a complaint charged negligence in running at a high rate of speed and in failure to sound the gong where it also charged negligence in running the car upon and against the plaintiff's buggy, an instruction submitting the doctrine of last clear chance was not outside the issues.[26] In some cases the failure of the company's

[24] Indianapolis St. R. Co. v. Bolin, 39 Ind. App. 169, 78 N. E. 210, and numerous cases cited in prevailing and dissenting opinions; Montgomery St. R. v. Hastings, 138 Ala. 432, 35 So. 412; Harrington v. Los Angeles R. Co., 140 Cal. 514, 74 Pac. 140, 63 L. R. A. 238, 98 Am. St. 85; Denver City Tramway Co. v. Wright, 47 Colo. 366, 107 Pac. 1074; Farnsworth v. Tampa Elec. Co., 62 Fla. 166, 57 So. 233; Hayden v. Fair Haven &c. Co., 76 Conn. 355, 56 Atl. 613; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687, 68 N. E. 609; Kern v. Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451; Donovan v. Lynn &c. R. Co., 185 Mass. 533, 70 N. E. 1029; Erb v. Boston &c. R. Co., 191 Mass. 482, 78 N. E. 117; Adams v. Boston &c. St. R. Co., 191 Mass. 486, 78 N. E. 117; Manley v. Bay State Ry. Co., 220 Mass. 124, 107 N. E. 409; Blackwell v. Old Colony St. R. Co., 193 Mass. 222, 79 N. E. 335; Baldwin v. Heraty, 136 Mich. 15, 98 N. W. 739; Petty v. St. Louis &c. R. Co., 179 Mo. 666, 78 S. W. 1003; Wood v. Omaha &c. St. R. Co., 84 Nebr. 282, 120 N. W. 1121, 22 L. R. A. (N. S.) 228 and note; Solatinow v. Jersey City &c. Co., 70 N. J. L. 154, 56 Atl. 235; Baxter v. Auburn &c. Elec. R. Co., 190 N. Y. 439, 83 N. E. 469; Voloske v. Interurban St. R. Co., 190 N. Y. 206, 82 N. E. 1090, 15 L. R. A. (N. S.) 1117, and note; Dubiver v. City &c. R. Co., 44 Ore. 227, 74 Pac. 915, 75 Pac. 693. In Seates v. Rapid Transit Ry. Co. (Tex. Civ. App.), 171 S. W. 503, an intoxicated man lying on the track was held guilty of contributory negligence and his contributory negligence seems to have been imputed to one who attempted to rescue him, citing Donahoe v. Ry. Co., 83 Mo. 560, 53 Am. R. 594; Luiz v. McDonald (Tex. Civ. App.), 133 S. W. 535 and other cases.

[25] See ante, § 842, and post, §§ 1877, 2109, 2492, 2708, also.

[26] Indianapolis St. R. Co. v. Marschke, 166 Ind. 490, 77 N. E. 945; Union Trac. Co. v. Bowen, 57 Ind. App. 661, 103 N. E. 1096. See also Dieckman v. Louisville &c. Ry. Co., 46 Ind. App. 11, 91 N. E. 179; Evansville &c. Trac. Co. v. Johnson, 54 Ind. App. 601, 605, 97 N. E. 176; Powers v. Des Moines City Ry. Co. (Iowa), 115 N. W. 494.

employes to take any steps to avoid injury after discovering the peril of the traveler would constitute willfulness and render the company liable on that ground even though the traveler had been guilty of contributory negligence, but in many cases the company may be held liable because negligence on the part of such employes after they have, or should have, discovered the danger is really the proximate cause of the injury.[27] In most jurisdictions, under the doctrine of the "last chance" or "last clear chance"[28] the plaintiff may still recover, notwithstanding he has negligently gone into a place of peril, where he has a right to go without being a trespasser, if the defendant discovered, or ought in the exercise of ordinary and reasonable care to have discovered, his peril in time by the exercise of such care to avoid injury to him and failed to exercise such care by which the injury would have been avoided.[29] The rule as applicable

[27] See Lee v. Market St. R. Co., 135 Cal. 293, 67 Pac. 765; Di Prisco v. Wilmington City R. Co., 4 Pen. (Del.) 527, 57 Atl. 906; Indianapolis Trac. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, and numerous cases there cited in opinion and note; Indianapolis Trac. &c. Co. v. Croly, 54 Ind. App. 566, 96 N. E. 973; Evansville &c. Trac. Co. v. Spiegel, 49 Ind. App. 412, 94 N. E. 718; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Orr v. Cedar Rapids &c. R. Co., 94 Iowa 423, 62 N. W. 851, 853. See Bedell v. Detroit &c. R., 131 Mich. 668, 92 N. W. 349; Costello v. Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897; Roberts v. Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

[28] For an elaborate note on this doctrine see 55 L. R. A. 418-465; also 7 L. R. A. (N. S.) 143; and 27 L. R. A. (N. S.) 379. In Schneider v. Mobile &c. Co., 146 Ala. 344, 40 So. 761, it is said that "the rights of street cars and citizens traveling in vehicles drawn by horses or other animals in the street being correlative, the motorman of a street car is not bound to stop his car until he is conscious of the fact that the driver of a preceding vehicle is heedless of his danger; but, when he is conscious of such fact, the motorman is bound to use the highest degree of care to stop the car."

[29] Birmingham &c. Co. v. Brantley, 141 Ala. 614, 37 So. 698; Louisville Ry. Co. v. Broaddus' Admr., 180 Ky. 298, 202 S. W. 654; Meng v. St. Louis &c. R. Co., 108 Mo. App. 553, 84 S. W. 213; Memphis St. R. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374; Richmond &c. Co. v. Gordon, 102 Va. 498, 46 S. E. 772. See also Nichols v. Chicago &c. R. Co., 44 Colo. 501, 98 Pac. 808; Barry v. Burlington &c. Co., 119 Iowa 62, 93

to street railway cases is stated by Judge Thompson in the following words: "Although the driver of a vehicle, a foot-passenger, or a child may, through his own negligence, expose himself to the danger of being run over by a street car,—yet if the driver, gripman or motorman sees his exposed condition in time, by the exercise of ordinary or reasonable care in giving him warning or in checking his car, to avoid running over him or injuring him, but nevertheless fails to do so, he is guilty of negligence such as will make the railway company liable for the injury which follows.[30] A few courts, however, have refused to apply

N. W. 68, and cases cited in last preceding note and next following note. Of course, if the plaintiff, and not the company, has the last clear chance to avoid injury he cannot recover, and if he is not actually discovered in peril, and his negligence continues to the last moment and the negligence of each is concurrent so that the plaintiff's negligence is really a contributing procurate cause, he cannot recover. See note to Locke v. Puget Sound &c. Ry. &c. Co., 100 Wash. 432, 171 Pac. 242, in L. R. A. 1918D, 1119, and reference therein to other notes. For Indiana rule, see Indianapolis Trac. &c. Co. v. Croly, 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 606; Indianapolis Trac. &c. Co. v. Davy, 57 Ind. App. 532, 103 N. E. 1098; Citizens' St. R. Co. v. Damm, 25 Ind. App. 511, 58 N. E. 564.

[30] Citizens' St. R. Co. v. Steen, 42 Ark. 321; Oliver v. Denver Tramway Co., 13 Colo. App. 543, 59 Pac. 79; Higgins v. Wilmington St. R. Co., 1 Marv. (Del.) 352, 41 Atl. 86; Central Pass. R. Co. v. Chatterson, 14 Ky. L. 663; Owensboro City R. Co. v. Hill, 21 Ky. L. 1638, 56 S. W. 21; Baltimore Traction Co. v. Wallace, 77 Md. 435, 26 Atl. 518; Lake Roland R. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; Baltimore &c. R. Co. v. Rifcowitz, 89 Md. 338, 43 Atl. 762; Czezewzka v. Benton-Belfontaine R. Co., 121 Mo. 201, 25 S. W. 911; Zurfluth v. People's R. Co., 46 Mo. App. 636; Cass v. Third Ave. R. Co., 20 App. Div. 591, 47 N. Y. S. 356; Fenton v. Second Ave. R. Co., 56 Hun 99, 29 N. Y. St. 962, 9 N. Y. S. 162; Huerzeler v. Central Crosstown R. Co., 1 Misc. 136, 48 N. Y. St. 649, 20 N. Y. S. 676; Brachfeld v. Third Ave. R. Co., 60 N. Y. S. 988, 29 Misc. 586; McClain v. Brooklyn &c. R. Co., 116 N. Y. 459, 22 N. E. 1062, 27 N. Y. St. 549, 40 Am. & Eng. R. Cas. 254; Galveston City R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Will v. West Side R. Co., 84 Wis. 42, 54 N. W. 30. The following statement of the rule has been repeatedly approved in Missouri: "It is a settled rule in this state that, though the plaintiff negligently placed himself in a perilous position by driving on or near the track, the motorman operating the car owed the plaintiff the duty of

the rule except where it appears that the employes of the company actually discovered the exposed situation and danger of the traveler.[31] This may be, and we think is the better rule as to trespassers upon the track of an ordinary commercial railroad company and the like, but not where, as is usually true in the case of a street railway company, the track is in the street where others have an equal right to go and must be expected. It should be remembered, however, that where there is mere error of judgment on the part of a competent railway employe there may be no liability, and that such an employe may usually assume up to the last moment, in the absence of anything to the contrary, that one on or near the track or approaching it will heed the signals and get out of the way or not negligently go into danger.[32]

trying to avoid injuring him, and plaintiff's previous negligence did not bar a recovery if the injury resulted from the negligence of the motorman in not stopping or checking the car." Sepetowski v. Transit Co., 102 Mo. App. loc. cit. 110, 76 S. W. 693; Morgan v. Railroad, 159 Mo. 262, 60 S. W. 195; Hutchinson v. Railway, 88 Mo. App. loc. cit. 383; Deitring v. St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140, 144.

[31] See Johnson v. Stewart, 62 Ark. 164, 34 S. W. 889; Ft. Smith &c. Co. v. Flint, 81 Ark. 231, 99 S. W. 79; Lyman v. Union R. Co., 114 Mass. 87; Schoenholtz v. Third Ave. R. Co., 37 N. Y. S. 682; Siek v. Toledo &c. St. R. Co., 9 Ohio C. D. 51, 16 Ohio C. C. 393; Houston &c. R. Co. v. Farrell (Tex. Civ. App.), 27 S. W. 942; Seates v. Rapid Transit Ry. (Tex. Civ. App.), 171 S. W. 503; Southern Trac. Co. v. Rogers (Tex. Civ. App.), 201 S. W. 199; Redford v. Spokane St. R. Co., 9 Wash. 55, 36 Pac. 1085; Johnson v. Superior &c. R. Co., 91 Wis. 233, 64 N. W. 753, with which, however, compare Little v. Superior &c. R. Co., 88 Wis. 402, 60 N. W. 705. See both principal and dissenting opinions in Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301, 45 L. R. A. (N. S.) 896 for a discussion of the entire subject and argument and authorities in support of the varying views and distinctions taken and drawn by the courts.

[32] Davidson v. Denver &c. Co., 4 Colo. App. 283, 35 Pac. 920; Morrisey v. Bridgeport Trac. Co., 68 Conn. 215, 35 Atl. 1126; Schulte v. New Orleans &c. R. Co., 44 La. Ann. 509, 10 So. 811; Doyle v. West End St. R. Co., 161 Mass. 533, 37 N. E. 741; Lyons v. Bay Cities &c. R. Co., 115 Mich. 114, 73 N. W. 139; Bennett v. Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480; Houston &c. R. Co. v. Farrell (Tex. Civ. App.), 27 S. W. 942;

§ 1543 (1096cr). **Street railways as carriers.**—Street railway companies are common carriers of passengers.[33] As such they are required to exercise the care and are subject, in most respects, to the rules elsewhere stated in regard to carriers of passengers.[34] "A passenger," it is said, "is one who undertakes, with the carrier's consent, to travel in the carriage of the latter, otherwise

Christensen v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018; Pantages v. Seattle Elec. Co., 55 Wash. 453, 104 Pac. 629. See also Lobbett v. Oakland &c. Ry., 36 Cal. App. 641, 172 Pac. 1123; Blatnikoff v. Detroit United Ry., 202 Mich. 69, 167 N. W. 956. But, as will elsewhere be shown, such an assumption can not ordinarily be made in case of a very young child or where the circumstances apparent to the employe forbid it. In Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Elwood St. R. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535; Bunyan v. Citizens' R. Co., 127 Mo. 12, 29 S. W. 842; Houston &c. R. Co. v. Woodlock (Tex. Civ. App.), 29 S. W. 817; Buttelli v. Jersey City &c. R. Co., 59 N. J. L. 302, 36 Atl. 700. See also Randle v. Birmingham R. &c. Co., 158 Ala. 532, 48 So. 114; Louisville Ry. Co. v. Broaddus' Admr., 180 Ky. 298, 202 S. W. 654; Tholen v. Brooklyn City R. Co., 30 N. Y. S. 1081, affirmed in 151 N. Y. 627, 45 N. E. 1134.

[33] Jackson v. Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192, 199; Schloemer v. St. Louis Transit Co., 204 Mo. 99, 102 S. W. 565; Nelson v. Metropolitan St. R. Co., 113 Mo. App. 702, 88 S. W. 1119; Fillingham v. Transit Co., 102 Mo. App. 573, 77 S. W. 314; Lincoln St. R. Co. v. McClellan, 54 Nebr. 672, 74 N. W. 1074, 69 Am. St. 736; San Antonio St. R. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719; and authorities cited in following note.

[34] See post, § 2397, as to their not being insurers but being required to exercise a high degree of care or the utmost practicable care. Nelson v. Metropolitan St. R. Co., 113 Mo. App. 702, 88 S. W. 1119, 1121 and authorities cited. Montgomery Elec. R. Co. v. Mallett, 92 Ala. 209, 9 So. 363; Bosqui v. Sutro R. Co., 131 Cal. 390, 63 Pac. 682; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269; West Chicago St. R. Co. v. Kromshinsky, 185 Ill. 92, 56 N. E. 1110; Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Citizens' St. R. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014; Topeka City R. Co. v. Higgs, 38 Kans. 375, 16 Pac. 667, 5 Am. St. 754; Nichols v. Lynn &c. R. Co., 168 Mass. 528, 47 N. E. 427; Hansen v. North Jersey St. R. Co., 64 N. J. L. 686, 46 Atl. 718; Schenckel v. Pittsburgh &c. Trac. Co., 194 Pa. St. 182, 44 Atl. 1072; El Paso &c. R. Co. v. Harry, 37 Tex. Civ. App. 90, 83 S. W. 735; Payne v. Spokane St. R. Co., 15 Wash. 522, 46 Pac. 1054.

than in its service.[35] And, although carried free, the carrier owes him the duty of exercising such skill as it possesses and as is consistent with the situation and service undertaken.[36] "A public common carrier of passengers is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from consideration of public policy. It must carry all alike, and for a reasonable compensation, furnish reasonable accommodations, must continuously operate its line, and submit to reasonable regulation. It has the franchise of taking tolls, and, if a street railway corporation, the franchise of laying tracks in the streets, of stringing wires and setting poles, and the right of way over all private means of transportation. Owing these public duties, possessing these public franchises, and having the burden of caring for innumerable human lives, it is justly held to the highest degree of care and skill."[37]

[35] Indianapolis Trac. &c. Co. v. Lawson, 143 Fed. 834, 837, citing Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

[36] Indianapolis Trac. &c. Co. v. Lawson, 143 Fed. 834, 836. See also as to liability to free passenger, North Chicago St. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672; Indianapolis Trac. &c. Co. v. Klentschy, 167 Ind. 598, 79 N. E. 908; Buck v. People's St. R. Co., 108 Mo. 179, 18 S. W. 1090; Rosenberg v. Third Ave. R. Co., 61 N. Y. S. 1052, 47 App. Div. 323; Harris v. Puget Sound Elec. R. Co., 52 Wash. 298, 100 Pac. 841. See also as to children permitted to ride free Ball v. Mobile &c. Co., 146 Ala. 309, 39 So. 584, 119 Am. St. 32; Metropolitan St. Ry. Co. v. Moore, 83 Ga. 453, 10 S. E. 730; Wilton v. Middlesex R. Co., 107 Mass. 108; Muelhausen v. St. Louis R. Co., 91 Mo. 332, 2 S. W. 315. Whether a passenger usually a question of fact: George v. Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. 184; Meyer v. Second Ave. R. Co., 8 Bosw. (N. Y.) 305. See also Wheeler v. Boston El. R. Co., 220 Mass. 289, 107 N. E. 938.

[37] Steamboat v. King, 16 How. (U. S.) 474, 14 L. ed. 1019; Indianapolis & St. L. R. R. v. Horst, 93 U. S. 296, 23 L. ed. 898; Indianapolis Trac. &c. Co. v. Lawson, 143 Fed. 834, 837, citing Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Kennedy v. New York &c. R. Co., 125 N. Y. 422, 26 N. E. 626; Simmons v. Oregon R. Co., 41 Ore. 151, 69 Pac. 440, 1022. See also Colorado Springs &c. Ry. Co. v. Reese (Colo.), 169 Pac. 572; Cain v. Kanawha Trac. &c. Co., 81 W. Va. 631, 95 S. E. 88.

§ 1544 (1096cs). Who are passengers.—The question as to who are passengers and when the relation of passenger and carrier begins and terminates is elsewhere,[38] considered, but the fact that street railway companies often have no regular stations or places for selling tickets or taking on and letting off passengers makes it desirable to briefly consider the question with particular reference to street railway companies. As a general rule where the car is stopped at a customary place in response to a signal, to take on one as a passenger and he gets on the step or platform for the purpose of taking passage, he is to be regarded as a passenger even though he has no ticket or has not yet paid his fare.[39] A woman with a proper transfer

[38] See post, §§ 2387, 2390.

[39] West Chicago St. R. Co. v. Shiplett, 85 Ill. App. 683; Citizens' St. R. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491; Gaffney v. St. Paul &c. R. Co., 81 Minn. 459, 84 N. W. 304; Gordon v. West &c. R. Co., 175 Mass. 181, 55 N. E. 990; Lockwood v. Boston El. Ry. Co., 200 Mass. 537, 86 N. E. 934, 22 L. R. A. (N. S.) 488; Wallace v. Third Ave. R. Co., 36 App. Div. 57, 55 N. Y. S. 132. See also George v. Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. 184; Nilson v. Oakland Trac. Co., 10 Cal. App. 103, 101 Pac. 413; North Chicago St. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672; Smith v. St. Paul &c. R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550 and note; Barth v. Kansas City &c. R. Co., 142 Mo. 535, 44 S. W. 778; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Messenger v. Valley City St. R. Co., 21 N. Dak. 82, 128 N. W. 1023, 32 L. R. A. (N. S.) 881; Cogswell v. West St. &c. R. Co., 5 Wash. 46, 31 Pac. 411. In Hall v. Terre Haute Elec. Co., 38 Ind. App. 43, 76 N. E. 335, 336, it is said: "A street railway company is granted its franchise in order that it may carry passengers. When it brings upon the street a car equipped for such purpose, stopping the same at a place selected by it, at which to receive passengers, and the person desiring to be transported boards, or attempts to board, such car for such purpose, he becomes a passenger thereon; the act of stopping the car at the customary place being an implied invitation to those waiting to take passage. Citizens' &c. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Citizens' St. R. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491; Gaffney v. St. Paul City R. Co., 81 Minn. 459, 462, 84 N. W. 304; Drew v. Sixth Ave. R. Co., 26 N. Y. 49; Ganiard v. Rochester City & Brighton R. Co., 50 Hun 22, 2 N. Y. S. 470; Ganiard v. Rochester City Elec. R. Co., 121 N. Y. 661, 24 N. E. 1092; Wallace v. Third Ave. R. Co., 36 App. Div. 57, 55 N. Y. S. 132, 135; Gordon v. West End St. R. Co., 175 Mass. 181, 55 N. E. 990; McDonough v. Metropolitan

ticket approaching a street car at the proper place to get on has also been held to be a passenger.[40] But it has been held that one who has given a signal which has been responded to but, before boarding the car is struck by the unexpected swinging of the car from its track to a switch track is not entitled to recover as a passenger,[41] and that one does not become a passenger by a mere attempt to board a car while in motion, although intending to pay his fare, in the absence of some act indicating an invitation or acceptance by the company, either express or implied.[42] Where, however, he is directed to enter

R. Co., 137 Mass. 210; Schepers v. Union Depot R. Co., 126 Mo. 665, 29 S. W. 712; Joliet Street R. Co. v. Duggan, 45 Ill. App. 450. If appellee did not wish to extend such invitation, its duty was to give those in waiting notice to that effect. Citizens' &c. Co. v. Jolly, supra. The person desiring passage, who boards the car without such notice, indicating his intention of becoming a passenger thereon cannot be treated as a trespasser. Citizens' &c. Co. v. Jolly, supra." In Waller v. Wilmington City R. Co., 5 Penn. (Del.), 374, 61 Atl. 874, one who in attempting to board a street car that had stopped at the usual place for cars to stop to take on passengers, took hold of the hand rail with one hand and had one foot on the platform step, was held to be a passenger. To same effect are Burger v. Omaha &c. St. R. Co., 139 Iowa 645, 117 N. W. 35, 130 Am. St. 343; Marshall v. Boston &c. St. R. Co., 203 Mass. 40, 88 N. E. 1094 (for jury); Berry v. St. Louis &c. Transit Co., 211 Mo. 88, 109 S. W. 661.

[40] Keator v. Scranton Trac. Co., 191 Pa. St. 102, 43 Atl. 86, 44 L. R. A. 546. See also Lewyt v. Dry Dock &c. R. Co., 56 Miss. 496, 107 N. Y. S. 14; Kohn v. Nassau Elec. R. Co., 117 N. Y. S. 231. That the relation continues while passenger is transferring from one car to another, see also Walger v. Jersey City &c. R. Co., 71 N. J. L. 356, 59 Atl. 14.

[41] Donovan v. Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297.

[42] Schepers v. Union Depot R. Co., 126 Mo. 665, 29 S. W. 712; Schaefer v. St. Louis &c. R. Co., 128 Mo. 64, 30 S. W. 331. In Smith v. Birmingham R. &c. Co., 147 Ala. 702, 41 So. 307, which was an action for the death of a person in attempting to board an electric car the declaration not averring that the decedent was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers, or that he was invited or knowingly permitted to board the car by an authorized servant of the company, or that he was in any manner accepted as a passenger, it was held demurrable as failing to show the relation of carrier and passenger.

the car by the motorman or conductor he is a passenger,[43] and where one signals a street car to stop, in good faith intending to take passage thereon, and the motorman answers the signal in such a way as to show an acceptance of him as a passenger, it is generally held that he thereby becomes a passenger so far at least as to be entitled to the care due passengers on the part of the company.[44] Newsboys and the like who jump on cars merely to sell papers or the like are not passengers,[45] nor is one who is allowed to ride free by an employe, without authority and not within the scope of his duty or employment.[46] The relation of passenger and carrier does not terminate, as a general rule, until the passenger has had a reasonable opportunity to leave the car at his journey's end where passengers are discharged,[47] nor does it always cease at once on the passenger

[43] Sniper v. Norfolk &c. R. Co., 144 N. Car. 18, 56 S. E. 477.

[44] Karr v. Milwaukee &c. Trac. Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. 1017. See also Smith v. St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. R. 550; Palfrey v. United Rys. Co., 162 Mo. App. 470, 142 S. W. 773; Carney v. Cincinnati So. R. Co., 8 Ohio S. & C. P. Dec. 587; Keater v. Scranton Trac. Co., 191 Pa. St. 102, 43 Atl. 86, 71 Am. St. 758, 44 L. R. A. 546; Brien v. Bennett, 8 Car. & P. 724. But compare Connecticut case in next to last preceding note; also Jaquette v. Capital Trac. Co., 34 App. D. C. 41, 25 L. R. A. (N. S.) 407; Ducherinn v. Boston El. R. Co., 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. 580.

[45] Raming v. Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268; Udell v. Citizens' St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. 336; Rosenkovitz v. United Rys. &c. Co., 108 Md. 306, 70 Atl. 108; Fleming v. Brooklyn City R. Co., 74 N. Y. 618, 1 Abb. N. C. 433; Barry v. Union R. Co., 105 App. Div. 520, 94 N. Y. S. 449.

[46] Clark v. Colorado &c. R. Co., 165 Fed. 408, 19 L. R. A. (N. S.) 988; Thompson v. Nashville &c. R. Co., 160 Ala. 590, 49 So. 340; Finley v. Hudson &c. R. Co., 64 Hun, 373, 19 N. Y. S. 621, affirmed in 74 N. Y. 618. See also post, §§ 2391, 2392. But see Denison &c. R. Co. v. Carter, 98 Tex. 196, 82 S. W. 782. So a person fraudulently traveling on another pass or school ticket is not a passenger. Fitzmaurice v. New York &c. R. Co., 192 Mass. 159, 78 N. E. 418, 116 Am. St. 236, 6 L. R. A. (N. S.) 1146 and notes.

[47] Chicago Terminal &c. Co. v. Schmelling, 99 Ill. App. 577, affirmed in 197 Ill. 619, 64 N. E. 714; Louisville &c. Ry. Co. v. Kennedy, 162 Ky. 560, 172 S. W. 970. See also Fremont &c. R. Co. v. Hagblad, 72 Nebr. 773, 101 N. W. 1033; Robertson v. West Jersey &c. R. Co.,

alighting from the car,[48] or its arrival at its destination.[49] But the public street is not a passenger station for which the company is responsible, and ordinarily, when a passenger once safely alights upon the street the relation of passenger and carrier terminates.[50]

§ 1545 (1096ct). Care as to premises, tracks and places for getting on and off.—A street railway company is bound to furnish for its passengers a reasonably safe and sufficient track and equipments, and to maintain them in a reasonably safe condition, so far as can be provided by the utmost human skill, diligence, and foresight,[51] and is liable to a passenger for slight

79 N. J. L. 186, 74 Atl. 300; Poland v. United Trac. Co., 107 App. Div. 561, 95 N. Y. S. 498.

[48] Melton v. Birmingham R. &c. Co., 153 Ala. 95, 45 So. 151, 16 L. R. A. (N. S.) 467; South Covington &c. St. R. Co. v. Beatty, 20 Ky. 1845, 50 S. W. 259; Burbridge v. Kansas City R. Co., 36 Mo. App. 669; Atlanta Consol. &c. Co. v. Bates, 103 Ga. 333, 30 S. E. 41. But see Indianapolis St. R. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044. Compare McDonald v. St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001; Stevens v. Kansas City El. R. Co., 126 Mo. App. 619, 105 S. W. 26. In Tompkins v. Boston El. R. Co., 201 Mass. 114, 87 N. E. 488, it is held that a passenger riding on the platform of a crowded car does not cease to be a passenger by temporarily alighting for the purpose of permitting a lady passenger to get off.

[49] Toledo Consol. St. R. Co. v. Fuller, 17 Ohio Cir. Ct. 562; Rosenberg v. Third Ave. R. Co., 47 App. Div. 323, 61 N. Y. S. 1052.

[50] Powers v. Connecticut Co., 82 Conn. 665, 74 Atl. 931, 26 L. R. A. (N. S.) 405; West Chicago St. R. Co. v. Walsh, 78 Ill. App. 595; Creamer v. West End St. R. Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. 456; Gorgan v. West End St. R. Co., 176 Mass. 106, 57 N. E. 217, 49 L. R. A. 421, 79 Am. St. 298; Platt v. Forty-second St. &c. Co., 2 Hun (N. Y.) 124; Poland v. Union Trac. Co., 107 App. Div. 561, 95 N. Y. S. 498; Chattanooga Elec. R. Co. v. Roddy, 105 Tenn. 666, 58 S. W. 646, 57 L. R. A. 885; Smith v. City &c. R. Co., 29 Ore. 539, 46 Pac. 136. See also and compare Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Brunswick &c. R. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000; Columbus R. Co. v. Asbell, 133 Ga. 573, 66 S. E. 902; Louisville &c. R. Co. v. Parke, 96 Ky. 580, 29 S. W. 455; Jonas v. South Covington &c. St. Ry. Co., 162 Ky. 171, 172 S. W. 131.

[51] Morris v. New York &c. R. Co., 106 N. Y. 678, 13 N. E. 455; Stierle v. Union R. Co., 156 N. Y. 70, 50 N. E. 419; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202; St. Louis &c. R. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883; Holloway v.

negligence in any of these respects by which an injury to him is occasioned. There are many cases in which the company has been held liable for injuries to its passengers proximately caused by its failure to keep its track or premises in repair or by its negligence in regard to the place for taking on or letting off passengers.[52] But it would seem that as to the condition of stopping places and especially as to places in the street where the company has no control, reasonable care is all that is required, and where the defect is caused by the city or others at a place where the company has no control, if not negligent in using or stopping at such place, or the like, the company is not liable therefor.[53]

Pasadena &c. R. Co., 130 Cal. 177, 62 Pac. 478. See also Macon Consol. St. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756; Blackwell v. Metropolitan &c. R. Co., 137 Mo. App., 654, 119 S. W. 456; Burris v. Pennsylvania R. Co., 233 Pa. St. 304, 82 Atl. 246, Ann. Cas. 1913B, 811, and note.

[52] See Montgomery St. R. Co. v. Mason, 133 Ala. 508, 32 So. 261; Beach v. Eureka Trac. Co., 135 Ark. 542, 203 S. W. 834; West Chicago St. R. Co. v. Stephens, 66 Ill. App. 303; Indianapolis St. R. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936; Mahnke v. New Orleans &c. Co., 104 La. Ann. 411, 29 So. 52; Valentine v. Middlesex R. Co., 137 Mass. 28; Bigelow v. West End St. R. Co., 161 Mass. 393, 37 N. E. 367; McLaren v. Boston El. R. Co., 197 Mass. 490, 83 N. E. 1088; Powers v. Old Colony St. R. Co., 201 Mass. 66, 87 N. E. 192; Blackwell v. Metropolitan &c. R. Co., 137 Mo. App. 654, 119 S. W. 456; Hazelton v. Portsmouth &c. St. R. Co., 71 N. H. 529, 53 Atl. 1016; Wolfe v. Third Ave. R. Co., 67 App. Div. 605, 74 N. Y. S. 336; Daub v. Yonkers St. R. Co., 69 Hun 138, 23 N. Y. S. 268; Creeman v. International R. Co., 124 N. Y. S. 360; Dixon v. Brooklyn City &c. Co., 100 N. Y. 170, 3 N. E. 65; Richmond City R. Co. v. Scott, 86 Va. 902, 11 S. E. 404.

[53] See Citizens' Pass. R. Co. v. Ketchum, 122 Pa. St. 228, 15 Atl. 733; Birmingham v. Rochester City R. Co., 137 N. Y. 13, 32 N. E. 995, 18 L. R. A. 764; Creeman v. International R. Co., 124 N. Y. S. 360; Indianapolis Trac. &c. Co. v. Pressell, 39 Ind. App. 472, 77 N. E. 357. If the company knows of an excavation, or the like, in the street it should not, of course, stop its cars there to let the passengers off without warning or assistance, and may be held liable for injury to a passenger caused by its negligence in so doing, although it did not make the excavation. Richmond City R. Co. v. Scott, 86 Va. 902, 11 S. E. 404.

§ 1546 (1096cu). Care as to cars and appliances.—As already stated the rule as to the care required of street railway companies and the duty they owe to their passengers applies to the selection or furnishing, maintaining, inspection, and use of cars and equipment. Thus, the company is at least prima facie liable[54] for injuries caused to passengers by patent defects in cars, brakes,[55] and the like.[56] It is the duty of the company to make proper inspection;[57] but if the defect is a latent one which

[54] Kingman v. Lynn &c. R. Co., 181 Mass. 387, 64 N. E. 79; Gould v. Boston El. R. Co., 191 Mass. 396, 77 N. E. 712; Mackin v. People's St. R. Co., 45 Mo. App. 82; Brod v. St. Louis Trans. Co., 115 Mo. App. 202, 91 S. W. 993; Holt v. Southwest &c. R. Co., 84 Mo. App. 443; Chase v. Jamestown St. R. Co., 60 Hun 582, 15 N. Y. S. 35; Kelly v. New York &c. R. Co., 109 N. Y. 44, 15 N. E. 879.

[55] Weber v. Metropolitan St. R. Co., 22 App. Div. 628, 47 N. Y. S. 812; Dintruff v. Rochester City R. Co., 57 Hun 585, 10 N. Y. S. 402, 61 Am. Dec. 751; Dougherty v. Pittsburgh Rys. Co., 213 Pa. St. 346, 62 Atl. 926.

[56] Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269; Herbert v. St. Paul City R. Co., 85 Minn. 341, 88 N. W. 996; Leonard v. Brooklyn &c. R. Co., 57 App. Div. 125, 67 N. Y. S. 985; Willis v. Second Ave. Trac. Co., 189 Pa. St. 430, 42 Atl. 1; Dougherty v. Pittsburgh Rys. Co., 213 Pa. St. 346, 62 Atl. 926; Cogswell v. West &c. R. Co., 5 Wash. 46, 31 Pac. 411; Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990, 2 L. R. A. (N. S.) 836; Burt v. Douglass &c. St. R. Co., 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479. See also McDonnell v. Chicago City R. Co., 131 Ill. App. 227; Allen v. St. Louis Trans. Co., 183 Mo. 411, 81 S. W. 1142; Houston &c. R. Co. v. Swancey (Tex. Civ. App.), 128 S. W. 677; note in 13 L. R. A. (N. S.) 601. Whether the company was negligent in not providing straps or other handholds is held a question for the jury in Kebbe v. Connecticut Co., 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167. In Adams v. Portland Ry., 87 Ore. 602, 171 Pac. 219, L. R. A. 1918D, 526, the company was held liable where the door of the street car was defective and worked so hard that the passenger was directed to push and the door then opened suddenly and he fell to the street. Other cases involving the same or somewhat similar defects are cited and reviewed in the note to the above case as reported in L. R. A. 1918D, 526.

[57] Indiana Un. Trac. Co. v. Scribner, 47 Ind. App. 621, 93 N. E. 1014; Aiken v. Southern Pac. Co., 104 La. 162, 29 So. 1; Gould v. Boston El. R. Co., 191 Mass. 396, 77 N. E. 712; Leonard v. Brooklyn &c. R. Co., 57 App. Div. 125, 67 N. Y. S. 985; Smith v. Metropolitan St. R. Co., 59 App. Div. 60, 69 N. Y. S. 176. It is usually a question for

could not have been foreseen and was not and could not have been discovered by proper inspection the company is not liable therefor.[58] The use of a platform without gates has been held not to be negligent,[59] and the company is not liable for not furnishing a portable or extra step for the use of passengers in entering or leaving a car.[60]

§ 1547 (1096cv). Care in operation of cars.—Many decisions might be cited illustrating the rule as to the high degree of care due passengers and showing its application to the operation of cars. As the general subject is so fully considered elsewhere, however, reference to a few of the decisions will be sufficient in this place. Recovery has been permitted for injuries caused by running a car at a high and dangerous rate of speed,[61] for injuries caused by overloading and overcrowding cars,[62] for negli-

the jury as to whether proper inspection has been made. Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752, 44 Am. St. 680; Palmer v. Delaware &c. Co., 120 N. Y. 170, 24 N. E. 302, 17 Am. St. 629.

[58] Sharp v. Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93; Carter v. Kansas City Cable R. Co., 42 Fed. 37; Kelly v. New York &c. R. Co., 109 N. Y. 44, 15 N. E. 879; Roanoke R. &c. Co. v. Sterrett, 108 Va. 533, 62 S. E. 385, 128 Am. St. 971, 19 L. R. A. (N. S.) 316, and cases there cited in notes. But compare Hegeman v. Western R. Co., 13 N. Y. 9, 64 Am. Dec. 517 and note.

[59] Byron v. Lynn &c. R. Co., 177 Mass. 303, 58 N. E. 1015. At least as a matter of law. See West Phila. &c. R. Co. v. Gallagher, 108 Pa. St. 524. But see Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

[60] Indianapolis Trac. &c. Co. v. Pressell, 39 Ind. App. 472, 77 N. E. 357; Young v. Missouri Pac. R. Co., 93 Mo. App. 267. See also Texas Midland R. Co. v. Frey, 25 Tex. Civ. App. 386, 61 S. W. 442; Crowe v. Michigan Cent. R. Co., 142 Mich. 692, 106 N. W. 395.

[61] Dallas Consol. Elec. R. Co. v. Ison, 37 Tex. Civ. App. 219, 83 S. W. 408. See also Eaton v. Wilmington City R. Co., 24 Del. 435, 75 Atl. 369; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Van Horn v. St. Louis Trans. Co., 198 Mo. 481, 95 S. W. 326.

[62] Chicago &c. R. Co. v. Newell, 113 Ill. App. 263; Lobner v. Metropolitan St. R. Co., 79 Kans. 811, 101 Pac. 463, 21 L. R. A. (N. S.) 972 (passenger pushed off by other passengers in alighting); McCumber v. Boston El. R. Co., 207 Mass. 559, 93 N. E. 598, 32 L. R. A. (N. S.) 475; Kalis v. Detroit United R. Co., 155 Mich. 485, 119 N. W. 906; Halverson v. Seattle &c. Co., 35 Wash. 600, 77 Pac. 1058. But see Sias v. Rochester R. Co., 169 N. Y.

gence in starting a car while passengers are getting on and off and before they have a reasonable opportunity to do so,[63] and for injuries caused by collisions and the like.[64]

§ 1548 (1096cw). Collisions or derailment.—Where one car collides with another or runs off the track and an injury is thus caused to a passenger who is free from contributory negligence the company is usually liable unless it shows that it exercised the high degree of care due from it to its passengers. In such, and similar cases, the doctrine res ipsa loquitur usually applies, and the burden is upon the company to explain and show that the injury was not proximately caused by its negligence. Many decisions illustrate and enforce this rule.[65]

118, 62 N. E. 132, 56 L. R. A. 850. It has been held for the jury to determine whether the company ought to have increased the number of employes on cars crowded during rush hours. Kuhlen v. Boston &c. R. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. 516. Additional care may be required. Alton &c. Trac. Co. v. Oliver, 217 Ill. 15, 75 N. E. 419; North Chicago St. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793; Winona &c. R. Co. v. Rousseau, 48 Ind. App. 248, 93 N. E. 34; LaBarge v. Un. Elec. Co., 138 Iowa 691, 116 N. W. 816, 19 L. R. A. (N. S.) 213; Cramer v. Brooklyn Heights R. Co., 190 N. Y. 310, 83 N. E. 35.

[63] Cody v. Market St. R. Co., 148 Cal. 90, 82 Pac. 666; Elliott v. Wilmington City R. Co., 6 Penn. (Del.) 570, 73 Atl. 1040; Guenther v. Metropolitan R. Co., 23 App. (D. C.) 493; Blades v. Des Moines City Ry. Co., 146 Iowa 580, 123 N. W. 1057; Rand v. Boston El. R. Co., 198 Mass. 569, 84 N. E. 841; Keeley v. City Elec. R. Co., 168 Mich. 79, 133 N. W. 1085; Shanahan v. St. Louis Transit Co., 109 Mo. App. 228, 83 S. W. 783; Lehner v. Metropolitan St. R. Co., 110 Mo. App. 215, 85 S. W. 110; Normile v. Wheeling &c. Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901. But see McKenzie v. Union R. Co., 178 N. Y. 638, 71 N. E. 1134; and see Sims v. Metropolitan St. R. Co., 65 App. Div. 270, 72 N. Y. S. 835; Byron v. Lynn &c. R. Co., 177 Mass. 303, 58 N. E. 1015.

[64] See next following section. As to failure to stop at regular station to take passenger see Christian v. Augusta &c. R. Co., 87 S Car. 123, 69 S. E. 17, Ann. Cas. 1912B, 995, and other cases cited in note. And as to care on approaching place where another car is discharging passengers, see Stewart v. Omaha &c. St. R. Co., 88 Nebr. 209, 129 N. W. 440, Ann. Cas. 1912B, 861, and numerous cases there cited and reviewed in note.

[65] Montgomery &c. R. Co. v. Ma-

§ 1549 (1096cx). Injuries received while on cars.—The mere fact that a passenger is injured by a sudden jerk or stopping of the car is not ordinarily sufficient to establish liability on the part of the company[66] unless it is unusual or extraordinary

lette, 92 Ala. 209, 9 So. 363; North Chicago St. Ry. Co. v. Colton, 140 Ill. 486, 29 N. E. 899; Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 N. E. 275; Indiana Un. Trac. Co. v. Ohne, 45 Ind. App. 632, 89 N. E. 507; Indianapolis &c. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Cincinnati &c. R. Co. v. Bravard, 38 Ind. App. 422, 76 N. E. 899; Indiana Union Trac. Co. v. McKinney, 39 Ind. App. 86, 78 N. E. 203; North Baltimore &c. R. Co. v. Kaskell, 78 Md. 517, 28 Atl. 410; Doherty v. Boston &c. R. Co., 207 Mass. 27, 92 N. E. 1026; Smith v. St. Paul &c. R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550 and note; Magrane v. St. Louis &c. R. Co., 183 Mo. 119, 81 S. W. 1158; Logan v. Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Wilkerson v. Consol. St. R. Co., 26 Mo. App. 144; Estes v. Missouri Pac. R. Co., 110 Mo. App. 725, 85 S. W. 627; Lincoln Trac. Co. v. Heller, 72 Nebr. 127, 102 N. W. 262; Cheetham v. Union R. Co., 26 R. I. 279, 58 Atl. 881; Bergen Co. Trac. Co. v. Demarest, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. 683; Hill v. Ninth Ave. R. Co., 109 N. Y. 239, 16 N. E. 61; Londoun v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988; Kay v. Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751. For cases holding that a prima facie case was not made, or was rebutted, see Cheetham v. Union R. Co., 26 R. I. 279, 58 Atl. 881; Swigelsky v. Interurban St. R. Co., 91 N. Y. S. 350; Black v. Boston El. R. Co., 187 Mass. 172, 72 N. E. 970, 68 L. R. A. 799 and note; Stanegy v. Boston El. Ry. Co., 220 Mass. 414, 107 N. E. 933. See also note to Sure v. Milwaukee Elec. Ry. &c. Co., 148 Wis. 1, 133 N. W. 1098, in Ann. Cas. 1913A, 1074-1077. As to whether the burden, in the true sense, shifts, see Lincoln Trac. Co. v. Shepherd, 74 Nebr. 369, 104 N. W. 882, 107 N. W. 764; note to Black v. Boston &c. R. Co., 187 Mass. 172, 92 N. E. 970, 68 L. R. A. 799. As to collisions generally, with cars and other vehicles, see Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 351, 42 Pac. 860, 43 Pac. 713; Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820; Hammond &c. R. Co. v. Spyzchalski, 17 Ind. App. 7, 46 N. E. 47; Blanchette v. Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481; Sterngy v. Boston El. Ry. Co., 220 Mass. 414, 107 N. E. 933 (res ipsa loquitur doctrine does not apply in case of collision with wagon); Sweeney v. Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Goorin v. Allegheny Trac. Co., 179 Pa. St. 327, 36 Atl. 207, 1129; Sears v. Seattle &c. R. Co., 6 Wash. 227, 33 Pac. 389. As to collisions at railroad crossings see, ante § 1536; also note in Ann. Cas. 1913E, 179.

[66] Chicago City R. Co. v. Morse, 98 Ill. App. 662, affirmed in 197 Ill.

or negligence on the part of the company proximately causing the injury is otherwise shown.[67] But the circumstances may be such as to bring the case within the doctrine of res ipsa loquitur.[68] And, as a general rule, a passenger who is occupying a proper place in the car cannot well be deemed guilty of contributory negligence. It is the duty of the company, so far as it may be done by the exercise of the care due passengers, to protect them from the violence and insults of its employes and of other passengers and persons upon the car.[69] But it is not

327, 64 N. E. 304; Chicago Union Trac. Co. v. Duckstein, 132 Ill. App. 535; Byron v. Lynn &c. R. Co., 177 Mass. 303, 58 N. E. 1015. See also Merrill v. Metropolitan St. R. Co., 73 App. Div. 401, 77 N. Y. S. 122; Cleveland City R. Co. v. Osbon, 66 Ohio St. 45, 63 N. E. 604. It has been so held where passengers were injured by starting of car before they got seated. Birmingham R. &c. Co. v. Lee, 153 Ala. 79, 45 So. 292; Birmingham R. &c. Co. v. Hawkins, 153 Ala. 86, 44 So. 983, 16 L. R. A. (N. S.) 1077; Lexington R. Co. v. Britton, 130 Ky. 676, 114 S. W. 295; Craig v. Boston El. R. Co., 207 Mass. 548, 93 N. E. 575.

[67] Bartley v. Metropolitan St. R. Co., 148 Mo. 124, 49 S. W. 840. See also Little Rock R. &c. Co. v. Doyle, 79 Ark. 378, 96 S. W. 353; Paul v. Salt Lake City R. Co., 30 Utah 41, 83 Pac. 563.

[68] Chadwick v. St. Louis Transit Co., 195 Mo. 517, 93 S. W. 798, 800; Scott v. Bergen Co. Trac. Co., 64 N. J. L. 362, 43 Atl. 1118; Consolidated Trac. Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132. See also Griffin v. Pacific Elec. R. Co., 1 Cal. App. 678, 82 Pac. 1084; Georgia R. &c. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610; Chicago Un. Trac. Co. v. Newmiller, 116 Ill. App. 625; Weir v. Union R. Co., 112 App. Div. 109, 98 N. Y. S. 268. Where an accident, resulting in injury to a passenger on a street car, was caused by the blowing out of the controller on the car, the company having control over the equipment and operation of the car, and the passenger not being charged with contributory negligence, it was held that the company was presumptively guilty of actionable negligence, it being presumed that the accident was caused by a defect in the controller, and that, although on being placed in danger in consequence of the blowing out of the controller on the car, he jumped from the car with a view of saving himself, and was injured, he was not deprived of the right to insist that proof of the accident presumptively showed actionable negligence on the company's part. Firebaugh v. Seattle &c. Co., 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990.

[69] See post, § 2407; also last note to last section of this chapter; notes in 28 Am. Rep. 112, 6 Am. St.

liable for the unexpected and unusual act of another passenger or stranger which it could not have foreseen and had no opportunity to prevent.[70] So, where a passenger was injured by the conductor's punch falling from the pocket of the conductor as he hurried through the car to readjust the trolley, it was held that the company was not liable as such a casualty could not reasonably have been anticipated or foreseen.[71] But in several very recent cases where passengers were pushed off of a street car or otherwise injured by fellow passengers in a panic caused by an explosion in the controller, the company was held liable.[72]

734, 97 Am. St. 526, et seq.; 8 Ann. Cas. 225; Ann. Cas. 1912C, 278. In Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. 519, it is held that only ordinary care is required to protect passengers from the criminal acts of strikers and strangers not subject to the orders or control of the company. In Ford v. Minneapolis St. R. Co., 98 Minn. 96, 107 N. W. 817, punitive damages were allowed for an assault by an employe, and other decisions are there cited to the same effect.

[70] Chicago City R. Co. v. Considine, 50 Ill. App. 471; Springfield Consol. R. Co. v. Flynn, 55 Ill. App. 600; Ferguson v. Citizens' St. R. Co., 16 Ind. App. 171, 44 N. E. 936; Louisville &c. R. Co. v. McEwan, 17 Ky. L. 406, 31 S. W. 465; Sullivan v. Jefferson Ave. R. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; Farrizzi v. New York &c. R. Co., 113 App. Div. 440, 99 N. Y. S. 281; Randall v. Frankford R. Co., 139 Pa. St. 464, 22 Atl. 639; Graeff v. Philadelphia &c. R. Co., 161 Pa. St. 230, 28 Atl. 1107, 23 L. R. A. 606, 41 Am. St. 885; Sure v. Milwaukee Elec. Ry. &c. Co., 148 Wis. 1, 133 N. W. 1098, Ann. Cas. 1913A, 1074, and note.

[71] Cheyne v. Van Brunt &c. Co., 89 N. Y. S. 626, 97 App. Div. 56. This case, however, seems pretty close to the line. See Kohner v. Capital Trac. Co., 22 App. (D. C.) 181, 62 L. R. A. 875; Goodloe v. Memphis &c. R. Co., 107 Ala. 233, 18 So. 166, 29 L. R. A. 729, 54 Am. St. 67, and note. As to liability for fall of window and other things and whether the doctrine of res ipsa loquitur applies compare Cleveland &c. R. Co. v. Hadley, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, with Boucher v. Boston &c. R. Co., 76 N. H. 91, 79 Atl. 993, Ann. Cas. 1912B, 847, and see the cases cited in the notes.

[72] Chicago Un. Trac. Co. v. Newmiller, 116 Ill. App. 625, affirmed in 215 Ill. 383, 74 N. E. 410; Toronto R. &c. Co. v. Fleming, (1913) 47 Can. Sup. Ct. 612, Ann. Cas. 1913D, 904. See also Kight v. Metropolitan R. Co., 21 App. Cas. (D. C.) 494, (for jury); Cassaday v. Old Colony St. R. Co., 184 Mass. 150, 68 N.

§ 1550 (1096cy). Injuries received in getting on or off cars. —Persons are frequently injured in boarding or alighting from street cars and there are many decisions upon the subject. As a general rule it is the duty of the company not to stop its cars at an unsafe place[73] to take on or let off passengers, at least without warning.[74] It is the duty of the conductor or persons in charge of the car before starting it again to give the boarding passenger a reasonable opportunity to get aboard safely[75] and the same is true as to giving passengers a reasonable opportunity to alight in safety.[76] Indeed, it has been

E. 10, 63 L. R. A. (N. S.) 285. It was held otherwise, however, where the panic was caused by the ignition of a passenger's dress by a match dropped by another passenger Farrizzi v. New York &c. R. Co., 113 App. Div. 440, 99 N. Y. S. 281.

[73] Mobile Light &c. Co. v. Walsh, 146 Ala. 290, 40 So. 559; Macon R. &c. Co. v. Vining, 120 Ga. 511, 48 S. E. 232; Ward v. Chicago City R. Co., 237 Ill. 633, 86 N. E. 1111; See Leverett v. Shreveport Belt &c. Co., 110 La. Ann. 399, 34 So. 579, 1 St. Ry. 253, and note; Henry v. Grant St. El. R. Co., 24 Wash. 246, 64 Pac. 137.

[74] Sweet v. Louisville R. Co., 113 Ky. 15, 67 S. W. 4; McDonald v. St. Louis &c. Co., 108 Mo. App. 374, 83 S. W. 1001. See also Colorado Springs &c. R. Co. v. Petit, 37 Colo. 326, 86 Pac. 121; Moriarity v. Durham Trac. Co., 154 N. Car. 586, 70 S. E. 938; Elliott v. Seattle &c. R. Co., 68 Wash. 129, 122 Pac. 614, 39 L. R. A. (N. S.) 608.

[75] Conner v. Citizens' St. R. Co., 103 Ind. 62; Mobile &c. R. Co. v. Reeves, 25 Ky. L. 2236, 80 S. W. 471; Louisville R. Co. v. Wilder, 143 Ky. 436, 136 S. W. 892; Baltimore City &c. R. Co. v. Baer, 99 Md. 97, 44 Atl. 992; Orth v. Saginaw Val. Trac. Co., 162 Mich. 353, 127 N. W. 330; Steeg v. St. Paul City R. Co., 50 Minn. 149, 16 L. R. A. 379, 52 N. W. 393; Godfrey v. Meridian R. &c. Co., 101 Miss. 565, 58 So. 534; Barth v. Kansas City El. R. Co., 142 Mo. 535, 44 S. W. 778; Ganiard v. Rochester City &c. R. Co., 50 Hun 22, affirmed in 121 N. Y. 661, 24 N. E. 1092; Black v. Brooklyn City R. Co., 108 N. Y. 640, 15 N. E. 389.

[76] Washington &c. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. ed. 284; Rutledge v. New Orleans &c. R. Co., 129 Fed. 94; Elwood v. Connecticut &c. Co., 77 Conn. 145, 58 Atl. 751; Capital City Trac. Co. v. Lusby, 12 App. (D. C.) 295; Metropolitan R. Co. v. Jones, 1 App. (D. C.) 200; Atlanta R. Co. v. Randall, 117 Ga. 165, 43 S. E. 412; Citizens' St. R. Co. v. Shepard, 30 Ind. App. 193, 65 N. E. 765; Patterson v. Omaha &c. R. Co., 90 Iowa 247, 57 N. W. 880; Paducah &c. R. Co. v. Walsh, 22 Ky. L. 532, 58 S. W. 431; Conway v. New Orleans &c. R. Co., 46 La. Ann. 1429, 16 So. 362;

held, more specifically, that the conductor or person in charge of the car should look around and use due care to see, before starting the car, that persons trying to get on or off have succeeded in doing so and are not in danger of being injured by the starting of the car.[77] But, in the absence of special reason or circumstances, the company is not required to wait until all passengers are seated and defer starting its car until that time.[78] Special circumstances, however, may render it negli-

Poulin v. Broadway &c. R. Co., 61 N. Y. 621; Fuller v. Denison &c. R. Co., 32 Tex. Civ. App. 399, 74 S. W. 940, 1 St. R. 789 and note.

[77] Dudley v. Front St. Cable R. Co., 73 Fed. 128; Highland &c. R. Co. v. Burt, 92 Ala. 291, 9 So. 410, 13 L. R. A. 95; West Chicago St. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958; Bloomington &c. R. v. Zimmerman, 101 Ill. App. 184; Anderson v. Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109, modified by Louisville &c. Trac. Co. v. Korbe, 175 Ind. 450, 93 N. E. 5, and Caughell v. Indianapolis Trac. &c. Co., 50 Ind. App. 5, 97 N. E. 1028, (holding that they must use highest degree of care to see but are not required absolutely to see and know); Union Trac. Co. v. Siceloff, 34 Ind. App. 511, 72 N. E. 266; Davey v. Greenfield &c. R. Co., 177 Mass. 106, 58 N. E. 172; Kohr v. Metropolitan St. R. Co., 117 Mo. App. 302, 92 S. W. 1145; Sexton v. Metropolitan St. R. Co., 40 App. Div. 26, 57 N. Y. S. 577; Akersloot v. Second Ave. R. Co., 131 N. Y. 599, 30 N. E. 195, 15 L. R. A. 489; Pfeffer v. Buffalo R. Co., 24 N. Y. S. 490, affirmed in 144 N. Y. 636, 39 N. E. 494; Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713; Cain v. Kanawha Trac. &c. Co., 81 W. Va. 631, 95 S. E. 88. But compare Perkins v. New Orleans R. &c. Co., 127 La. Ann. 177, 53 So. 484; Gilbert v. West End St. R. Co., 160 Mass. 403, 36 N. E. 60; Foster v. Seattle Elec. Co., 35 Wash. 177, 76 Pac. 995; Woodman v. Seattle Elec. Co., 42 Wash. 406, 85 Pac. 23. And see, where the passenger adopts an unusual mode of egress, or the employes are not aware or chargeable with notice of his attempt to get off. Ratteree v. Galveston &c. R. Co., 36 Tex. Civ. App. 194, 81 S. W. 566; Harris v. Gulf &c. R. Co., 36 Tex. Civ. App. 94, 80 S. W. 1023; McCarthy v. Interurban St. R. Co., 88 N. Y. S. 388; Brown v. Interurban St. R. Co., 88 N. Y. S. 388; Chicago &c. R. Co. v. Dice, 113 Ill. App. 74.

[78] Ottinger v. Detroit United Ry., 166 Mich. 106, 131 N. W. 528, Ann. Cas. 1912D, 578 and other cases there cited in opinion and note; Herbich v. North Jersey St. R. Co., 65 N. J. L. 381, 47 Atl. 427; Boston El. R. Co. v. Smith, 168 Fed. 628, 23 L. R. A. (N. S.) 890. See also Bennett v. Louisville R. Co., 122 Ky. 59, 90 S. W. 1052, 121 Am. St. 453, 4 L. R. A. (N. S.) 558; Sharp v. New Orleans City R. Co.,

gent to start before passengers are seated or at least have an opportunity to become seated, especially if it is done recklessly and before the passengers have reached a place of safety.[79] The duty of the company and the duty of the passenger are thus stated in the syllabus in a recent case: "A street railway company, in taking on or letting off passengers, must stop its cars at its usual stopping places and wait a reasonable time for passengers to get on or off, and must exercise reasonable care to secure the safety of the passengers. A passenger attempting to board or alight from a street car must see that the car has stopped so that he may safely get on or off, and must exercise reasonable care to avoid danger."[80] But it is generally held that an attempt to board or alight from a slowly moving car is not necessarily contributory negligence as a matter of law but is a question of fact for the jury.[81] The

111 La. Ann. 395, 35 So. 614, 100 Am. St. 488; Weeks v. Boston El. R. Co., 190 Mass. 563, 77 N. E. 654; Miller v. St. Paul City R. Co., 66 Minn. 192, 68 N. W. 862.

[79] Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 N. E. 934, 22 L. R. A. (N. S.) 488; Brady v. Springfield Trac. Co., 140 Mo. App. 421, 124 S. W. 1070; Dougherty v. Missouri R. Co., 81 Mo. 330, 51 Am. R. 239; Herbich v. North Jersey St. R. Co., 67 N. J. L. 574, 52 Atl. 357. See also Birmingham R. &c. Co. v. Hawkins, 153 Ala. 86, 44 So. 983, 16 L. R. A. (N. S.) 1077; West Chicago St. R. Co. v. Craig, 57 Ill. App. 411; Powelson v. United Trac. Co., 204 Pa. St. 474, 54 Atl. 282; White v. Columbia &c. Elec. R. Co., 215 Pa. St. 462, 64 Atl. 676.

[80] Waller v. Wilmington City R. Co., 5 Del. 374, 61 Atl. 874.

[81] Puget Sound Elec. R. Co. v. Felt, 181 Fed. 938; Birmingham &c. R. Co. v. James, 121 Ala. 120, 25 So. 847; Pueblo &c. R. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322; Posten v. Denver &c. Co., 11 Colo. App. 187, 53 Pac. 391; Rouser v. Washington &c. R. Co., 13 App. (D. C.) 320; Chicago City R. Co. v. McCanghna, 216 Ill. 202, 74 N. E. 819; Chicago City R. Co. v. Meehan, 77 Ill. App. 215; Indianapolis St. R. Co. v. Hockett, 159 Ind. 677, 66 N. E. 39; United R. &c. Co. v. Weir, 102 Md. 286, 62 Atl. 588; McDonough v. Metropolitan R. Co., 137 Mass. 210; Briggs v. Union St. R. Co., 148 Mass. 72, 19 N. E. 19, 12 Am. St. 518; Nichols v. Lynn &c. R. Co., 168 Mass. 528, 47 N. E. 427; McDonough v. Boston El. R. Co., 191 Mass. 509, 78 N. E. 141; Brittan v. Grand Rapids St. R. Co., 90 Mich. 159, 51 N. W. 276; McDonald v. Kansas City &c. R. Co., 127 Mo. 38; Schmitt v. St. Louis Transit Co., 115 Mo. App. 445, 90 S. W. 421; Effendorf v. Brooklyn City &c. R. Co., 69 N. Y. 195; Ganly v. Brook-

speed may be so great, however, or the circumstances such that it is so obviously dangerous as to prevent recovery.[82]

§ 1551. **Injury to alighting passenger by car on parallel track.** —Persons alighting from street cars have been injured in a number of instances, while in the act of alighting or almost immediately thereafter, by cars, on parallel tracks. Questions as to negligence and contributory negligence have been considered by the courts in such cases and upon some phases of the subject the decisions are not entirely harmonious. As a general rule, according to the weight of authority, it may be said that the company is charged with the duty of so managing a car approaching another car from which passengers are alighting so as not to jeopardize and negligently injure such passengers, but this duty does not absolve alighting passengers desiring to cross the track from exercising reasonable care for their own safety.[83]

lyn City R. Co., 7 N. Y. S. 854; Armstrong v. Portland R. Co., 52 Ore. 437, 97 Pac. 715; Sweeny v. Union Trac. Co., 199 Pa. St. 293, 49 Atl. 66. So, as to getting on lower step, preparatory to alighting. Wabash Riv. Trac. Co. v. Baker, 167 Ind. 262, 78 N. E. 197; Heinze v. Interurban R. Co., 139 Iowa 189, 117 N. W. 385, 21 L. R. A. (N. S.) 715; Anderson v. Metropolitan St. R. Co., 159 Mo. App. 449, 141 S. W. 461; McCullon v Atlantic City &c. R. Co., 77 N. J. L. 603, 72 Atl. 87. But compare Schultz v. Michigan United R. Co., 158 Mich. 665, 123 N. W. 294, 27 L. R. A. (N. S.) 503.

[82] See Hester v. Savannah Elec. Co., 130 Ga. 454, 60 S. E. 1045; Ackerstadt v. Chicago City R. Co., 194 Ill. 616, 62 N. E. 884; Chicago City R. Co. v. Delcourt, 33 Ill. App. 430; Weber v. Kansas City &c. Co., 100 Mo. 194, 18 S. W. 804, 13 S. W. 87, 7 L. R. A. 819 and note, 18 Am. St. 541 and note; Schmidt v. North Jersey St. R. Co., 66 N. J. L. 424, 49 Atl. 438; Reddington v. Philadelphia Trac. Co., 132 Pa. St. 154, 9 Atl. 28; Newport News &c. R. Co. v. McCormick, 106 Va. 517, 56 S. E. 281; Fosner v. Duluth St. R. Co., 140 Wis. 455, 122 N. W. 1054, 30 L. R. A. (N. S.) 270. Or it may not amount to an invitation to board the car. Savage v. Third Ave. R. Co., 29 App. Div. 556, 51 N. Y. S. 1066; Basch v. North Chicago &c. Co., 40 Ill. App. 583. Nor an invitation to alight. Stevens v. Boston El. R. Co., 199 Mass. 471, 85 N. E. 571; Law v. New York City R. Co., 96 N. Y. S. 1019. See also Ashtabula &c. Co. v. Holmes, 67 Ohio St. 153, 65 N. E. 877; Campbell v. Los Angeles R Co., 135 Cal. 137, 67 Pac. 50; Kohler v. West Side R. Co., 99 Wis. 33, 74 N. W. 568.

[83] See Bremer v. St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382,

In some of the cases it is held that the company owes the same high degree of care to the alighting passenger in this respect that it owes to him in other respects,[84] and that he ordinarily has a right to presume that it will exercise such care and is not guilty of contributory negligence defeating a recovery as matter of law even though he passes behind or around the car from which he alighted and on to the other track without stopping and looking and listening.[85] The better rule, however, seems to be that the company, while it must exercise ordinary and reasonable care under the circumstances, does not owe the highest degree of care to one who has fully alighted so as to become a traveler upon the highway,[86] and that he must exercise reasonable care for his own safety,[87] although there may be

12 Ann. Cas. 911, 21 L. R. A. (N. S.) 887, and note; Hornstein v. United Rys. Co., 195 Mo. 440, 92 S. W. 729, and note. Compare also Bloom v. Sioux City Trac. Co. (Iowa), 122 N. W. 831.

[84] Capital Trac. Co. v. Lusby, 12 App. (D. C.) 295; Van Natta v. People's St. R. &c. Co., 133 Mo. 13, 34 S. W. 505. See also Chicago City R. Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. 87; Pelletreau v. Metropolitan St. R. Co., 74 App. Div. 192, 77 N. Y. S. 386, affirmed in 174 N. Y. 503, 66 N. E. 1113; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276.

[85] Birmingham R. &c. Co., v. Landrum, 153 Ala. 192, 45 So. 198; Louisville R. &c. Co. v. Hudgins, 124 Ky. 79, 98 S. W. 275, 7 L. R. A. (N. S.) 152; Dobert v. Troy City R. Co., 91 Hun 28, 36 N. Y. S. 105. See also Bass v. Norfolk R. &c. Co., 100 Va. 1, 40 S. E. 100.

[86] Indianapolis St. R. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044; Creamer v. West End St. R. Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. 456, and notes; Gargan v. West End St. R. Co., 176 Mass. 106, 57 N. E. 217, 49 L. R. A. 421, 79 Am. St. 298.

[87] Stowers v. Citizens St. R. Co., 21 Ind. App. 434, 52 N. E. 710; Thomas v. Kansas City El. R. Co., 79 Kans. 335, 99 Pac. 594; Harten v. Brightwood R. Co., 18 App. (D. C.) 260; Baltimore Trac. Co. v. Helms, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; Doty v. Detroit Citizens St. R. Co., 129 Mich. 464, 88 N. W. 1050; Hornstein v. United Rys. Co., 195 Mo. 440, 92 S. W. 884, 4 L. R. A. (N. S.) 729; Giardina v. St. Louis &c. M. R. Co., 185 Mo. 330, 84 S. W. 928; Hagen v. Jersey City &c. St. R. Co., 74 N. J. L. 699, 67 Atl. 24, 11 L. R. A. (N. S.) 1058; Reed v. Metropolitan St. R. Co., 180 N. Y. 315, 73 N. E. 41; Smith v. City Suburban R. Co., 29 Ore. 539, 46 Pac. 136, 780; Gettler v. Rhode Island Co., 31 R. I. 534, 77 Atl. 1088, 31 L. R. A. (N. S.) 1176; Morice v. Milwaukee Elec. R. & L. Co., 129 Wis. 529, 109 N. W. 567. In nearly

no hard and fast rule requiring him to stop or look and listen as he might be required to do as matter of law at the crossing of a highway and an ordinary commercial railroad.[88]

§ 1552 (1096cz). Riding on running board, or in exposed or dangerous place.—It is not necessarily negligence as a matter of law for a street railway company to permit passengers to stand on the running board, platform, or the like, but it may be negligence under particular circumstances and if the company permits the car to be overcrowded so that the passenger can find no other place it may be held liable, in the absence of contributory negligence, if it fails to exercise the care demanded by the circumstances.[89] It is not necessarily contributory negligence per se or as a matter of law for a passenger to ride on the platform, running board, or step.[90] This is especially true where

all of these cases the traveler was held guilty of negligence and in most of them as matter of.

[88] Bremer v. St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. (N. S.) 887, where authorities on both sides are reviewed in opinion and note; Stewart v. Omaha &c. St. R. Co., 83 Nebr. 97, 118 N. W. 1106. See also Louisville R. Co. v. Hudgins, 124 Ky. 79, 98 S. W. 275, 7 L. R. A. (N. S.) 152; Louisville Ry. Co. v. Kennedy, 162 Ky. 403, 172 S. W. 683, where conflicting authorities on both sides of the general question are also reviewed. In some of the cases it is said that he must stop and look and listen. See Hornstein v. United Rys. Co., 195 Mo. 440, 92 S. W. 884, 113 Am. St. 693, 4 L. R. A. (N. S.) 729 and cause cited in opinion and note and distinguished in first case cited in this note. Buzby v. Philadelphia Trac. Co., 126 Pa. St. 559, 17 Atl. 895, 12 Am. St. 919.

[89] North Chicago St. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793; North Chicago St. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672. See also Chicago &c. R. Co. v. Lindahl, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914A, 561; West Chicago St. R. Co. v. Marks, 82 Ill. App. 185, affirmed in 182 Ill. 15, 55 N. E. 67; Faris v. Brooklyn City &c. R. Co., 46 App. Div. 231, 61 N. Y. S. 670; Sheridan v. Brooklyn &c. R. Co., 36 N. Y. 39, 93 Am. Dec. 490; Craighead v. Brooklyn City R. Co., 123 N. Y. 391, 25 N. E. 387; Neslie v. Second &c. R. Co., 113 Pa. St. 300, 6 Atl. 72, note in 12 L. R. A. 129. Whether the conductor had authority to permit a passenger to stand on the running board has been held a question for the jury. Ft. Wayne Trac. Co. v. Hardendorf, 164 Ind. 403, 72 N. E. 593.

[90] Seigel v. Eisen, 41 Cal. 109; Hesse v. Meriden &c. Co., 75 Conn. 571, 54 Atl. 299; Harbison v. Metropolitan R. Co., 9 App. (D. C.)

the car is crowded so that there is no other place to ride.[91] The question is usually one for the jury.[92] But where a passenger voluntarily rides on the running board or front platform or steps thereof, when he could readily obtain a seat inside it seems that he assumes the ordinary risks thereof, and some authorities hold that this is prima facie evidence of negligence.[93] And a passenger who takes such a position must

60; North Chicago St. R. Co. v. Baur, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108; Marion St. R. Co. v. Shaffer, 9 Ind. App. 486, 36 N. E. 861; Terre Haute Elec. R. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703; Meesel v. Lynn &c. R. Co., 8 Allen (Mass.) 234; Upham v. Detroit City R. Co., 85 Mich. 12, 48 N. W. 199, 12 L. R. A. 129, and note; Matz v. St. Paul City R. Co., 52 Minn. 159, 53 N. W. 1071; Pray v. Omaha St. Ry. Co., 44 Nebr. 167, 62 N. W. 447, 48 Am. St. 717; Nolan v. Brooklyn City &c. R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Doolittle v. Southern R. Co., 62 S. Car. 130, 40 S. E. 133; Muldoon v. Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901. See also note to Chicago &c. R. Co. v. Lindahl, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914A, 561.

[91] Cummings v. Worcester &c. R. Co., 166 Mass. 220, 44 N. E. 126; Bruno v. Brooklyn City R. Co., 5 Misc. 327, 25 N. Y. S. 507; Ward v. International Ry. Co., 206 N. Y. 83, 99 N. E. 262, Ann. Cas. 1914A, 1170; Thirteenth &c. R. Co. v. Boudrou, 92 Pa. St. 475, 37 Am. Rep. 707; Reber v. Pittsburgh &c. Co., 179 Pa. St. 339, 36 Atl. 245, 57 Am. St. 599. See also Ft. Wayne Tract. Co. v. Hardendorf, 164 Ind. 403, 72 N. E. 593; Egan v. Old Colony St. R. Co., 195 Mass. 159, 80 N. E. 696.

[92] Oliver v. Ft. Smith &c. Tract. Co., 89 Ark. 222, 116 S. W. 204, 131 Am. St. 86; Math v. Chicago City R. Co., 243 Ill. 114, 90 N. E. 235; Topeka City R. Co. v. Higgs, 38 Kans. 375, 16 Pac. 667, 5 Am. St. 754; Watson v. Portland &c. R. Co., 91 Maine 584, 40 Atl. 699, 64 Am. St. 268, 44 L. R. A. 157; Wilde v. Lynn &c. R. Co., 163 Mass. 533, 40 N. E. 851; Eldridge v. Boston El. R. Co., 203 Mass. 582, 89 N. E. 1041; Archer v. Ft. Wayne &c. R. Co., 87 Mich. 101, 49 N. W. 488; Matz v. St. Paul City R. Co., 52 Minn. 159, 53 N. W. 1071; Bowie v. Greenville St. R. Co., 69 Miss. 196, 10 So. 574; Previsich v. Butte Elec. R. Co., 47 Mont. 170, 131 Pac. 25; City R. Co. v. Lee, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. 798; Germantown &c. R. Co. v. Walling, 97 Pa. St. 55, 37 Am. Rep. 796; Geitz v. Milwaukee City R. Co., 72 Wis. 307, 39 N. W. 866.

[93] Ashbrook v. Frederick Ave. R. Co., 18 Mo. App. 290; Clark v. Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495; Coleman v. Second Ave. R. Co., 114 N. Y. 609, 21 N. E. 1064; Ward v. International R. Co., 206 N. Y. 83, 99 N. E. 262, Ann. Cas. 1914A, 1170, 1171; Aikin

exercise reasonable care under the circumstances.[94] The passenger may also be guilty of contributory negligence in violating some rule or regulation of the company in force and forbidding such act.[95] And it has been held that, where there is such a rule, stating that passengers who ride on the platforms do so at their own risk a passenger, who, knowing the rule, rides on the front platform cannot recover, although he rides there because the car is crowded.[96] And if he voluntarily

v. Frankford &c. Co., 142 Pa. St. 47, 21 Atl. 781; Thane v. Scranton Tract. Co., 191 Pa. St. 249, 43 Atl. 136, 71 Am. St. 767; Bumbear v. United Tract. Co., 198 Pa. St. 198, 47 Atl. 961; Kirchner v. Oil City St. R. Co., 210 Pa. St. 45, 59 Atl. 270; McDade v. Philadelphia Rapid Trans. Co., 215 Pa. St. 105, 64 Atl. 327. See also Caspars v. Dry Dock &c. Co., 22 App. Div. 156, 47 N. Y. S. 961; Moylan v. Second Ave. R. Co., 128 N. Y. 583, 27 N. E. 977; Cassidy v. Atlantic Ave. R. Co., 9 Misc. 275, 29 N. Y. S. 724; Garber v. Joline, 119 N. Y. S. 1070; Elliott v. Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208. And compare also Richmond St. &c. R. Co. v. Beverly, 43 Ind. App. 105, 85 N. E. 721; Magrane v. St. Louis &c. R. Co., 124 Iowa 556, 100 N. W. 478; Wheeler v. South Orange &c. Tract. Co., 70 N. J. L. 725, 58 Atl. 927; Frussell v. Morris County Tract. Co., 79 N. J. L. 533, 77 Atl. 535, 30 L. R. A. (N. S.) 351.

[94] See Seller v. Market St. R. Co., 139 Cal. 267, 72 Pac. 1006, 1 St. R. 8 and note; Nugent v. Fair Haven &c. St. R. Co., 73 Conn. 139, 46 Atl. 875; Citizens' St. R. Co. v. Hoffbauer, 23 Ind. App. 614, 56 N. E. 54; Cummings v. Worcester &c. R. Co., 166 Mass. 220, 44 N. E. 126; Benedict v. Minneapolis &c. R. Co., 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. 345; Flynn v. Consolidated Tract. Co., 64 N. J. L. 375, 45 Atl. 799; Rosen v. Dry Dock &c. R. Co., 91 N. Y. S. 333; Kiefer v. Brooklyn Heights R. Co., 111 App. Div. 404, 97 N. Y. S. 841; Coleman v. Second Ave. R. Co., 114 N. Y. 609, 21 N. E. 1064. Most of these citations are of cases where the passenger leaned out from the running board or step, and did not look, and was injured by collision with some object.

[95] Highland Ave. &c. R. Co. v. Donovan, 94 Ala. 299, 10 So. 139; Ft. Clark St. R. Co. v. Ebaugh, 49 Ill. App. 582; Baltimore &c. Road v. Cason, 72 Md. 377, 20 Atl. 113; Baltimore City &c. Co. v. Wilkinson, 30 Md. 224. See also Wills v. Lynn &c. R. Co., 129 Mass. 351; Burns v. Boston El. R. Co., 183 Mass. 96, 66 N. E. 418; Twiss v. Boston El. R. Co., 208 Mass. 108, 94 N. E. 253, 32 L. R. A. (N. S.) 728.

[96] Tompkins v. Boston El. R. Co., 201 Mass. 114, 87 N. E. 488, 131 Am. St. 392, 20 L. R. A. (N. S.) 1063. But see Williams v. British Columbia Elec. R. Co., 22 West L.

sits upon the dashboard,[97] or rides upon the bumper,[98] or the like,[99] he may be held guilty of contributory negligence even as a matter of law in a proper case.

§ 1553 (1096da). Making change and giving transfers.—A street railway company may make and enforce, in a proper case, reasonable rules as to obtaining tickets, making change, giving transfers, and the like.[1] But they must not be unrea-

R. (Brit. Columbia) 377, 7 Dominion L. R. 459; Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 So. 139; Capital City Tract. Co. v. Brown, 29 App. D. C. 473, 12 L. R. A. (N. S.) 831.

[97] Downey v. Hendrie, 46 Mich. 498, 9 N. W. 828, 41 Am. Rep. 177, approved in Upham v. Detroit City R. Co., 85 Mich. 12, 48 N. W. 199, 12 L. R. A. 129 and note.

[98] Bard v. Pennsylvania Tract. Co., 176 Pa. St. 97, 34 Atl. 953, 53 Am. St. 672; Nieboer v. Detroit El. R., 128 Mich. 486, 87 N. W. 626. See also Feldheim v. Brooklyn G. C. & S. R. Co., 122 App. Div. 883, 107 N. Y. S. 413. But see Grieve v. New Jersey St. R. Co., 65 N. J. L. 409, 47 Atl. 427; Beaumont Tract. Co. v. Happ, 57 Tex. Civ. App. 427, 122 S. W. 610 (may recover where injury is due to negligent management of car and his position is not proximate cause). And compare Chicago City R. Co. v. Schmidt, 217 Ill. 396, 75 N. E. 383; and Kirkpatrick v. Metropolitan St. R. Co., 161 Mo. App. 515, 143 S. W. 865, to same effect.

[99] Butler v. Pittsburg &c. Co., 139 Pa. St. 195, 21 Atl. 500; Wills v. Lynn &c. R. Co., 129 Mass. 351; Sibley v. New Orleans City &c. Co., 49 La. Ann. 588, 21 So. 850; Barry v. Union Tract. Co., 194 Pa. St. 576, 45 Atl. 321; Ward v. Central Park &c. R. Co., 33 N. Y. Sup. Ct. (1 J. & S.) 392. See also Wagner v. Atlantic &c. R. Co., 147 N. Car. 315, 61 S. E. 171, 19 L. R. A. (N. S.) 1028; Mann v. Philadelphia Tract. Co., 175 Pa. St. 122, 34 Atl. 572; Wenzel v. City & Elm Grove R. Co., 64 W. Va. 310, 61 S. E. 1001. But compare Adams v. Washington &c. R. Co., 9 App. (D. C.) 26; North Chicago St. R. Co. v. Baur, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108; Chicago City R. Co. v. Schmidt, 217 Ill. 396, 75 N. E. 383; Kean v. West Chicago St. R. Co., 75 Ill. App. 38; Ginna v. Second Ave. R. Co., 67 N. Y. 596; Beaumont Tract. Co. v. Happ, 57 Tex. Civ. App. 427, 122 S. W. 610; Bailey v. Tacoma Tract. Co., 16 Wash. 48, 47 Pac. 241; Cornish v. Toronto St. R. Co., 23 U. C. C. P. 355.

[1] See authorities cited in following notes to this section; also Taylor v. Spartanburg Ry. &c. Co., 98 S. Car. 206, 82 S. E. 409, 52 L. R. A. (N. S.) 908 and note, citing §§ 228, 229, 233; McGilvra v. Seattle Elec. Co., 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912B, 1020, and cases there cited in opinions and note.

sonable and inconsistent with the rights of the public or the provisions of the charter or statute. Indeed, the giving of transfers, like the rate of fare, is frequently regulated largely by the charter, statute or contract with the municipality.[2] Questions as to the validity and enforcement of such rules and regulations most often arise where a passenger is ejected for failure to comply with them, but they may also arise, in some other instances, where there is a question as to whether one is a passenger or as to whether the company has violated its duty to him or he has been guilty of contributory negligence, or the like. As street railway companies often have no place, outside the cars, for purchasing tickets and fare is paid after the passenger has boarded the car, it would seem that some of the rules frequently enforced in the case of ordinary commercial railroads can not always apply, and it has been held that a tender of the exact fare is not, and cannot, always be required in such a case.[3] But a reasonable sum may be required and a regulation of the company limiting the amount of change to be furnished by the conductor is valid.[4] In regard to transfers, it is said: "In cases where by law or by the contract the carrier is bound to furnish a transfer to his passengers over a connecting line, it must see to it that the correct transfer is furnished,

[2] See next following section.

[3] See Tarbell v. Central Pac. R. Co., 34 Cal. 616. As to regulations as to payment of fare see generally, Nashville St. R. Co. v. Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451; Perry v. Pittsburg &c. R. Co., 153 Pa. St. 236, 25 Atl. 772; Braun v. Northern Pac. R. Co., 79 Minn. 404, 82 N. W. 675, 49 L. R. A. 319, 79 Am. St. 497; Faber v. Chicago &c. R. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789.

[4] Barker v. Central Park &c. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. 626 (holding a regulation requiring change only to the amount of two dollars reasonable, and that tender of a five-dollar bill, where the fare was five cents, was not good); Fulton v. Grand Trunk R. Co., 17 U. C. Q. B. 428; Muldowney v. Pittsburg &c. Trac. Co., 8 Pa. Sup. Ct. 335, 43 W. N. C. 52; Knoxville Tract. Co. v. Wilkerson, 177 Tenn. 482, 99 S. W. 992. But, in California, where five-dollar gold coin is the smallest gold coin in ordinary use, and gold is generally used, while the rule is recognized that an unreasonable amount of change cannot be required, such a tender has been held good. Barrett v. Market St. R. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. 61.

and the passenger is not necessarily negligent if he fail to discover any error therein."[5] The same author also lays down the following propositions in a more recent work: "A rule limiting the use of a transfer to the next car is proper, if there be room on such car for the passenger to ride with reasonable comfort and safety. A rule with respect to the punching of transfers is reasonable, if due precautions be taken to insure its observance and application in such a manner as to protect a passenger from the errors or mistakes of the conductor. If the passenger by reason of the inattention of the company's servants to its own rules regarding transfers, or to statutory requirement in that regard, is ejected, an action for the breach of the contract of transportation is not his only remedy. If it were, the carrier might be encouraged to employ negligent or incompetent conductors, to the serious annoyance and inconvenience of the traveling public, and passengers would not be afforded reasonable protection or security in their rights. If a passenger entered the car believing his transfer was valid, and was not negligent in failing to discover that it had been punched erroneously, he was there lawfully, and is entitled to maintain an action for the wrongful ejection, and to recover compensating damages for the loss of time, fare on another car and injury to his feelings because of the indignities suffered by him and his wrongful ejection from the car. Exemplary damages, however, will not be awarded against a company, except for the malicious wrongful acts of its conductors, unless it appear that the employer has been guilty of negligence in employing or retaining the conductor, or has authorized or ratified his wrongful act, or the conductor has previously shown his incompetence or been guilty of misconduct."[6] But

[5] Nellis Street Surface R. 440. See also Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261; Moon v. Interurban St. R. Co., 85 N. Y. S. 363; Laird v. Pittsburg Tract. Co., 166 Pa. St. 4, 31 Atl. 51; Memphis St. R. Co. v. Graves, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. 803.

[6] Nellis St. R. Acc. Law, 84. See also Citizens' St. R. Co. v. Clark, 33 Ind. App. 190, 71 N. E. 53, 104 Am. St. 249; Indianapolis St. R. Co. v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St.

there is considerable difference of opinion and conflict among the decisions upon this question as to the duty of the passenger in such a case and his remedy.[7] In a recent case, although the passenger knew that he could have traveled to his destination by a route over which the company issued transfers, yet, as he had frequently traveled over the route selected and had received transfers, and on the occasion in question there was no notice of the discontinuance of transfers before he boarded the car or in time to select the other route, it was held that the company was liable for refusal to issue a transfer to him.[8] It has also been held that if the transfer slip or ticket designates the route by which the carrier may go so generally as to be applicable to several routes or lines, he may take either of them.[9] But the designation of the route and time within which the transfer may be made, or the like, must usually be complied with,[10] and by some courts the transfer ticket has

261; Vining v. Detroit &c. R. Co., 122 Mich. 248, 80 N. W. 1080; Rouser v. North Park St. R. Co., 97 Mich. 565, 56 N. W. 937; Hayter v. Prunswick Tract. Co., 66 N. J. L. 575, 49 Atl. 714; Perrine v. North Jersey St. R. Co., 69 N. J. L. 230, 54 Atl. 799; Eddy v. Syracuse &c. Co., 50 App. Div. 109, 63 N. Y. S. 645; Muckle v. Rochester R. Co., 79 Hun 32, 29 N. Y. S. 732; O'Rourke v. Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. 639; Lawshe v. Tacoma R. &c. Co., 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350.

[7] Little Rock Ry. &c. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97, and note citing additional cases to the effect that the passenger must pay fare and is confined to his remedy for breach of contract, including perhaps compensation for the indignity. See also to same effect Norton v. Consolidated R. Co., 79 Conn. 109, 63 Atl. 1087; Kiley v. Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. 460; Bradshaw v. South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481.

[8] Freeman v. New York City R. Co., 92 N. Y. S. 47. See also Consolidated Tract. Co. v. Laborn, 58 N. J. L. 1, 408, 32 Atl. 685.

[9] Pine v. St. Paul City R. Co., 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347.

[10] See Shortsleeves v. Capital Tract. Co., 28 App. D. C. 365, 8 L. R. A. (N. S.) 287; Hornesby v. Georgia &c. Co., 120 Ga. 913, 48 S. E. 339; Wakefield v. South Boston R. Co., 117 Mass. 544; Bradshaw v. South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481 and note;

been held conclusive between the passengers and conductor in this respect.[11]

§ 1554 (1096db). Transfers—Statutes and rules and regulations.—Under a New York statute providing that a passenger desiring to make a continuous trip should be given a transfer, upon demand and without extra charge, entitling him to one continuous trip, upon another car to which he is transferred, it has been held unreasonable for the company to adopt an arbitrary time limit of ten minutes or less when no suitable accommodations are offered within such time.[12] But in a proper case, under other statutes, a reasonable time limit has been upheld.[13] And where the ordinance granting the franchise provided that the company should give transfers where one line intersected another and it appeared that the company owned a line which extended from the point of intersection with another line to the city limits, beyond which it was owned by a different corporation, which,

Percy v. Metropolitan St. R. Co., 58 Mo. App. 75; Duke v. Metropolitan St. R. Co., 166 Mo. App. 121, 148 S. W. 166; Jones v. Omaha &c. St. R. Co., 95 Nebr. 798, 146 N. W. 959; Graves v. Newark &c. R. Co., 6 N. J. L. 307; Jenkins v. Brooklyn &c. R. Co., 29 App. Div. 8, 51 N. Y. S. 216; Hanna v. Nassau El. R. Co., 18 App. Div. 137, 45 N. Y. S. 437; Taylor v. Spartanburg R. &c. Co., 98 S. Car. 206, 82 S. E. 404, 52 L. R. A. (N. S.) 908.

[11] Keen v. Detroit Elec. R. Co., 123 Mich. 247, 81 N. W. 1084. See also ante, note 7. In De Board v. Camden Interstate R. Co., 62 W. Va. 41, 57 S. E. 279, it was held conclusive in favor of the passenger who had no knowledge of a limitation or regulation not printed on the ticket.

[12] Jenkins v. Brooklyn &c. R. Co., 29 App. Div. 8, 51 N. Y. S. 216. See also Topham v. Interurban St. R. Co., 42 Misc. 503, 86 N. Y. S. 295, as to duty of company to give transfer and furnish accommodation. Lessee must do so. O'Reilly v. Brooklyn &c. R. Co., 179 N. Y. 450, 72 N. E. 517. But see Montpelier v. Barre &c. Co., 76 Vt. 66, 56 Atl. 278.

[13] Garrison v. United R. & El. Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. 452. See also Heffron v. Detroit City R. Co., 92 Mich. 406, 52 N. W. 802, 31 Am. St. 601, 16 L. R. A. 345; Hornesby v. Georgia &c. Co., 120 Ga. 913, 48 S. E. 339; Crowley v. Fitchburg &c. St. R. Co., 185 Mass. 279, 70 N. E. 56 (regulation requiring production of transfer or payment of fare is reasonable). See and compare as to the rule when the car is late. Little Rock Tract. &c. Co. v. Minn., 75 Ark. 529, 87 S. W. 1025, and Hornesby v. Georgia R. &c. Co., 120 Ga. 913, 48 S. E. 339, with Heffron v. Detroit City R. Co., 92 Mich. 406, 52 N. W. 802, 16 L. R. A. 345, 31 Am. St. 601, and Hanna v. Nassau Elec. R. Co., 18 App. Div. 137, 45 N. Y. S. 437.

however, ran its cars with the same operatives into the city to the point of intersection, it was held that this was an intersecting line to which the provision as to transfers applied.[14]

§ 1555 (1096dc). Liability for willful acts of employes.— There is some slight conflict in the cases as to whether a street railway company can be held liable for a willful wrong of one of its drivers or motormen.[15] In view of the fact that it is now quite well settled that corporations are liable for the willful acts of their employes when performed in the general line of the service in which the employes are engaged, it seems clear that street railway companies must be held liable for the willful wrongs of their drivers and conductors within the scope of their employment, but not otherwise. The cases which declare a different rule are founded upon the old doctrine of the English courts, which exculpates a master from liability for the willful act of his servant, but that rule has been much relaxed, if not entirely overthrown, in so far as it affects the liability of corporations. In a recent case[16] the company was held liable where the conductor of one of its cars, in sport threw a dead hen at the motorman of the car upon which the plaintiff was riding and the hen missed the motorman and struck the window of

[14] Passenger &c. Co. v. Commonwealth, 103 Va. 644, 49 S. E. 995. So transfer may be required where territory is afterward annexed to city. Indiana R. Co. v. Hoffman, 161 Ind. 593, 69 N. E. 399.

[15] Affirming that liability exists: Perke v. Twenty-third Avenue R. Co., 52 Hun 611, 4 N. Y. S. 905; Stewart v. Brooklyn and Cross Town R. Co., 90 N. Y. 588, 43 Am. Rep. 185; McCann v. Sixth Ave. R. Co., 117 N. Y. 505; Shea v. Sixth Avenue R. Co., 2 N. Y. 180. See also Birmingham R. &c. Co. v. Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752, 89 Am. St. 43; Eads v. Metropolitan R. Co., 43 Mo. App. 536; Lexington R. Co. v. Cozine, 111 Ky. 799, 64 S. W. 848, 98 Am. St. 430; Lafitte v. New Orleans &c. R. Co., 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337. See Day v. Brooklyn &c. R. Co., 76 N. Y. 593; Hanson v. Urbana &c. St. R. Co., 75 Ill. App. 474 (company held not liable for assault by motorman after passenger had alighted); Fohrmann v. Consolidated Tract. Co., 63 N. J. L. 391, 43 Atl. 892 (act must be approved or ratified); Vassau v. Madison Elec. Ry. Co., 106 Wis. 301, 82 N. W. 152 (same). See, generally, post, § 1805.

[16] Hayne v. Union St. R. Co., 189 Mass. 551, 76 N. E. 219

the car near the plaintiff and injured the plaintiff. In considering the subject the court said:[17]

"We will assume in favor of the defendant that there was no evidence to warrant a finding that the conductor who threw the hen was acting within the scope of his employment, and therefore, under the rules of the law applicable to the ordinary relations of master and servant, the defendant would not be liable for the servant's act. But the plaintiff invokes a special rule applicable to common carriers. A common carrier of passengers impliedly agrees to exercise the utmost care and diligence, consistent with the proper management of his business, to protect his passengers from injury through the misconduct of other persons, while he is performing his contract for their transportation. They necessarily submit themselves in a large degree to his care and control, and he undertakes to provide for their safety in all those particulars which ought to be under his direction and management. Among these, to a certain extent, are the kind of persons permitted to approach the passengers on the carrier's premises, and the rules and regulations which govern the conduct of the carrier's servants and others, while the contract for carriage is being performed. While the carrier does not guaranty perfection in these particulars, he is under an obligation of implied contract, and consequent legal duty, to use a very high degree of care to prevent injuries that might be caused by the negligence or

[17] Citing New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. ed. 1049; Chicago & Eastern Illinois R. Co. v. Flexman, 103 Ill. 546-550, 42 Am. Rep. 33; Terre Haute & Indiana R. Co. v. Jackson, 81 Ind. 19; Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219; Goddard v. Grand Trunk R. Co., 57 Maine 202, 2 Am. Rep. 39; Simmons v. New Bedford &c. Steamboat Company, 97 Mass. 361, 93 Am. Dec. 99; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Haver v. Central R. Co., 62 N. J. L. 282-284, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. 647; Stewart v. Brooklyn &c. R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Dwinelle v. New York Central &c. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611; Fick v. Chicago & Northwestern R. Co., 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878. See also Atlanta St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41.

willful misconduct of others. This rule prevails generally in the American courts. In the application of the rule to injuries caused by servants of the carrier while engaged in the performance of his contract of carriage, it is held that he is liable absolutely for their misconduct."

§ 1556 (1096dd). Care as to persons at work on streets.— It may be said, generally, that the motorman must use the care which ordinarily prudent men would use under the circumstances, to prevent injury to persons at work on the streets, and whose work is of such a character as to make constant watchfulness for approaching street cars impracticable.[18] These persons are lawfully on the streets,[19] and are not to be treated as trespassers or bare licensees. Of persons so engaged Judge Thompson has said: "The proper discharge of their employment necessarily absorbs their care and attention. They cannot keep their eyes on their work and at the same time look up and down the street for approaching cars or vehicles. Their situation is passive. They are driving no instrument of danger. It follows, both on moral and legal grounds, that if, while so absorbed at their work, they fail, even through inattention or negligence, to see an approaching street car in time to get out of the way and avoid it, this will not exonerate the street railway company, if the car is driven upon them under such circumstances that the driver, gripman or motorman might, by the exercise of ordinary or reasonable care, have seen them at their work in their exposed position, and might, by the exercise of like care, have warned them in time, or checked his car in time to avoid running upon

[18] Third Ave. R. Co. v. Krausz, 112 Fed. 379, 293; South Covington &c. R. Co. v. Eichler, 32 Ky. L. R. 329, 108 S. W. 329; Hennessey v. Forty-second St. &c. R. Co., 44 Misc. 198, 88 N. Y. S. 728; O'Connor v. Union R. Co., 67 App. Div. 99, 73 N. Y. S. 606 (street sweeper); Beugiverega v. Brooklyn Heights R. Co., 48 App. Div. 515, 62 N. Y. S. 912; Wells v. Brooklyn Heights R. Co., 67 App. Div. 212, 74 N. Y. S. 196, affirming 68 N. Y. S. 305. See also Kelly v. Boston &c. R. Co., 197 Mass. 420, 83 N. E. 865, 15 L. R. A. (N. S.) 282.

[19] Owens v. Peoples' Pass. R. Co., 155 Pa. St. 334, 26 Atl. 748.

them."[20] Though the motorman may in most cases assume that persons thus situated will heed his signals and get out of the way,[21] yet it is obviously his duty, at least where he ought to see that one is engaged in work or the like, to keep his car under control, so that he can stop it before running upon one who inadvertently fails to heed his signal.[22] It has been held, where motormen have been in the habit of giving certain warning signals to laborers at work on the street, that such laborers have a right to rely upon the giving of these signals, and may recover damages where they were not given, and as a result the injuries sued for were suffered.[23] In another case, where a car sufficiently cleared men at work in a trench at the side of the track, it was held that the company was not liable for injuries to a workman standing in the trench, caused by his being struck by the body of the conductor while passing around passengers standing on the footboard.[24] Persons so working on the street cannot be expected to exercise the same vigilance as pedestrians who are not so engaged in work;[25] but this does not relieve such workmen from the effect of utter failure on their part to use their senses, and they are generally held to the exercise of ordinary or reasonable care under the circumstances.[26]

[20] Thomp. Neg. (2nd ed.), § 1391. But it may be that this statement is a little too strong in some respects.

[21] McKeown v. Cincinnati St. R. Co., 2 Ohio Leg. N. 388. See also Eddy v. Cedar Rapids &c. Ry. Co., 98 Iowa 626, 67 N. W. 676.

[22] Pittsburgh Elec. R. Co. v. Kelly, 57 Kans. 514, 46 Pac. 945. See also Houston City St. R. Co. v. Woodlock (Tex. Civ. App.), 29 S. W. 817.

[23] Owens v. Peoples' Pass. R. Co., 155 Pa. St. 334, 26 Atl. 748. See also Midland Valley R. Co. v. Shores, 40 Okla. 75, 136 Pac. 157, 49 L. R. A. (N. S.) 814. See also Ahearn v. Boston &c. R. Co., 194 Mass. 350, 80 N. E. 217.

[24] United Railway &c. Co. v. Fletcher, 95 Md. 533, 52 Atl. 608.

[25] Danny v. North Jersey St. R. Co., 69 N. J. L. 1, 54 Atl. 221, affirmed in 70 N. J. L. 338, 57 Atl. 1132; Lewis v. Binghamton R. Co., 35 App. Div. 12, 54 N. Y. S. 452; Graves v. Portland Ry. &c. Co., 66 Ore. 232, 134 Pac. 1, Ann. Cas. 1915B, 500; Craven v. Pittsburg R. Co., 243 Pa. St. 619, 90 Atl. 361. See also Hanley v. Boston El. R. Co., 201 Mass. 55, 87 N. E. 197; Paschal v. Boston El. R. Co., 214 Mass. 161, 100 N. E. 1022.

[26] Marietta v. United Tract. Co.,

§ 1557 (1096de). Deaf, blind and aged persons on the track.— A person of impaired hearing or eyesight is not regarded as negligent as a matter of law in attempting, unattended, to cross a street railway track.[27] But such persons are required to exercise more care in some respects than persons not so afflicted. Thus a person with impaired hearing is charged with the duty of a diligent use of his eyesight to learn whether he may safely cross a track or not.[28] And where such a person walks along the track it is clearly his duty to look back at short intervals to note the approach of cars from the rear, and his neglect to do so may amount to contributory negligence, defeating a recovery for injuries from being run into.[29] One court has held that a woman seventy-two years old was not, as a matter of law, chargeable with contributory negligence in attempting to cross a street railway track in front of an approaching car which was from ninety to one hundred feet distant at the time she

174 Fed. 207; Indianapolis Tract. Co. v. Crawley, 51 Ind. App. 357, 96 N. E. 392; Young v. Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; Hanley v. Boston El. R. Co., 201 Mass. 55, 87 N. E. 197; Daly v. Detroit Citizens' St. Ry. Co., 105 Mich. 193, 63 N. W. 73; Stenzhorn v. City Elec. R. Co., 159 Mich. 82, 123 N. W. 621; Davies v. Peoples' Ry. Co., 159 Mo. 1, 59 S. W. 982; Brockschmidt v. St. Louis &c. R. Co., 205 Mo. 435, 103 S. W. 964, 12 L. R. A. (N. S.) 345; Nolan v. Metropolitan St. R. Co., 173 N. Y. 604, 66 N. E. 1112, affirming 65 App. Div. 184, 72 N. Y. S. 501; Kieley v. Seattle Elec. R. Co., 78 Wash. 396, 134 Pac. 197. The company may be liable, however, in a proper case if it could by reasonable care have avoided the injury thereafter. Kramm v. Stockton Elec. R. Co., 3 Cal. App. 606, 86 Pac. 738; Heinel v. People's R. Co., 6 Penn. (Del.) 428, 67 Atl. 173; Riccio v. Peoples' R. Co., 3 Boyce (Del.) 235, 82 Atl. 604.

[27] Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334. See also Perjue v. Citizens' Elec. &c. Co., 131 Iowa 710, 109 N. W. 280.

[28] Aldrich v. St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141; Hall v. West End St. R. Co., 168 Mass. 461, 47 N. E. 124; Atlantic &c. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41. See also Ft. Smith &c. Tract. Co. v. Barnes, 80 Ark. 169, 96 S. W. 976; McCormick v. Ottumwa R. &c. Co., 146 Iowa 119, 124 N. W. 889; Adams v. Boston &c. R. Co., 191 Mass. 486, 78 N. E. 117; Bennett v. Metropolitan St. Ry. Co., 122 Mo. App. 703, 99 S. W. 480.

[29] Shanks v. Springfield Tract. Co., 101 Mo. App. 702, 74 S. W. 386.

stepped upon the track upon which said car was running.[30] And in another case a man eighty years of age, confused by cars on different tracks, was held not guilty of contributory negligence.[31]

[30] Walls v. Rochester R. Co., 92 Hun 581, 36 N. Y. S. 1102. Affirmed in 154 N. Y. 771, 49 N. E. 1105.

[31] Perjue v. Citizens' Elec. &c. Co., 131 Iowa 710, 109 N. W. 280.

CHAPTER XLVIII.

HIGHWAY CROSSINGS.

Sec.
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§ 1565 (1097). **What is included in highway crossing.**—Strictly speaking a highway crossing may be defined as the space included within the boundaries of the right of way and the boundaries of the highway. In some cases this is the recognized meaning of the term highway crossing. The class of cases to which we refer is composed of those cases which hold that where a railway company is bound to put in wing fences and cattle-guards at public crossings, the fences and cattle-guards must be erected along the margin of the highway,[1] and not recede from or encroach upon it. A crossing, however,

[1] See post, § 1712.

often embraces more than the mere space included in the boundaries referred to, and it may not include so much. Crossings are constructed for the purpose of enabling persons, horses and vehicles, or the like, to cross the railway tracks, and all the structures, and the like, reasonably necessary to enable that object to be safely accomplished are included in the crossing. Thus embankments or approaches necessary to enable a traveler to get on or off the crossing are regarded as a part of the crossing.[2] Only such embankments, however, as are reasonably necessary to enable the crossing to be used can well be regarded as a part of the crossing. Where the highway is nearly level with the railway track, an embankment for a distance of twenty rods cannot be regarded as a part of the crossing.[3] And where a railway company is required to construct good and sufficient crossings it is held that it is not necessary to construct a crossing the full width of the highway.[4] This, perhaps, would be the rule only where a limited portion of the highway was used for the actual purpose of travel. In cities where the entire width of the highway is used for travel we are of the opinion that a crossing would, ordinarily at least, be required for the entire width of the highway.[5] And under certain cir-

[2] Cincinnati &c. R. Co. v. Claire, 6 Ind. App. 390, 33 N. E. 918; Farley v. Chicago &c. R. Co., 42 Iowa 234; Beatty v. Central &c. R. Co., 58 Iowa 242, 12 N. W. 332; Maltby v. Chicago &c. R. Co., 52 Mich. 108, 17 N. W. 717; Moberly v. Kansas City &c. R. Co., 98 Mo. 183, 11 S. W. 569; Gulf &c. R. Co. v. Greenlee, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322; Roxbury v. Central Vermont R. Co., 60 Vt. 121, 14 Atl. 92; Moggy v. Canadian Pac. R. Co., 3 Manitoba 209. In Collier v. Georgia &c. R. Co., 76 Ga. 611, it was said: "The crossing includes the width of the land on both sides of the road allowed by charter or appropriated by the company therefor, and for as many feet beyond each way as is necessary for a traveler to get on and off the crossing safely or conveniently." See also Western R. Co. v. Cleghorn, 143 Ala. 392, 39 So. 133; Lake Erie &c. R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; See v. Wabash R. Co., 123 Iowa 443, 99 N. W. 106.

[3] Beatty v. Central Iowa R. Co., 58 Iowa 242, 12 N. W. 332, 8 Am. & Eng. R. Cas. 210.

[4] Ellis v. Wabash &c. R. Co., 17 Mo. App. 126.

[5] In Cleveland &c. R. Co. v. Johns, 106 Ill. App. 427, it is held that crossings and approaches in populous cities must be maintained

cumstances barriers and guard-rails may be such a necessary part of a railway crossing that the company will be bound to maintain them.[6]

§ 1566 (1098). Right to lay out highway across railway.—While the charters of railway companies are contracts within the provision of the federal constitution that no state shall pass any law impairing the obligation of contracts, the general rule is such that charters are granted and the franchises of railway companies are acquired subject to the police power of the state and to the right of eminent domain in favor of the public.[7] The public are entitled to have highways to meet the requirements of new and increased growth in business and population and it is well settled that railway companies acquire the right to construct their tracks subject to the dominant right of the state to cross their tracks with new streets and highways whenever the public necessity demands it.[8] Under a general

for the full width of the street, but that in rural districts and villages it depends on circumstances and what is reasonably necessary to accommodate the public. See post, § 1587.

[6] Pittsburg &c. R. Co. v. Moses, 2 Atl. 188, 24 Am. & Eng. R. Cas. 295; Southern Ind. R. Co. v. McCarrell, 163 Ind. 469, 71 N. E. 156.

[7] "There is nothing more obvious," it is said in Cincinnati &c. R. Co. v. Morgan County, 143 Fed. 798, 799, "than that a railway company holds its right of way subject to the right of the sovereign to cross its right of way whenever the public convenience shall require the opening of new highways or the changing of the course of old ones." Chicago &c. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Pittsburgh &c. R. Co. v. Gregg, 181 Ind. 42, 102 N. E. 961; State v. District Court, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121; Elliott Roads and Streets (3rd ed.), § 241; ante, § 789. See also Houston &c. R. Co. v. Dallas (Tex. Civ. App.), 78 S. W. 525, 529, 530 (citing text). Boston &c. R. Co. v. County Com'rs., 79 Maine 386, 10 Atl. 113; Clarendon v. Rutland R. Co., 75 Vt. 6, 52 Atl. 1057.

[8] State v. District Court, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121; Chicago &c. R. Co. v. Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150, 29 N. E. 1109; Illinois Cent. R. Co. v. Chicago, 141 Ill. 586, 30 N. E. 1044, 1047, 17 L. R. A. 530; citing Elliott Roads and Streets, 598. The rule is thus expressed in the case of Ft. Wayne v. Lake Shore &c. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367 and note, 32 Am. St. 277: "Private corporations acquire the right to

authority conferred upon the municipality to lay out and open streets and highways or to construct a highway from one point to another, power is implied to cross the tracks and rights of way of railway companies.[9] But under such a general power to cross a railway track a part of the railway cannot be taken for the purpose of constructing a parallel or longitudinal street.[10] The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together.[11] Where the two

construct roads subject to the dominant right of the state to cross such road whenever the public necessity demands that new roads or streets shall be opened, and for this reason it is held that the general power to construct and open streets or other public highways carries with it the power to construct them across railroad tracks. Elliott Roads and Streets (3rd ed.), § 249; Lake Erie &c. R. Co. v. Kokomo, 130 Ind. 224, 29 N. E. 780; State v. Easton &c. R. Co., 36 N. J. L. 181; Morris &c. R. Co. v. Central &c. R. Co., 31 N. J. L. 205; Baltimore &c Co. v. Union R. Co., 35 Md. 224, 6 Am. Rep. 397; Little Miami &c. R. Co. v. Dayton, 23 Ohio St. 510; St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141, 27 N. W. 500; President &c. Canal Co. v. Whitehall, 90 N. Y. 21; Albany &c. R. Co. v. Brownell, 24 N. Y. 345." See also New York &c. Rd. Co. v. Drummond, 46 N. J. L. 644; Chicago &c. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485; Chicago &c. R. Co. v. Minneapolis, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. ed. 671. In Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62, it was said: "Unless, therefore, every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude."

[9] St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141, 27 N. W. 500, 24 Am. & Eng. R. Cas. 309; Lake Erie &c. R. Co. v. Kokomo, 130 Ind. 224, 29 N. E. 780; Hannibal v. Hannibal &c. R. Co., 49 Mo. 480. See also Bridgeport v. New York &c. R. Co., 36 Conn. 255, 4 Am. Rep. 63.

[10] Ante, §§ 60, 1130; Bridgeport v. New York &c. R. Co., 36 Conn. 255, 4 Am. Rep. 63; Ft. Wayne v. Lake Shore &c. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, and note 32 Am. St. 277.

[11] Lewis v. Germantown &c. Co., 16 Phila. (Pa.) 608.

uses are such that both cannot stand together the general rule is that the railroad company's property cannot be taken for a street unless there is statutory authority authorizing it.[12] But under general authority to lay out streets across the tracks of a railway company it has been held that streets may be laid out across switches,[13] and even across yards where no franchise of the company is impaired thereby.[14]

§ 1567 (1099). Right to construct railway across highway.—The general rule is that where a railway company is chartered with authority to construct a railway between certain termini the authority to cross highways between such termini exists by necessary implication.[15] So, authority to cross any "public road or way" has been held to include the right to cross city streets.[16] In many states the general law under which railway companies are chartered confers upon them, in express terms,

[12] Infra, § 1572.

[13] Illinois Central R. Co. v. Chicago, 141 Ill. 586, 30 N. E. 1044, 51 Am. & Eng. R. Cas. 528.

[14] Philadelphia &c. R. Co. v. Philadelphia, 9 Phila. (Pa.) 563; Illinois Central R. Co. v. Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530, 51 Am. & Eng. R. Cas. 528; Commissioners v. Detroit &c. R. Co., 93 Mich. 58, 52 N. W. 1083, 51 Am. & Eng. R. Cas. 525. But where the yards are the property of the corporation streets cannot be constructed through them without the tender or payment of compensation, for in such a case there is a taking of private property for a public use. See, generally, on this subject, ante, § 1213.

[15] In Inhabitants v. Port Reading &c. R. Co., 49 N. J. Eq. 11, 23 Atl. 127, 50 Am. & Eng. R. Cas. 169, the court said: "The defendant is incorporated under the general railroad law, and, by that statute, acquires whatever rights it possesses in crossing highways. That it may cross a highway cannot be questioned. The right is given by implication from the bare authority to build a railroad connecting distant points between which there exist highways that must be crossed, and as well from expressions in the statute which assumes its existence; and, as it is impossible for a railroad to cross a highway without some incidental interference with it, such interference is also of necessity made lawful." Warren R. Co. v. State, 29 N. J. L. 353; Appeal of South Waverly (Pa.), 11 Atl. 245, 20 W. N. C. 209.

[16] Canton v. Canton &c. Co., 84 Miss. 268, 36 So. 266, 105 Am. St. 428, 65 L. R. A. 561, and cases cited, also citing Elliott Roads and Streets (3rd ed.), § 1, note 6.

the right and authority to construct their lines across public highways.[17] The right to cross, however, is limited to the necessities of the crossing and no greater rights can be claimed than those reasonably necessary to enable the objects of the crossing to be accomplished.[18] It is the duty of the railway company constructing its lines across public highways, to do so in such a manner as to interfere with the right of the public to use the highway as little as possible or, as is reasonably necessary, and to restore the highway to as safe a condition for travel as before the crossing was made so far as it can reasonably and practicably be done.[19] Where the right to cross exists and the company has acted on such right by constructing its line across the highway it has been held that the company may lay such additional parallel tracks as are reasonably necessary for it in the transaction of its business.[20]

[17] Clawson v. Chicago &c. R. Co., 95 Ind. 152; Cook County v. Great Western R. Co., 119 Ill. 218, 10 N. E. 564.

[18] Inhabitants v. Port Reading &c. R. Co., 49 N. J. Eq. 11, 23 Atl. 127, 50 Am. & Eng. R. Cas. 169; Northern &c. R. Co. v. Mayor, 46 Md. 425; Palatka &c. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. 395; Lehigh Valley R. Co. v. Orange Water Co., 42 N. J. Eq. 205, 7 Atl. 659. See also Jones v. Erie &c. R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916. It has been held that the crossing should not be permitted where the usefulness of the highway will be virtually destroyed. Osborne v. Jersey City &c. R. Co., 27 Hun (N. Y.) 589. So, it has been held that the mere nonuser of a highway for two years does not entitle a railroad company crossing it to exclude the public by fencing the right of way. McNamara v. Minneapolis &c. R. Co., 95 Mich. 545, 55 N. W. 440.

[19] See infra. §§ 1573, 1574, where the duty of the company to restore the condition of the highway is fully discussed. See also Wabash R. Co. v. Railroad Com., 176 Ind. 428, 95 N. E. 673; Paducah &c. R. Co. v. Com., 80 Ky. 147; Johnson v. St. Paul &c. R. Co., 31 Minn. 283, 17 N. W. 622; Louisville &c. R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; Roxbury v. Central Vt. R. Co., 60 Vt. 121, 14 Atl. 92.

[20] Commonwealth v. Hartford &c. R. Co., 14 Gray (Mass.) 379; Bangor &c. R. Co. v. Smith, 47 Maine 34. But the right to construct and use more than one track may often depend upon the provisions of the statute granting the corporate franchise, and upon the license granted by the local authorities. See also Bangor &c. R. Co. v. Smith, 47 Maine 34.

§ 1568 (1100). Proceedings by municipality.—The proceeding by municipality in the matter of laying out streets is so largely a matter of statutory regulation and the statutes of the different states are so different that we cannot do more at this place than refer to some of the general principles governing such proceedings. Where it is sought to lay out a street across a railway company's right of way the general rule is that the railway company stands in some respects in the same position to the proceedings as any land-owner through whose lands the proposed street passes. The railway company must be made a party to the proceedings,[21] and it must be served with notice the same as other land-owners.[22] But where the railway company's interest does not appear of record and the statute provides that personal service shall be made only on persons whose interests appear of record the general notice by publication is sufficient to bind the railway company.[23] And it has been held that the legislature may provide that the notice as to everybody shall be constructive.[24] The statutes authorizing the

[21] Detroit &c. R. Co. v. Detroit, 49 Mich. 47, 12 N. W. 904. A mortgagee need not be made a party. Grand Rapids v. Grand Rapids &c. R. Co., 58 Mich. 641, 26 N. W. 159.

[22] St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141, 24 Am. & Eng. R. Cas. 309, 27 N. W. 500; Long Island R. Co. v. Silverstone, 64 Hun 634, 19 N. Y. S. 140. Service of notice upon a station agent upon whom service in suits against the company is valid is sufficient. State v. O'Conner, 78 Wis. 282, 47 N. W. 433.

[23] State v. Chicago &c. R. Co., 68 Iowa 135, 26 N. W. 37.

[24] In St. Paul &c. R. Co. v Minneapolis, 35 Minn. 141, 27 N. W. 500, 24 Am. & Eng. R. Cas. 309, it was said: "The plaintiff further complains that the notice of the condemnation proceedings, and the assessment of damages provided by the charter, and the only notice, in fact, given in this case, was by publication. It is certainly remarkable that in a matter so important to the interest of property-holders, the legislature should have made no further or more adequate provision in the charter for notice of the pendency of proceedings for the assessment of damages in this class of cases. But this was a question for the legislature, and we do not think the proceedings void because the notice provided was constructive, or by publication. The proceedings are in rem, and it is the rule generally recognized that, in such cases, the legislature may provide that the compensation due the owner of the lands taken may be ascertained upon constructive notice merely, as well as upon personal notice."

proceedings usually provide a remedy for persons aggrieved by the action of the municipality. The remedy thus provided is, as a rule, exclusive and parties aggrieved must pursue the remedy provided. Thus, for example, where a remedy by appeal is provided the company must pursue that remedy for neither relief by certiorari,[25] nor by injunction,[26] will be granted.

§ 1569 (1101). Proceedings by railway company.—The general rule is, as we have said, that the authority conferred upon a railway company to construct its line from one point to another carries with it by implication authority to cross intervening highways. Where there is such authority and there is no statute regulating the subject the only proceedings required by a railway company to secure crossings over highways are such as are necessary to secure the right of way. It has been held that where the right of way has been secured from the land-owner, no further proceedings are as a rule, necessary to secure the right to cross the highway.[27] In some states, however, statutes are in force which require railway companies to secure consent to construct their tracks across public highways, from the local authorities. Thus, under a New York statute, the company must after notice to the highway commissioners, obtain the consent of the supreme court, to construct its roads across the

[25] Lake Shore &c. R. Co. v. Chicago &c. R. Co., 96 Ill. 125; Western &c. Railroad Co. v. Patterson, 37 Md. 125; Detroit &c. R. Co. v. Graham, 46 Mich. 642, 14 Am. & Eng. R. Cas. 327; St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141, 27 N. W. 500, 24 Am. & Eng. R. Cas. 309; Little Miami &c. R. Co. v. Dayton, 23 Ohio St. 510.

[26] Long Island R. Co. v. Silverstone, 19 N. Y. S. 140, 64 Hun 634; Detroit &c. R. Co. v. Detroit, 91 Mich. 444, 52 N. W. 52. See also Lancy v. Boston, 185 Mass. 219, 70 N. E. 88; Erie R. Co. v. Buffalo, 96 App. Div. 458, 89 N. Y. S. 122. And see generally as to the procedure and compensation under various statutes, New York &c. R. Co. v. Rhodes, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225; Louisville &c. R. Co. v. Louisville, 131 Ky. 108, 114 S. W. 743, 24 L. R. A. (N. S.) 1213, and cases cited in notes.

[27] Cook County v. Great Western &c. R. Co., 119 Ill. 218, 10 N. E. 564. In this case it was held that a board of county commissioners had no power to require railway companies to secure consent to cross highways.

surface of any highway.[28] Where the highway sought to be crossed is owned by a private corporation, as a turnpike company, it is held that the turnpike company is entitled to compensation and in such a case the crossing should be secured either by agreement or condemnation,[29] for the crossing of such a highway is a taking of property for which compensation must be made. The crossing of a street or highway by a railway company within the limits of an incorporated village, town or city, stands on somewhat different grounds from such a crossing without such limits. Within such municipalities the authority over streets is very broad and it is generally held that the municipality has power to regulate and control the laying of railway tracks in or across the streets. The general rule is that as a condition precedent to the right to lay its tracks across streets in a municipality, unless otherwise expressly or impliedly provided by statute, consent must first be had from the proper municipal authorities.[30]

§ 1570 (1102). Construction of crossing.—As a general rule it is the duty of every railway company to construct and maintain in good condition its crossings over highways so far as the same can be done without interfering with the operation of the railway.[31] This duty, as a rule, however, extends only to the

[28] Osborne v. Jersey City &c. R. Co., 27 Hun (N. Y.) 589; Schermerhorn v. Mt. McGregor &c. R. Co., 52 N. Y. S. 892. And in many states the manner of crossing is usually within the jurisdiction of the railroad commission. See Wabash R. Co. v. Railroad Com., 176 Ind. 428, 95 N. E. 673; Mayor &c. of Hyattsville v. Washington &c. R. Co., 122 Md. 660, 90 Atl. 515; New Platz &c. Tract. Co. v. New England &c. Ry. Co., 84 Misc. 528, 147 N. Y. S. 624.

[29] Seneca Road Co. v. Auburn &c. R. Co., 5 Hill (N. Y.) 170; Fletcher v. Auburn &c. R. Co., 25 Wend. (N. Y.) 462; Indianapolis &c. Co. v. Belt R. Co., 110 Ind. 5, 10 N. E. 923, 32 Am. & Eng. R. Cas. 173.

[30] Cook County v. Great Western &c. R. Co., 119 Ill. 218, 10 N. E. 564, ante, §§ 1425, 1430. See also Chicago v. New York &c. R. Co., 216 Fed. 735 (under Illinois law the company may locate without consulting the city but cannot construct without its consent); Covington v. Louisville &c. R. Co., 158 Ky. 136, 164 S. W. 329; Ward v. Erie R. Co., 87 Misc. 365, 149 N. Y. S. 717.

[31] Farley v. Chicago &c. R. Co.,

crossings of such highways as were legally laid out or have become such by dedication or prescription.[32] The duty is now imposed by statute in nearly all of the states, but such duty exists independent of statute, at least as to all crossings which are in existence at the time the railway is constructed.[33] Where the duty is imposed by statute the weight of authority is to the effect that it applies to crossings of highways laid out after

42 Iowa 234; Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147; Thayer v. Flint &c. R. Co., 93 Mich. 150, 53 N. W. 216; Lincoln v. St. Louis &c. R. Co., 75 Mo. 27; Moberly v. Kansas City &c. R. Co., 98 Mo. 183, 11 S. W. 569; State v. Chicago &c. R. Co., 29 Nebr. 412, 45 N. W. 469; Burlington &c. R. Co. v. Koonce, 34 Nebr. 479, 51 N. W. 1033; Ferguson v. Virginia &c. R. Co., 13 Nev. 184; Pittsburg &c. R. Co. v. Dunn, 56 Pa. St. 280; Buchner v. Chicago &c. R. Co., 60 Wis. 264, 19 N. W. 56. See also Louisville &c. R. Co. v. Hubbard, 148 Ala. 45, 41 So. 814; Baltimore &c. R. Co. v. State, 159 Ind. 510, 518, 65 N. E. 508 (citing text); Cleveland &c. R. Co. v. Clark, 51 Ind. App. 392, 97 N. E. 822; Black v. Rock Island &c. R. Co., 125 La. Ann. 101, 51 So. 82, 26 L. R. A. (N. S.) 166.

32 Gulf &c. R. Co. v. Montgomery, 85 Tex. 64, 19 S. W. 1015; Gurley v. Missouri &c. R. Co., 104 Mo. 211, 16 S. W. 11. Compare also Missouri &c. R. Co. v. Long, 27 Kans. 684; Chesapeake &c. R. Co. v. Young, 146 Ky. 317, 142 S. W. 709; Flint &c. R. Co. v. Willey, 47 Mich. 88, 10 N. W. 120. But see Kelly v. Southern Minn. R. Co., 28 Minn. 98, 9 N. W. 588; Lee v. St. Louis &c. R. Co., 150 Mo. App. 175, 129 S. W. 773 (may extend to way which company invites public to use); Choctaw &c. R. Co. v. Wilker, 16 Okla. 384, 84 Pac. 1086, 3 L. R. A. (N. S.) 595 (duty may extend to temporary way maintained in making repairs at crossing); Racine v. Chicago &c. R. Co., 92 Wis. 118, 65 N. W. 857. See generally and compare Missouri &c. R. Co. v. Long, 27 Kans. 684; Johanson v. Boston &c. R. Co., 153 Mass. 57, 26 N. E. 426; Retan v. Lake Shore &c. R. Co., 94 Mich. 146, 53 N. W. 1094; Missouri &c. R. Co. v. Bridges, 74 Tex. 520, 15 Am. St. 856, 12 S. W. 210; Taylor &c. R. Co. v. Warner, 88 Tex. 642, 32 S. W. 868. The Missouri statute requiring railroad companies to maintain crossing planks 24 feet long as a street crossing applies even to a street not opened by legal proceedings or established by user and expenditure of public moneys but dedicated to the public by the company. Phillips v. Pryor (Mo. App.), 190 S. W. 1027.

33 See Chicago &c. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273; Moberly v. Kansas City &c. R. Co., 98 Mo. 183, 11 S. W. 569.

the construction of the railway, as well as those in existence at the time of its construction.[34] There is, however, some conflict in the authorities, some holding that a railway company is not bound to construct crossings over highways which are not in existence at the time of the construction of the railway.[35]

[34] Illinois Cent. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; Chicago &c. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109, 50 Am. & Eng. R. Cas. 150; Louisville &c. R. Co. v. Smith, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608; Lake Erie &c. R. Co. v. Shelley, 163 Ind. 36, 41, 71 N. E. 151 (citing text); State v. District Court, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121, 42 Am. & Eng. R. Cas. 241; State v. Shardlow, 43 Minn. 524, 46 N. W. 74, 45 Am. & Eng. R. Cas. 106; State v. St. Paul &c. R. Co., 98 Minn. 380, 108 N. W. 261; State v. St. Paul &c. R. Co., 98 Minn. 380, 108 N. W. 261, reviewing the authorities; Lancaster County v. Chicago &c. R. Co., 29 Nebr. 412, 45 N. W. 469, 42 Am. & Eng. R. Cas. 248; Missouri Pac. R. Co. v. Cass County, 76 Nebr. 396, 107 N. W. 773; Dyer Co. v. Railroad, 87 Tenn. 712; Chesapeake &c. R. Co. v. Dyer Co., 38 Am. & Eng. R. Cas. 676. Most of these decisions expressly, and others impliedly, hold such a statute constitutional, especially where there is a reserved power to amend or repeal the charter. See also Albany &c. R. Co. v. Brownell, 24 N. Y. 345; Georgia &c. R. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; Chicago &c. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; Chicago &c. R. Co. v. Minneapolis, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. ed. 671; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368; New York &c. R. Co. v. Bristol, 62 Conn. 527, 26 Atl. 122, affirmed in 14 Sup. Ct. 431; Vandalia R. Co. v. State, 166 Ind. 219, 76 N. E. 980, 981 (citing text); New York &c. R. Co. v. Rhodes, 171 Ind. 521, 525, 526, 86 N. E. 840, 24 L. R. A. (N. S.) 1225; Portland &c. R. Co. v. Deering, 78 Maine 61, 2 Atl. 670, 23 Am. & Eng. R. Cas. 51, 57 Am. Rep. 784; Boston &c. R. Co. v. Greenbush, 52 N. Y. 510; People v. Boston &c. R. Co., 70 N. Y. 569. But the statute is not always construed as applying to streets thereafter laid out across existing railroads. Albia v. Chicago &c. R. Co., 102 Iowa 624, 71 N. W. 541; State v. Morgan's &c Co., 111 La. Ann. 120, 35 So. 482; Chicago &c. R. Co. v. Milwaukee, 97 Mo. 418, 72 N. W. 1118. See Kansas City v. Kansas City &c. R. Co., 102 Mo. 633, 14 S. W. 808; Houston &c. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850, and note, as to power of city to require company to change or conform to grade.

[35] Rock Creek Tp. v. St. Joseph &c. Co., 43 Kans. 543, 23 Pac. 585, 42 Am. & Eng. R. Cas. 255; State v. Wilmington &c. R. Co., 74 N. Car. 143; People v. Lake Shore &c. R. Co., 52 Mich. 277, 17 N. W. 841.

We are of the opinion that the better rule is that laid down in the cases holding that the duty may be imposed upon the company to construct the class of crossings referred to. The authority to require railroad companies to construct crossings at highways, rests upon the police power of the state, and as a railway company acquires its rights subject to the police power, it seems to us that it is a just exercise of such power to hold that railway companies may be compelled to construct crossings at those highways which are afterwards opened and laid out across their rights of way.[36] The doctrine which we

In several jurisdictions it is held that the railroad company cannot constitutionally be compelled to construct a crossing in such a case without compensation. See Massachusetts &c. R. Co. v. Boston &c. R. Co., 121 Mass. 124; Illinois Central R. Co. v. Bloomington, 76 Ill. 447; Chicago &c. R. Co. v. Comrs. Chautauqua Co., 49 Kans. 763, 31 Pac. 736; Northern &c. R. Co. v. Mayor, 46 Md. 425; Old Colony R. Co. v. Inhabitants &c., 14 Gray (Mass.) 155; Detroit v. Detroit &c. Co., 43 Mich. 140, 5 N. W. 275; Chicago &c. R. Co. v. Hough, 61 Mich. 507, 28 N. W. 532; People v. Detroit &c. R. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717, 2 Lewis' Am. R. & Corp. 215; State v. Capner, 49 N. J. L. 555, 9 Atl. 781; Gulf &c. R. Co. v. Rowland, 70 Tex. 298, 7 S. W. 718, 35 Am. & Eng. R. Cas. 286; post, § 1571. In Kansas City v. Kansas City Belt R. Co., 102 Mo. 633, 14 S. W. 808, 10 L. R. A. 851, 3 Lewis's Am. R. & Corp. 522, it was held that a company which had constructed a proper bridge or viaduct was entitled to compensation for the expense of altering it to conform to the street as thereafter widened by the city.

[36] Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Chicago &c. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109, 50 Am. & Eng. R. Cas. 150; New York &c. R. Co. v. Rhodes, 171 Ind. 521, 86 N. E. 840, 842, 24 L. R. A. (N. S.) 1225 (citing text); Portland &c. R. Co. v. Deering, 78 Maine 61, 2 Atl. 670, 57 Am. Rep. 784, 23 Am. & Eng. R. Cas. 51; Boston &c. R. Co. v. County Com'rs. 79 Maine 386, 10 Atl. 113, 32 Am. & Eng. R. Cas. 271; Gulf &c. R. Co. v. Rowland, 70 Tex. 298, 7 S. W. 718, 35 Am. & Eng. R. Cas. 286. In State v. Chicago &c. R. Co., 29 Nebr. 412, 45 N. W. 469, 42 Am. & Eng. R. Cas. 248, the court said: "The respondent insists that the act is not constitutional, as it imposes a burden on the corporation that did not exist when it was incorporated. Under the general public power of the state, the legislature has authority to place new and additional burdens upon corporations, when such burdens are for the safety of the people and for the public good, although the power to do so may

have stated is well supported by those cases which hold that railway companies may be required by laws passed subsequent to the granting of their charters, and the construction of their lines, to fence their tracks, to put in cattle-guards, to give signals or to do other acts for the safety and protection of the public.[37] The duty to construct and maintain a suitable crossing is a continuing one and the company may be compelled to perform it, so as to meet and provide for the increased needs of the traveling public.[38]

§ 1571 (1103). **Damages where highway is opened across a railroad.**—In those jurisdictions in which it is held that a railroad company is entitled to compensation where a highway is laid out across its track, it is frequently difficult to determine the exact elements of compensation or measure of damages. It is generally held that compensation should be made both for the use of the land actually taken, or its value subject to its use by the railroad company, and for any additional expense created by the use of the right of way for the street, together with such other damages as may be sustained by injury to the

not be reserved in the charter." See also Railway Co. v. People, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596; Chicago &c. R. Co. v. Minneapolis, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. ed. 671, and cases there reviewed; State v. Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269; Illinois Cent. R. Co. v. Swalm, 83 Miss. 631, 36 So. 147; Harriman v. Southern R. Co., 111 Tenn. 538, 82 S. W. 213; Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118.

[37] Galena &c. R. Co. v. Loomis, 13 Ill. 548, 56 Am. Dec. 471; Galena &c. R. Co. v. Dill, 22 Ill. 265; Ohio &c. R. Co. v. McClelland, 25 Ill. 140; Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. Rep. 799; Illinois Central R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; Chicago &c. R. Co. v. Irons, 38 Ind. App. 196, 78 N. E. 207.

[38] State v. St. Paul &c. R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Cooke v. Boston &c. R. Co., 133 Mass. 185, 10 Am. & Eng. R. Cas. 328; Burritt v. New Haven, 42 Conn. 174; Manley v. St. Helens &c. R. Co., 2 Hurl. and N. 840; post, § 1580. See also Kansas City v. Kansas City Belt R. Co., 102 Mo. 633, 14 S. W. 808, 10 L. R. A. 851, 3 Lewis' Am. R. & Corp. R. 522; citing Elliott Roads and Streets, 599; State v. St. Paul &c. R. Co., 98 Minn. 380, 108 N. W. 261 (also holding that a contract by a city abdicating its police power in this regard is not binding).

track, right of way or franchise, as a natural and proximate result of the opening and use of the street across the track and right of way, but not for expenses necessary in order to comply with mere police regulations, or, in other words, while, according to many of the authorities, the compensation should include such damages as arise in making the necessary structural changes and necessarily continue in the future operation and management of the road, it should not include such damages or expenses as are incurred in complying with the ordinary police regulations of the state or municipality.[39] In Massachusetts, however, while the general rule is recognized that the increased expense of ringing bells and giving signals in compliance with police regulations should not be included, it is held that the expense of erecting and maintaining signboards and cattle-guards should be included.[40] In Minnesota the contrary view is taken,[41] but the courts of both states agree in

[39] Grand Rapids v. Grand Rapids &c. R. Co., 66 Mich. 42, 33 N. W. R. 15; State v. District Court, 42 Minn. 247, 7 L. R. A. 121 and note; Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155; Boston &c. R. Co. v. Cambridge, 159 Mass. 283, 34 N. E. 382; Paterson &c. R. Co. v. Newark, 61 N. J. L. 80, 38 Atl. 689. See also Cincinnati &c. R. Co. v. Connersville, 170 Ind. 316, 324, 83 N. E. 503, 507 (citing text on last part of the proposition); Chicago &c. Ry. Co. v. Chautauqua County, 49 Kans. 763, 31 Pac. 736; Baltimore &c. R. Co. v. Baltimore, 98 Md. 535, 56 Atl. 790 (both holding company entitled to compensation for planking and the like at bid when not otherwise provided by statute). But compare Chicago &c. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109, 50 Am. & Eng. R. Cas. 150; Commissioners of Parks v. Chicago &c. R. Co., 91 Mich. 291, 51 N. W. 934; Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118, 1121 (citing text and reviewing authorities).

[40] Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155. See also Kansas &c. R. Co. v. Jackson County, 45 Kans. 716, 26 Pac. 394; Massachusetts &c. R. Co. v. Boston &c. R. Co., 121 Mass. 124; Chicago &c. R. Co. v. Hough, 61 Mich. 507, 28 N. W. 532; Detroit v. Detroit &c. R. Co., 112 Mich. 304, 70 N. W. 573. See also State v. Bayonne, 51 N. J. L. 428, 17 Atl. 971; Morris &c. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730.

[41] State v. District Court, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121; State v. Shardlow, 43 Minn. 524, 46 N. W. 74, 45 Am. & Eng. R. Cas. 106. (But the entire expense of constructing the crossing, including planking may be included. Chi-

holding that company is entitled to compensation for planking the roadway, and maintaining such planking, where the street crosses the tracks. Under an Illinois statute, however, the railroad company is not entitled to compensation for the expense of grading and planking where a street is laid across the tracks under the power of eminent domain.[42] And in most jurisdic-

cago &c. Ry. Co. v. Le Roy, 124 Minn. 107, 144 N. W. 464.) And in a recent Nebraska case it is said: "The authorities are in no wise uniform in the conclusions reached as to the particular items of damage which should or should not fall within the provisions of the statute. The weight of authority, however, is, that under statutes similar to our own such items of damage as are necessitated and occasioned by the operation of the railroad, as the erection of sign posts, the construction of wing fences and cattle guards, and the building of approaches from the public road to the railroad track, are within the clear letter of the statute, and must be borne by the railroad company without compensation. With reference to the costs that necessarily would have been expended by the public in making the highway, had the railroad never been constructed, the opinions are divergent; but, as the exercise of the police power under this section of the statute frequently casts onerous burdens on public service corporations, and as the doctrine announced by this court, when the statute was first interpreted, is supported by the authority therein quoted (People v. Lake Shore &c. R. Co., 52 Mich. 277, 17 N. W. 841), and, though a deviation from the letter, is in harmony with the spirit of the enactment, we see no reason for changing the rule which has long been acquiesced in. Applying these principles to the items of damage claimed in the case at bar, the trial court was clearly right in excluding from the estimate the cost of putting in cattle guards, building wing fences, and constructing necessary approaches from the highway to the track. We think, however, that, for the land condemned within the plaintiff's right of way for public use, there should have been compensatory, and not mere nominal damages, awarded. It matters not whether the right of the plaintiff in the land was a mere easement or a fee-simple title." Missouri Pac. R. Co. v. Cass County, 76 Nebr. 396, 107 N. W. 773. Compare Mayor v. Cowen, 88 Md. 447, 41 Atl. 900, 71 Am. St. 433; Cincinnati &c. R. Co. v. Troy, 68 Ohio St. 510, 67 N. E. 1051. See State v. St. Paul &c. R. Co., 98 Minn. 380, 108 N. W. 261; Detroit F. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. ed. 860; Gulf &c. R. Co. v. Milam County, 90 Tex. 355, 38 S. W. 747.

[42] Chicago &c. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485 and cases cited. But see and compare

tions it is held that the legislature, under the police power, may require the expense of planking, and like matters incidental to the construction of the crossing, including safety gates and wing fences and cattle-guards, to be borne by the company without compensation.[43] No damages should be allowed for mere interruptions or inconveniences causing a slower movement of trains, or the like, nor for the increased danger of accidents at the crossing.[44] In Michigan, it has been held that where, by reason of the condemnation of a highway crossing over a company's tracks, an adjacent warehouse of the company, and the land on which it stands, are rendered less available and less valuable, the company is entitled to compensation for such damage.[45] Alleged benefits to the company on ac-

Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118.

[43] St Louis &c. R. Co. v. Royall, 75 Ark. 530, 88 S. W. 555; New York &c. R. Co. v. Rhodes, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225, and numerous cases cited in note; Louisville &c. R. Co. v. Louisville, 131 Ky. 108, 114 S. W. 743, 24 L. R. A. (N. S.) 1213; Missouri &c. R. Co. v. Cass County, 76 Nebr. 396, 107 N. W. 773; Morris &c. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; People &c. v. New York &c. R. Co., 156 N. Y. 570, 51 N. E. 312; Grafton v. St. Paul &c. R. Co., 16 N. Dak. 313, 113 N. W. 598, 22 L. R. A. (N. S.) 1; Gulf &c. R. Co. v. Milam County, 90 Tex. 355, 38 S. W. 747; Chicago &c. R. Co. v. Fair Oaks, 140 Wis. 334, 122 N. W. 810; Chicago &c. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979. And see chapter on Compensation and Damages in volume II of this work.

[44] Bridgeport v. New York &c. R. Co., 36 Conn. 255, 4 Am. Rep. 63; Chicago &c. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; New York &c. R. Co. v. Rhodes, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225; Louisville &c. R. Co. v. Louisville, 131 Ky. 108, 114 S. W. 743, 24 L. R. A. (N. S.) 1213; Portland &c. R. Co. v. Deering, 78 Maine 61, 2 Atl. 670, 57 Am. Rep. 784; Boston &c. R. Co. v. County Com'rs, 79 Maine 386, 10 Atl. 113, 32 Am. & Eng. R. Cas. 271; Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604; Southern Kans. R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

[45] Commissioners of Parks v. Chicago &c. R. Co., 91 Mich. 291, 51 N. W. 934. So as to structural changes such as elevating tracks, removing buildings and making new platforms. Chicago &c. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Paterson &c. R. Co. v. Nutley, 72 N. J. L. 123, 59 Atl. 1032; Southern Kans. R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1050. See also

count of increase in its traffic or business arising from the increased facility for travel which the highway affords are not to be taken into consideration.[46]

§ 1572 (1104). Impairing rights of railway company.—The rule is that where property is already devoted to one public use it can not be taken for another public use, unless there is a statute which clearly authorizes such a taking. Where property is already devoted to one public use it can, as a rule, be taken for another public use, only where authority is clearly conferred by statute, and then upon just compensation paid or tendered. Where a street is laid out across the right of way of a railway company at a point where the company has only a track or switch, no question can justly arise as to an impairment of the company's franchise by such taking, for under such circumstances both the use as a highway and the use as a railway can stand together and do not interfere with each other.[47] But where it is sought to lay out a highway through

Portland &c. R. Co. v. Deering, 78 Maine 61, 2 Atl. 670, 57 Am. Rep. 784.

[46] State v. Shardlow, 43 Minn. 524, 46 N. W. 74; Hook v. Chicago &c. R. Co., 133 Mo. 313, 34 S. W. 549; Morris &c. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155; Boston &c. R. Co. v. Middlesex, 1 Allen (Mass.) 324.

[47] In Cincinnati &c. R. Co. v. Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. 285, it was said: "Under the general law permitting cities to establish streets, we have no doubt of the implied power to extend streets transversely across the right of way of a railroad when in so doing the uses for which right of way is employed are not materially injured or destroyed, and where such uses, and those for a street, may coexist without impairment of the first uses. But where such uses cannot so coexist, or where the first use is materially impaired or destroyed, it is well settled, in this state and elsewhere, that the second public use will be denied. Lake Erie &c. R. Co. v. Boswell, 137 Ind. 336, 36 N. E. 1103; Ft. Wayne v. Lake Shore &c. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, and note, 32 Am. St. 277; Seymour v. Jeffersonville &c. R. Co., 126 Ind. 466, 26 N. E. 188; Valparaiso v. Chicago &c. R. Co. 123 Ind. 467, 24 N. E. 249; Prospect Park &c. R. Co. v. Williamson, 91 N. Y. 552; Buffalo, In re, 68 N. Y. 167; Boston &c. R. Co., In re, 53 N. Y. 574; Albany &c. R. Co. v. Brownell, 24 N. Y. 345; Milwaukee &c. R. Co. v.

a depot of a railway company, the use is such as to destroy or materially impair the franchise or property rights of the company, and the construction of the street or highway, except where the statute authorizes the taking and makes provision for the payment of compensation, will not be permitted.[48] The location and construction of a highway through ground intended for a station-house or engine-house may, in the proper case, be enjoined;[49] and so may the location and construction of a highway through a round-house,[50] or, it seems, a park used exclusively as a place for amusement and accommodation of passengers.[51] It has been held however, that a highway may be laid out over a mere collection of tracks used for switching, handling and storing cars.[52] A railway company having acquired lands and erected thereon permanent structures to enable it to transact its business, to permit a street to be opened through such lands and structures would have the effect to

Faribault, 23 Minn. 167; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; Mohawk &c. R. Co. v. Artcher, 6 Paige (N. Y.) 83; St. Paul &c. Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684; New Jersey &c. R. Co. v. Long Branch Com'rs., 39 N. J. L. 28." See also Louisville &c. R. Co. v. Louisville, 131 Ky. 108, 114 S. W. 743, 24 L. R. A. (N. S.), 1213 and note citing § 1566, ante.

[48] Chicago &c. R. Co. v. Wilson, 17 Ill. 123; New York &c. R. Co., In re, v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; St. Paul &c. R. Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684.

[49] New York &c. R. Co., In re, 77 N. Y. 248; Low v. Galena &c. R. Co., 18 Ill. 324. But see Illinois Cent. R. Co. v. Normal, 175 Ill. 562, 51 N. E. 781 (section house not necessary to road.)

[50] Cincinnati &c. R. Co v. Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. 285.

[51] Prospect Park &c. R. Co. v. Williamson, 91 N. Y. 552.

[52] Illinois Central R. Co. v. Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530, 51 Am. & Eng. R. Cas. 528; Chicago &c. R. Co. v. Lake, 71 Ill. 333; Chicago &c. R. Co. v. Starkweather, 97 Iowa 159, 66 N. W. 87, 59 Am. St. 404, 31 L. R. A. 183; Commissioners v. Michigan &c. R. Co., 90 Mich. 385, 51 N. W. 447, 50 Am. & Eng. R. Cas. 144; Commissioners v. Detroit &c. R. Co., 93 Mich. 58, 52 N. W. 1083, 51 Am. & Eng. R. Cas. 525; Philadelphia &c. R. Co. v. Philadelphia, 9 Phila. (Pa.) 563. But compare People v. New York &c. R. Co., 156 N. Y. 570, 51 N. E. 312; Richmond &c. R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496. See also Boston &c. R. Co. v. Greenbush, 52 N. Y. 510.

destroy franchises of the company, and prevent it from performing its public duties, and in all such cases the company's property can never be taken for a street, unless the right to take is clearly conferred upon the municipality,[53] and provision made for compensation. A fuller consideration of the general subject of this section will be found in the chapter on appropriation under the eminent domain.

§ 1573 (1105). Restoring condition of highway.—The right of a railway company to lay out its rights of way and construct its tracks across public highways does not carry with it the right to destroy the highway.[54] Where a railway company constructs its tracks over a public highway the rule is that it must be done with as little injury as is practicably possible to the highway.[55] In the very nature of things it is of course impossible to lay out and construct a railway across a public highway without doing some injury to the highway and to a reasonable extent injury is to be expected, but the authorities are all to the effect that the construction must be such as to not unnecessarily interfere with or impair the usefulness of the highway.[56] As a rule the duty rests upon the railway company to

[53] Chicago &c. R. Co. v. Williams, 148 Fed. 442; Valparaiso v. Chicago &c. R. Co., 123 Ind. 467, 24 N. E. 249; Fort Wayne v. Lake Shore &c. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367 and note, 32 Am. St. 277; Milwaukee &c. R. Co. v. Faribault, 23 Minn. 167; Housatonic R. Co. v. Lee &c. R. Co., 118 Mass. 391; Winona &c. R. Co. v. Watertown, 4 S. Dak. 323, 56 N. W. 1077.

[54] "A grant to a railroad company of the right to construct its road along, upon, or across, or to use, an existing highway, is not to be construed as a power to destroy the highway as such." Palatka &c. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. 395. See also Chicago &c. R. Co. v. People, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596.

[55] Northern &c. R. Co. v. Baltimore, 46 Md. 425; Palatka &c. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. 395. See also Kyne v. Wilmington &c. R. Co., 8 Hous. (Del.) 185, 14 Atl. 922; Caldwell v. Vicksburg &c. R. Co., 41 La. Ann. 624, 6 So. 217; Elliott Roads & Sts. (3rd ed.), § 1010.

[56] Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318; State v. Hannibal &c. R. Co., 86 Mo. 13; Kansas v. Kansas City &c. R. Co., 102 Mo. 633, 14 S. W. 808, 10 L. R. A. 851, 47 Am. & Eng. R. Cas. 157; Osborne

restore every highway crossed by its line to as safe a condition for travel as it was in before the construction of the line, so far as it is reasonably practicable for it to be done.[57] It is not always possible to make a highway as safe for travel as it was before the construction of the railway, but this must be done so far as it is practicable to do so. The duty imposed upon railway companies to restore highways to their former condition of usefulness is usually imposed by general statute,[58] although the duty may be imposed by the charter granted to the company.[59] The duty, however, rests upon the company at

v. Jersey City &c. R. Co., 27 Hun (N. Y.) 589; People v. Dutchess &c. R. Co., 58 N. Y. 152; People v. New York &c. Co., 74 N. Y. 304; Northern Central R. Co. v. Commonwealth, 90 Pa. St. 300; Chester v. Baltimore &c. R. Co., 140 Pa. St. 275, 21 Atl. 320; Roxbury v. Central Vermont R. Co., 60 Vt. 121, 14 Atl. 92.

[57] Peoria &c. R. Co. v. Lyons, 9 Ill. App. 350; Louisville &c. R. Co v. Pritchard, 131 Ind. 564, 31 N. E. 358, 31 Am. St. 451; Chicago &c. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939 (even in absence of statute); Cooke v. Boston &c. R. Co., 133 Mass. 185, 10 Am. & Eng. R. Cas. 328; Cott v. Lewiston &c. R. Co., 36 N. Y. 214; Gale v. New York &c. R. Co., 76 N. Y. 594; Masterson v. New York &c. R. Co., 84 N. Y. 247, 38 Am. Rep. 510 and note. See also Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763, 786, citing Elliott Roads & Sts. (3rd ed.), § 1010; Minneapolis &c. R. & D. Elec. T. Co. v. City of Minneapolis, 124 Minn. 351, 145 N. W. 609 (citing text).

[58] Palatka &c. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. 395; Chicago &c. R. Co. v. Payne, 59 Ill. 534; Evansville &c. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. 865; Missouri &c. R. Co. v. Long, 27 Kans. 684, 6 Am. & Eng. R. Cas. 254; Atchison &c. Ry. Co. v. Townsend, 71 Kans. 524, 81 Pac. 205; Inhabitants v. Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127, 50 Am. & Eng. R. Cas. 169; People v. Troy &c. R. Co., 37 How. Pr. (N. Y.) 427; Schermerhorn v. Mt. McGregor R. Co., 52 N. Y. St. 892; Little Miami Railroad v. Commissioners, 31 Ohio St. 338; Johnson v. Providence &c. R. Co., 10 R. I. 365; Dallas &c. R. Co. v. Able, 72 Tex. 150, 9 S. W. 871, 37 Am. & Eng. R. Cas. 453; St. Louis &c. R. Co. v. Johnson, 38 Tex. Civ. App. 322, 85 S. W. 476; Roberts v. Chicago &c. R. Co., 35 Wis. 679. See also Seybold v. Terre Haute &c. R. Co., 18 Ind. App. 367, 46 N. E. 1054, 1058 (citing text); Chicago &c. R. Co. v. State, 158 Ind. 189, 63 N. E. 224, 226 (also citing text.)

[59] People v. Chicago &c. R. Co., 67 Ill. 118; Dyer County v. Railroad, 87 Tenn. 712, 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer

common law, and it may be compelled to restore highways although there is no statute upon the subject and the company's charter is silent in reference to the matter.[60] In restoring the highway the company may, if that be necessary and no private rights are invaded, change the location of the highway, or, slightly change its course, if that be necessary to make the highway reasonably safe for travel[61] and it has been held that the

County, 38 Am. & Eng. R. Cas. 676; People v. Chicago &c. R. Co., 67 Ill. 118. See also West Jersey &c. R. Co. v. Waterford Twp., 64 N. J. 663, 55 Atl. 157.

[60] People v. Chicago &c. R. Co., 67 Ill. 118; Chicago &c. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273 (citing text); Northern &c. R. Co. v. Baltimore, 46 Md. 445; State v. St. Paul &c. R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Louisville &c. R. Co. v. State, 3 Head (Tenn.), 523, 75 Am. Dec. 778. In Palatka &c. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. 395, the court said: "Where the statute is silent, the common law applies, and a statute which expresses specifically no further exaction than a restoration of the highway to its former condition is not to be construed as abridging the common law duty of maintaining the crossing in such plight as to make it reasonably safe, Maltby v. Chicago &c. R. Co., 52 Mich. 108, 17 N. W. 717." In Dyer County v. Railroad, 87 Tenn. 712, 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer County, 38 Am. & Eng. R. Cas. 676, the court said: "It is a well-settled rule of the common law resting upon the most obvious consideration of fairness and justice, that, where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way." See also Hicks v. Chesapeake &c. R. Co., 102 Va. 197, 45 S. E. 888.

[61] Clawson v. Chicago &c. R. Co., 95 Ind. 152, 20 Am. & Eng. R. Cas. 56; Warren R. Co. v. State, 29 N. J. L. 353; Schermerhorn v. Mt. McGregor R. Co., 52 N. Y. S. 892; North Manheim v. Reading &c. R. Co., 18 Phila. (Pa.) 650; Davis v. County Commissioners 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750. But we think the rule asserted by the authorities referred to is to be carefully applied and that it can not on principle be extended. The public and private rights can not in such cases be sacrificed for the mere convenience of railroad companies. Much depends, it is obvious, upon the facts of the particular case and it is not easy to frame general rules that will justly apply to all cases. See also Forest View Land Co. v. Atlantic Coast Line R. Co., 120 Va. 308, 91 S. E. 198.

company may condemn property for the purpose of the necessary approaches and abutments to the new crossing.[62] Whether the railway company has properly restored the highway is ordinarily a question for the jury.[63]

§ 1574 (1106). **Mandamus to compel restoration.**—Mandamus is the appropriate remedy to compel a railroad company to perform its duty to restore a highway over which it crosses to its former condition of usefulness.[64] It has also been held that a mandatory injunction may be granted in such a case.[65] But where the railroad company has a discretion or option as to the manner of crossing, if it properly exercises its discretion and constructs and maintains an adequate crossing, mandamus will not lie to compel it to construct the crossing in a different man-

[62] Clawson v. Chicago &c. R. Co., 95 Ind. 152, 20 Am. & Eng. R. Cas. 56.

[63] Roberts v. Chicago &c. R. Co., 35 Wis. 679.

[64] People v. Chicago &c. R. Co., 67 Ill. 118; Indianapolis &c. R. Co. v. State, 37 Ind. 489; Clawson v. Chicago &c. R. Co., 95 Ind. 152; Cummins v. Evansville &c. R. Co., 115 Ind. 417; Chicago &c. R. Co. v. State, 158 Ind. 189, 191, 63 N. E. 224, 226; Vandalia R. Co. v. State, 166 Ind. 219, 76 N. E. 980, 982 (both citing text); Boggs v. Chicago &c. R. Co., 54 Iowa 435, 6 N. W. 744; State v. Missouri Pac. R. Co., 33 Kans. 176; Cambridge v. Charlestown &c. R. Co., 7 Met. (Mass.) 70; State v. Hannibal &c. R. Co., 86 Mo. 13; State v. Chicago &c. R. Co., 29 Nebr. 412, 45 N. W. 469, 2 Lewis' Am. R. & Corp. R. 664; Pittsburgh &c. R. Co. v. Commonwealth, 104 Pa. St. 583; State v. Northeastern R. Co., 9 Rich. L. (S. Car.) 247, 67 Am. Dec. 551; Moundsville v. Ohio River &c. R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161, 167, 168, citing Elliott Roads and Streets, 33, 600 (3rd ed. § 1013). See also State v. New York &c. R. Co., 71 Conn. 43, 40 Atl. 925; State v. Minnesota &c. R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State v. Lake Erie &c. R. Co., 83 Fed. 284. In Greenup Co. v. Maysville &c. R. Co., 88 Ky. 659, 11 S. W. 774, it is held that a county may maintain an action to compel a railroad company to restore the highway.

[65] Moundsville v. Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161 and note; Jamestown v. Chicago &c. R. Co., 69 Wis. 648, 34 N. W. 728; Oshkosh v. Milwaukee &c. R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. 175, 39 Am. & Eng. R. Cas. 681. See also Attorney-General v. Turner's R. &c. Co., 47 L. J. Ch. 776, 38 L. T. N. S. 555.

ner, nor, as a general rule in such a case, will the court determine which of two or more modes within the discretion of the company it shall adopt.[66] The railroad company, however, has no discretion as to whether it will or will not restore the highway, and if it "elects a manner that is not effectual, and the act remains substantially undone," it is still "under liability to do it." The discretion is a ministerial one, and "the act of restoration must be done." If the company has adopted an ineffectual mode, "the court will and should point out to it in what it has failed, and direct it particularly what it must do so as not to fail again."[67]

§ 1575 (1107). Approaches, embankments and other structures.—We have seen that there is a general duty resting upon railway companies to restore all highways crossed by their lines to a reasonably safe condition for travel, and, as near to their former condition as can practically be done. Where the railway crosses the highway at a different grade, and even where the crossing is exactly at the same grade, the highway is, however, always disturbed to a greater or less degree. Some change in the highway is always necessary, and as a rule the greater the difference in the grades of the highway and the railway, the greater the change required. At every crossing something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make

[66] King v. Bristol Dock Co., 6 Barn. & Cress. 181; Reg. v. South Eastern R. Co., 4 H. L. Cas. 471, affirmed in Southeastern R. Co. v. Reg. 17 Q. B. 485; People v. New York &c. R. Co., 74 N. Y. 302. See also Illinois Cent. R. Co. v. Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; Jamaica v. Long Island R. Co., 66 Hun 631, 21 N. Y. S. 327.

[67] People v. Dutchess &c. R. Co., 58 N. Y. 152, approved in Moundsville v. Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161, 166; State v. Minneapolis &c. R. Co., 39 Minn. 219, 39 N. W. 153, 35 Am. & Eng. R. Cas. 250; Chicago &c. R. Co. v. State, 158 Ind. 189, 195, 63 N. E. 224 (quoting text with approval); Vandalia R. Co. v. State, 166 Ind. 219, 76 N. E. 980, 982 (citing text). See also Wabash R. Co. v. Railroad Com., 176 Ind. 428, 95 N. E. 673; Hudson County v. Central R. Co., 68 N. J. Eq. 500, 59 Atl. 303.

the highway reasonably safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveler to get on, over and off the crossing in safety. Proper approaches and embankments necessary to enable a traveler to reach and leave the crossing are a part of the crossing and the railway company must construct and maintain them.[68] The embankments are to be constructed and maintained for only such a distance from the crossing as is reasonably necessary to enable the traveler to reach or pass the crossing,[69] by the exercise of ordinary care with reasonable convenience and safety. Approaches and embankments need not, as a rule, be constructed over the entire width of the highway. The company has performed its duty in this respect when it has properly constructed approaches and embankments for the width of the portion of the highway available and actually in use.[70] An additional use of the highway for an increased width will, however, necessitate an increased width in the approaches and embankments.[71] And where the construction of the railway causes a cut or fill in the highway so as to make it dangerous for travelers unless protected, it will be the duty of the company to erect proper guards or bar-

[68] Ante, § 1565. The text is quoted with approval in Baltimore &c. R. Co. v. State, 159 Ind. 510, 65 N. E. 508, 512. See also Southern R. Co. v. Morris, 143 Ala. 628, 42 So. 17; Western R. Co. v. Cleghorn, 143 Ala. 392, 39 So. 133; City of Bloomington v. Chicago &c. R. Co., 52 Ind. App. 510, 98 N. E. 188; St. Louis &c. R. Co. v. Smith, 49 Tex. Civ. App. 1, 107 S. W. 638; Board &c. v. Norfolk &c. Ry. Co., 119 Va. 763, 91 S. E. 124.

[69] Ante, § 1565.

[70] Appeal of Township of North Manheim (Pa.), 22 W. N. C. 149, 14 Atl. 137, 36 Am. & Eng. R. Cas. 194; Queen v. Rigby, 14 Q. B. 687, 14 Jur. 329. See Queen v. Birmingham &c. R. Co., 2 Q. B. 47, 2 Eng. Ry. & Canal Cas. 694; Moggy v. Canadian Pac. R. Co., 3 Manitoba, 209. But see under Virginia statute, Board &c. v. Norfolk &c. R. Co., 119 Va. 763, 91 S. E. 124.

[71] Queen v. Rigby, 14 Q. B. 687, 6 Eng. Ry. & Canal Cas. 479, 14 Jur. 329. Compare, however, St. Louis &c. R. Co. v. Dyer, 87 Ark. 531, 113 S. W. 49. The rule stated in the text is a general one and we suppose that railroad companies must adapt their crossings to the reasonable requirements of the public, and to a reasonable extent conform to the necessities created by the growth and improvement of the country. Ante, § 789; post, § 1580.

riers to prevent travelers from falling into the cut or off the embankment.[72] Barriers or guard rails in a proper case are regarded as a reasonable part of a necessary restoration of the highway to a safe condition for travel.[73] Where the railway crosses the highway through a deep cut, the company may be required to make the highway safe by building a bridge over the railway track.[74] And where it is reasonably practicable to build a railroad bridge spanning the entire highway, it has been held that the company should be restrained from erecting abutments within the limits of the highway.[75] It is impossible to lay down any rule defining just what kind of structures shall be used in any particular case. Each particular crossing presents different conditions, but the general rule governing all is the same, and that rule is that the company must erect whatever structures are reasonably necessary to the safety and convenience of the travelers using the crossing.[76]

§ 1576 (1108). **Grade crossings.**—Where a railway company has the right to construct its track across public highways and there is no statute prescribing how the crossing shall be made it seems that the company may usually exercise its discretion

[72] Atlanta &c. R. Co. v. Wood, 48 Ga. 565; Veazie v. Penobscot Railway Co., 49 Maine 119; Aston v. McClure, 102 Pa. St. 323; Pittsburgh &c. R. Co. v. Moses (Pa.), 2 Atl. 188, 24 Am. & Eng. R. Cas. 295; Oliver v. North Eastern Railroad Co., L. R. 9 Q. B. 409.

[73] Southern Ind. R. Co. v. McCarrell, 163 Ind. 469, 71 N. E. 156.

[74] Dyer Co. v. Railroad, 87 Tenn. 712, 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer County, 38 Am. & Eng. R. Cas. 676. See also St. Louis &c. R. Co. v. Smith, 49 Tex. Civ. App. 1, 107 S. W. 638.

[75] Radnos Twp. v. Philadelphia &c. R., 214 Pa. St. 299, 63 Atl. 694.

[76] Chicago &c. R. Co. v. State, 158 Ind. 189, 193, 63 N. E. 224 (citing text); Cincinnati &c. R. Co. v. Connersville, 176 Ind. 316, 83 N. E. 503 (citing text); Atchison &c. R. Co. v. Henry, 57 Kans. 154, 45 Pac. 576, 579, citing Elliott Roads & Streets (3rd ed.) § 1010; Kansas v. Kansas City &c. R. Co., 102 Mo. 633, 14 S. W. 808, 10 L. R. A. 851, 47 Am. & Eng. R. Cas. 157; Dyer County v. Railroad, 87 Tenn. 712, 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer County, 38 Am. & Eng. R. Cas. 676. See also Nashville &c. Ry. Co. v. Ragan, 167 Ala. 277, 52 So. 522; Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763; Newark v. Erie R. Co., 72 N. J. Eq. 447, 68 Atl. 413 and cases cited.

as to the manner in which the crossing shall be constructed.[77] As a rule railway lines are constructed so as to conform in a great degree to the surface of the ground over which they pass and where the country through which a railroad passes is comparatively level nearly all crossings will be found to be grade crossings. Unless there be a statute or valid order of railroad commissioners or the like forbidding grade crossings the railway company may so construct its line as to cross the highway on the same level.[78] Grade crossings are as a rule more dangerous than crossings above or below grade and the company is held to the exercise of a greater degree of care in the operation of its trains at such crossings than at those where the highway is on a different level. Yet municipalities are often, if not usually, invested with discretion to locate highways across railroad tracks at grade.[79] Statutes conferring

[77] Illinois &c. R. Co. v. Bentley, 64 Ill. 438. See also De Lucca v. North Little Rock, 142 Fed. 597. And compare Murphy v. Chicago Ry. Co., 247 Ill. 614, 93 N. E. 381.

[78] Morris v. Chicago &c. R. Co., 26 Fed. 22. See Connecticut &c. R. Co. v. St. Johnsbury, 59 Vt. 320, 10 Atl. 573.

[79] In Cincinnati &c. R. Co. v. Morgan County, 143 Fed. 798, the court refused to enjoin the county from so doing, and in the course of the opinion it is said: "It may be that the crossing of a railroad at grade might, under certain circumstances, be absolutely destructive of the franchise to operate a railway, and the damage so resulting irreparable at law. In such a case, if one should arise, a court of equity might find itself able to grant relief under the well-recognized head of equity jurisdiction in respect of damages incapable of redress by an action at law. But we have been unable to discover any authorities of moment where a court of equity has intervened to restrain a crossing unless there has been a taking of property for the purpose which was forbidden by statute as necessary to the enjoyment of a general franchise. Such was the case of Albany Northern R. Co. v. Brownell, 24 N. Y. 345, and Smethport R. Co. v. Pittsburgh R., 203 Pa. 176, 52 Atl. 88. We have been referred to the case of Franklin Turnpike Co. v. Maury, 27 Tenn. 342, and Turnpike Co. v. Davidson County, 106 Tenn. 258, 61 S. W. 68, cases where the action of county courts of Tennessee in authorizing the opening of particular roads, was enjoined. Both were cases of turnpikes opened in violation of the charter rights of turnpike companies, and the injunction granted because of the impairment of the contract of a chartered company. The most

upon railway companies the right to cross highways with their tracks usually provide that the crossing shall be constructed in such a manner as to be safe for travel and if the company fails to construct them in the manner prescribed by the statute it will be liable for maintaining a nuisance.[80] The company may,

that has been made out in this case as a reason for enjoining a grade crossing is that such a crossing will to a certain extent inconvenience the business of the railroad company. The crossing is not through the yards or terminals of the company, but at a place south of its yards, but close enough to be sometimes used for switching purposes when the trains are of unusual length. The extent of such is matter of great conflict and wide difference of opinion as to the amount of inconvenience resulting. That a grade crossing is more dangerous to the public and to the railway company may be conceded. Still it would take a more than ordinary case to justify a court of equity in substituting its judgment for that of the semi-legislative body intrusted with the whole subject of public highways. The case of the Wabash R. v. Defiance, 52 Ohio St. 263, 10 N. E. 89, and upon writ of error in the Supreme Court of the United States, 167 U. S. 88, 102, 17 Sup. Ct. 748, 42 L. ed. 87, was a case which, in one aspect involved the power of a court of equity to restrain the action of a municipality from causing the removal of an overhead street crossing and the making of a crossing at grade. Mr. Justice Brown, speaking for the court, after referring to the modern tendency to avoid grade crossings, said: 'But however this may be, we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised, or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the courts either to praise the wisdom or criticise the unwisdom of such action. The question before us is simply whether the council had the power to make the change, and of this we have no doubt.' The case of the Lake Shore &c. R. Co. v. Chicago &c. R. Co., 97 Ill. 506, and Illinois Central R. Co. v. Chicago, 141 Ill. 509, 30 N. E. 1044, 17 L. R. A. 530, were much stronger applications upon the theory of irreparable injury than that made out here; but in both the court declined to enjoin the opening of the streets; in one instance through the yards of a railway company." But see Pennsylvania R. Co. v. Bogert, 209 Pa. St. 589, 59 Atl. 100.

[80] Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471

to a reasonable degree, change the grade or surface of the highway provided the same be kept in good repair and safe for travel.[81]

§ 1577 (1109). **Crossings above grade.**—The modern policy in reference to the construction of railways over highways is to avoid grade crossings wherever it is possible to do so.[82] It is a valid exercise of the police power for the legislature to require railway companies to construct crossings other than at grade. And the legislature may even compel the company, after the construction of its line, to change grade crossings so as to make the track pass above or below the highway.[83] An act of the

and note; Wasmer v. Delaware &c. R. Co., 80 N. Y. 212, 36 Am. Rep. 608; People v. New York Central &c. R. Co., 74 N. Y. 302; Evansville &c. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. 865. As to when there is no estoppel see Bolivar v. Pittsburgh &c. R. Co., 179 N. Y. 523, 71 N. E. 1141, affirming 88 App. Div. 387, 84 N. Y. S. 678.

[81] Davis v. Chicago &c. R. Co., 46 Iowa 389; Commonwealth v. Hartford &c. R. Co., 14 Gray (Mass.) 379. Under the Virginia statute county roads may be altered for the purpose of avoiding or reducing the number of crossings with consent of the board of supervisors, and when the company has properly petitioned it may compel them to act, so as to either consent or refuse, by mandamus. Carolina &c. Ry. v. Board, 109 Va. 34, 63 S. E. 412.

[82] In Doolittle v. Braford, 59 Conn. 402, 22 Atl. 336, 49 Am. & Eng. R. Cas. 279, it was said: "In the light of these reiterated expressions of the legislative will, it is undeniable that it has become the settled policy of the legislature to abolish grade crossings. This policy has been recognized and seconded by the courts in numerous cases. Town of Suffield v. New Haven &c. Co., 53 Conn. 367, 5 Atl. 366; Woodruff v. Catlin, 54 Conn. 277, 6 Atl. 849; New York &c. R. Co. v. Waterbury, 55 Conn. 19, 10 Atl. 162; Westbrook's Appeal, 57 Conn. 95, 17 Atl. 368, 37 Am. & Eng. R. Cas. 446; Fairfield's Appeal, 57 Conn. 167, 17 Atl. 764, 39 Am. & Eng. R. Cas. 689."

[83] Waterbury's Appeal, 57 Conn. 84, 17 Atl. 355; New York &c. R. Company's Appeal, 62 Conn. 527, 26 Atl. 122; New York &c. R. Co. v. Bristol (Conn.), 55 Am. & Eng. R. Cas. 38, affirmed 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269, 60 Am. & Eng. R. Cas. 577; In re Mayor of Northampton, 158 Mass. 299, 33 N. E. 568, 55 Am. & Eng. R. Cas. 31; Ante, § 789. As to assessment of damages under Massachusetts' statute where grade crossings are abolished, see Providence &c. Co. v. Fall River, 187 Mass. 45, 72 N. E. 338;

kind just referred to is a valid exercise of the police power, and is constitutional.[84] Where the street is constructed by the municipality after the railway has been built, the municipal officers generally have the right to determine whether the street shall

Taunton, In re, 185 Mass. 199, 70 N. E. 48; Norwood, In re, 183 Mass. 147, 66 N. E. 637. In State v. St. Paul &c. R. Co., 98 Minn. 380, 108 N. W. 261, affirmed in 214 U. S. 497, 29 Sup. Ct. 698, 53 L. ed. 1057 and State v. Duluth, 98 Minn. 429, 108 N. W. 269, it is held that the legislature may require railroad companies, without compensation, to construct and maintain crossings with all necessary safety devices, over highways, whether laid out before or after, and that in such a case a city can not alienate the police power, and can not contract to forever abdicate its police power and agree to maintain a viaduct, so constructed at a crossing, at its own expense. See also Chicago &c. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169, affirmed in 232 U. S. 436, 34 Sup. Ct. 400, 58 L. ed. 671; Chicago B. & Q. R. Co. v. Nebraska, Omaha, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 948; Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596; Shortle v. Railway Co., 131 Ind. 338, 30 N. E. 1084; Vandalia R. Co. v. State, 166 Ind. 219, 76 N. E. 980; Newton v. Railway Co., 66 Iowa 422, 23 N. W. 905; Railway Co. v. Mayor, 112 Ga. 782, 38 S. E. 60. And compare City of Newark v. Erie R. Co., 75 N. J. Eq. 20, 71 Atl. 620, and cases there cited; State v. Chicago &c Ry. Co., 135 Minn. 277, 160 N. W. 773; State v. Chicago &c. Ry. Co., 164 Wis. 304, 159 N. W. 919.

[84] See authorities in last preceding note. Pennsylvania R. Co. v. Braddock &c. R. Co., 152 Pa. St. 116, 25 Atl. 780. See also Cincinnati R. & W. R. Co. v. Connersville, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. ed. 1060, affirming 170 Ind. 316, 83 N. E. 503; Clarendon v. Rutland R. Co. 75 Vt. 6, 52 Atl. 1057. Requiring a railroad company to repair, at its own expense, a viaduct and its approaches over a street which did not cross until after the railroad was built, does not impair the obligation of a contract by which the municipality in consideration of a contribution from the company towards the expense of original construction agreed to maintain the viaduct and approaches where the highest court has consistently held that a contract limiting the exercise of legislative and police power in such regard is void, and the exercise of the police power cannot be bargained away or destroyed by agreement in the nature of a compromise. Northern Pac. R. Co. v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630. It is also held that a statute may be constitutional and valid although it requires a railroad company, whenever its right of way crosses a street, to construct a suitable sidewalk. Great Northern Ry. Co. v

be carried over or under the railway tracks.[85] And where the railway is constructed across a highway, and the crossing must be above or below grade, it has been held that the company may choose for itself which crossing shall be constructed, and where it exercises an election in good faith it is not subject to review.[86] Where the company constructs its track over the highway above grade it must not obstruct the highway by piers, abutments, or the like, but must restore it to safe condition for use; and it has been held that at such a crossing the company must bridge the entire width of the highway,[87] unless the highway be such that only a small portion is used for actual travel, when the abutments to support the railway may encroach upon the highway.[88] The crossing must be so constructed that parts of the crossing or material connected with the crossing will not fall and injure persons passing along the highway under the railroad.[89]

§ 1578 (1110). Crossings below grade.—Of the crossings above and below grade the greater number, perhaps, are below grade. Owing to the great weight of railway trains as compared with the weight of vehicles using the highway, it is as a rule much cheaper and safer to construct the crossing so that the

Minnesota, 246 U. S. 434, 38 Sup. Ct. 346, 62 L. ed. 817.

[85] Illinois Central R. Co. v. Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530, 51 Am. & Eng. R. Cas. 528; Smith v. New Haven, 59 Conn. 203, 22 Atl. 146. A city may require the elevation of railroad tracks in the exercise of its police power. Lord v. City of Chicago, 274 Ill. 313, 113 N. E. 597.

[86] People v. New York &c. R. Co., 74 N. Y. 302. See Regina v. Southeastern R. Co., 6 Eng. L. & Eq. 214. But, these matters are now often placed within the jurisdiction of a railroad commission or the like.

[87] Township of Raritan v. Port Reading &c. R. Co., 49 N. J. Eq. 11, 23 Atl. 127, 50 Am. & Eng. R. Cas. 169; Windsor v. President &c. of Delaware &c. Co., 92 Hun 125, 36 N. Y. S. 863. See Jones v. Erie &c. R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916.

[88] Township of Raritan v. Port Reading &c. R. Co., 49 N. J. Eq. 11, 23 Atl. 127, 50 Am. & Eng. R. Cas. 169. See also Gates v. Kansas City &c. Ry. Co., 111 Mo. 28, 19 S. W. 957; Detamore v. Hindley, 83 Wash. 322, 145 Pac. 463, 465.

[89] Kearney v. London &c. R. Co., L. R. 5 Q. B. 411.

highway passes above and over the railway track. We have already seen that where the highway is carried over the track it is the duty of the company to construct a proper bridge and proper approaches and barriers thereto.[90] A company is under no obligation to construct a tunnel for its road under a highway, where the tunnel is such that it would be flooded at intervals, and be an interference with travel on the company's trains.[91] Where the company constructs its tracks below the grade of the highway and carries the highway across its track by an overhead bridge, it has been held that it is only bound to construct such a bridge as will meet the demands of ordinary travel.[92] But, as will hereafter be shown, the duty to restore and keep in repair is continuous, and where a railway company has constructed its tracks at grade and the use of the street afterward becomes so great as to require an overhead crossing as a matter of public safety, the railroad company may be compelled to construct an overhead crossing at its own expense.[93] It has been held erroneous in an action by county commissioners to compel a railroad company to build an undergrade crossing, to receive in evidence proposals of the company for the building of such crossing, made before the action was commenced, for the purpose of showing a necessity for the crossing.[94]

[90] Ante, § 1575.

[91] Kyne v. Wilmington &c. R. Co., 8 Hous. (Del.) 185, 14 Atl. 922.

[92] It has been held that the company is not required to maintain a bridge of sufficient strength to support the weight of heavy electric cars. People v. Adams, 88 Hun 122, 34 N. Y. S. 579. See also St. Louis &c. R. Co. v. Dyer, 87 Ark. 531, 113 S. W. 49. But compare Louisville &c. R. Co. v. Sweet, 142 Ky. 337, 134 S. W. 204. See Briden v. New York &c. R. Co., 27 R. I. 569, 65 Atl. 315.

[93] People v. Union Pacific &c. R. Co., 20 Colo. 186, 37 Pac. 610. See also Wabash R. Co. v. Railroad Com., 176 Ind. 428, 95 N. E. 673; St. Paul, Minn. & M. R. Co. v. St. of Minn. City of Minneapolis, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, affirmed in 214 U. S. 497, 29 Sup. Ct. 698, 53 L. ed. 1057. But see as to keeping pavement below in repair. People v. Illinois Cent. R. Co., 235 Ill. 374, 85 N. E. 606, 18 L. R. A. (N. S.) 915 and note.

[94] State v. Minneapolis &c. R. Co., 90 Minn. 88, 95 N. W. 581.

§ 1579 (1111). Mandamus to compel construction of viaduct. —Where it is the duty of a railroad company to construct a viaduct or bridge over its tracks, it may be compelled to do so by mandamus.[95] This duty may exist and be enforced by mandamus even though there is no express provision in the charter or statute, in regard to the erection of bridges or viaducts. It may arise out of, or be embraced in the duty to restore and keep the highway in repair. Thus, in a leading case, it appeared that the railroad company's charter empowered the company to lay its track across any public highway or street, if necessary on condition that it should put such highway or street "in such condition or state of repair, as not to impair or interfere with its free and proper use." It was held that this was a continuing duty, and that, although the crossing might have been adequate when constructed, yet if by reason of the increase of the business of the railroad, or of the travel upon the street the crossing became dangerous or obstructed such travel, the railway company was bound to provide some other mode of crossing; and as it appeared that the only safe and convenient mode was to carry the street by viaduct under the tracks, it was further held that mandamus would lie to compel the railway company to construct such viaduct, including the abutments and approaches, as well as the bridge for its tracks.[96] So, where a petition for mandamus to compel cer-

[95] State v. Savannah &c. R. Co., 26 Ga. 665; People v. Chicago &c. R. Co., 67 Ill. 118; Boggs v. Chicago &c. R. Co., 54 Iowa 435, 6 N. W. 744; State v. Missouri Pac. R. Co., 33 Kans. 176, 5 Pac. 772; State v. Minneapolis &c. R. Co., 39 Minn. 219, 39 N. W. 153, 35 Am. & Eng. R. Cas. 250; Trenton &c. Co., In re, 20 N. J. L. 659. See State v. New Haven &c. Co., 45 Conn. 331, 348, and also ante, § 1574. In Burlington &c. R. Co. v. People, 20 Colo. App. 181, 77 Pac. 1026, a suit in equity and not mandamus, is held to be the proper remedy.

[96] State v. St. Paul &c. R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; State v. Minneapolis &c. R. Co., 39 Minn. 219, 39 N. W. 153, 35 Am. & Eng. R. Cas. 250; State v. Minnesota &c. R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; Elliott Roads and Streets (3rd ed.), §§ 1011, 781. To the same effect are Cooke v. Boston &c. R. Co., 133 Mass. 185, 10 Am. & Eng. R. Cas. 328; English v. New Haven &c. R. Co., 32 Conn. 240; Maltby v. Chicago &c. Railway Co., 52 Mich. 108, 17 N. W. 717; Attorney General v. Fort St. Union Depot Co., 117 Mich. 609, 76 N.

tain railroad companies to erect a bridge across their tracks showed that the street at that point was crossed by more than twenty tracks, on which trains were continually running; that it was in a populous part of the city; that there were only four streets of which the street in question was one, connecting a part of the city on one side of the tracks, consisting of over twenty thousand inhabitants with the part on the other side, consisting of a much larger number of inhabitants, and that the nearest of the other three streets was several blocks away, it was held that necessity for the construction of a bridge clearly appeared.[97] But it has been held that a railroad company, at least where it erects a bridge at the crossing of a country road, cannot be compelled to construct and maintain it so as to meet the needs of an electric street railway company.[98]

§ 1580 (1112). **Keeping crossing in repair.**—The duty of a railroad company in regard to the restoration and repair of highway crossings is not fully performed and ended by the mere restoration of the highway or the construction of a proper crossing in the first instance. It should keep the crossing in

W. 85; State v. St. Paul &c. Ry. Co., 98 Minn. 38, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. 581, affirmed in 214 U. S. 497, 29 Sup. Ct. 298, 53 L. ed. 1057; Johnston v. Providence &c., 10 R. I. 365; Manley v. St. Helens &c. R. Co., 2 Hurl. & N. 840. See also Cleveland v. City Council of Augusta, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, 644 (citing text); Chicago &c. R. Co. v. State, 158 Ind. 189, 194, 63 N. E. 224, 225; Baltimore &c. R. Co. v. State, 159 Ind. 510, 65 N. E. 508; Vandalia R. Co. v. State, 166 Ind. 219, 76 N. E. 980 (all citing text); Newton v. Chicago &c. R. Co., 66 Iowa 422, 23 N. W. 905, 23 Am. & Eng. R. Cas. 298; New York &c. R. Co. v. State, 50 N. J. L. 303, 32 Am. & Eng. R. Cas. 186. City may compel company to construct and maintain a bridge to carry a street over its tracks when necessary to enable the public to cross safely and conveniently. City of St. Paul v. Chicago &c. Ry. Co., 139 Minn. 322, 166 N. W. 335.

[97] People v. Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610, 10 Lewis' Am. R. & Corp. 371.

[98] Conshohocken R. Co. v. Pennsylvania R. Co., 15 Pa. Co. Ct. 445; People v. Adams, 88 Hun (N. Y.), 122. See also mandamus to require construction of railway under unreasonable ordinance was refused in City of Emporia v. Atchison &c. Ry. Co., 94 Kans. 718, 147 Pac. 1095. See also Houston &c. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850.

reasonably safe condition and repair, with reference both to the use of the same for its own purposes and for ordinary travel upon the highway. Indeed, as to passengers upon its trains it may owe a still higher duty. This duty to keep the crossing in repair is a continuing duty[99] which rests not only upon the original company, but also upon its successors in the ownership and possession of the road.[1] We have already considered this general subject,[2] and will treat of the liability of the company for injuries to travelers upon the highway by reason of the failure to perform this duty, in a subsequent chapter.[3] It may be well, however, to state in this connection, that the obligation to maintain and keep the crossing in repair usually extends only to lawful highways,[4] but if the

[99] Southern R. Co. v. Morris, 143 Ala. 628, 42 So. 17; Chicago &c. R. Co. v. Moffitt, 75 Ill. 524; Pennsylvania &c. R. Co. v. Frund, 4 Ind. App. 469, 30 N. E. 1116; Seybold v. Terre Haute &c. R. Co., 18 Ind. App. 367, 46 N. E. 1054, 1058 (citing text); Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318; Wellcome v. Leeds, 51 Maine 313; Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763, 786, (citing Elliott Roads & Streets, § 1010); State v. Hannibal &c. R. Co., 86 Mo. 13, 29 Am. & Eng. R. Cas. 604; Newark v. Erie R. Co., 72 N. J. Eq. 447, 68 Atl. 413; Metuchen v. Pennsylvania R. Co., 73 N. J. Eq. 359, 69 Atl. 465; People v. New York &c. R. Co., 74 N. Y. 302; Hatch v. Syracuse &c. R. Co., 50 Hun (N. Y.) 64; Windsor v. President &c., 92 Hun 127, 36 N. Y. S. 863; Roxbury v. Central Vermont R. Co., 60 Vt. 121, 14 Atl. 92.

[1] Wasmer v. Delaware &c. R. Co., 80 N. Y. 212, 36 Am. Rep. 608; People v. Chicago &c. R. Co., 67, Ill. 118; Little Miami &c. R. Co. v. Commissioners, 31 Ohio St. 338; Dyer County v. Chesapeake &c. R. Co., 87 Tenn. 712, 11 S. W. 943. As to when the duty begins, see Buchner v. Chicago &c. R. Co., 60 Wis. 264, 19 N. W. 56; Pittsburgh &c. R. Co. v. Commonwealth, 101 Pa. St. 192; Chester v. Baltimore &c. R. Co., 140 Pa. St. 275, 21 Atl. 320.

[2] Ante, §§ 1442, 1570, 1573. See also further to the effect that it may be enforced by statute even though the railroad existed long before the highway. State v. St. Paul &c. Ry. Co., 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298 and note; Illinois Cent. R. Co. v. Copiah County, 81 Miss. 685, 33 So. 502; Illinois Cent. R. Co. v. Swalm, 83 Miss. 631, 36 So. 147; Harriman v. Southern R. Co., 111 Tenn. 538, 82 S. W. 213. But compare State v. Wilmington &c. R. Co., 74 N. Car. 143; Cincinnati &c. R. Co. v. Troy, 68 Ohio St. 510, 67 N. E. 1051.

[3] Post, Chap. LI.

[4] International &c. R. Co. v. Jordan (Tex.), 10 Am. & Eng. R. Cas. 301; Missouri &c. R. Co. v. Long, 27 Kans. 684; Flint &c. R. Co. v.

company has constructed a crossing, and invited or induced people to use it as a public crossing, the duty rests upon the company to use reasonable care to keep it in repair, and it has been even held that this is so where it has merely licensed or acquiesced in the use of a crossing by the public, although it is not in a public road or street.[5] It seems to us that this doctrine is, at best, questionable, and that, in the absence of some governing statute, it should not be extended to strictly private crossings or those which are used only occasionally by certain members of the public without anything in the form of an invitation express or implied.[6] Whether the company has so constructed and maintained a crossing as to make it reasonably safe and convenient, is usually a question for the jury to determine.[7]

§ 1581 (1113). **Rights of abutters.**—We have already considered the rights and remedies of abutters where a railroad is constructed along a street[8] and where viaducts and bridges are built at crossings.[9] We will here consider the rights

Willey, 47 Mich. 88, 10 N. W. 120. Duty to restore exists where town is platted and street dedicated. Racine v. Chicago &c. R. Co., 92 Wis. 118, 65 N. W. 857. See as to when it begins. Pittsburgh &c. R. Co. v. Com., 101 Pa. St. 192; Buchner v. Chicago &c. R. Co., 60 Wis. 264, 19 N. W. 36; Dallas &c. R. Co. v. Able, 72 Tex. 150, 9 S. W. 871.

[5] See Kelly v. Southern &c. R. Co., 28 Minn. 98, 9 N. W. 588, 6 Am. & Eng. R. Cas. 264, distinguished in Missouri &c. R. Co. v. Long, 27 Kans. 684, 6 Am. & Eng. R. Cas. 254, and compare Missouri Pac. R. Co. v. Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. 856; Cross v. Lake Shore &c. R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. 399; Hanks v. Boston &c. R. Co., 147 Mass. 495, 18 N. E. 218.

[6] See Louisville &c. R. Co. v. Miller, 12 Ind. App. 414, 40 N. E. 539; Breneman v. Burlington &c. R. Co., 92 Iowa 755, 60 N. W. 176; Wright v. Boston &c. R. Co., 142 Mass. 296, 7 N. E. 866; Redigan v. Boston &c. R. Co., 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. 520 and note; Gurley v. Missouri Pac. R. Co., 104 Mo. 211, 16 S. W. 11; post, § 1647, where additional authorities on both sides are cited and reviewed.

[7] Roberts v. Chicago &c. R. Co., 35 Wis. 679. See Galveston &c. R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573.

[8] Ante, §§ 1435, 1440.

[9] Ante, § 1441.

of abutters at ordinary crossings. The erection and maintenance of gates in a street at the crossing, in compliance with a valid ordinance for the safety of the public, is not a taking for which the abutting owners are entitled to compensation.[10] Nor, is a railroad company which crosses a highway, under due authority, on a level, without change of grade, liable to the abutters for damages on account of mere inconveniences, such as stoppages or the like, incident to such crossing.[11] In the absence of any constitutional or statutory provision requiring compensation for change of grade or consequential damages it has been held that a railroad company is not liable on account of a mere change of grade, rendered necessary by the construction of its road across a highway in the authorized manner,[12] and this rule has been applied in some cases where it constructed embankments or viaducts, although there is much conflict among the authorities upon the subject.[13] Indeed, it has

[10] Trustees v. Milwaukee &c. R. Co., 77 Wis. 158, 45 N. W. 1086.

[11] Wood v. Stourbridge R. Co., 16 C. B. N. S. 222; Caledonia R. Co. v. Ogilvy, 2 Macq. H. L. Cas. 229; Morgan v. Des Moines &c. R. Co., 64 Iowa 589, 21 N. W. 96, 52 Am. R. 462, 20 Am. & Eng. R. Cas. 67. See also Morris &c. R. Co. v. Newark, 10 N. J. Eq. 352.

[12] Slatten v. Des Moines &c. R. Co., 29 Iowa 148, 4 Am. Rep. 205; Newport &c. R. Co. v. Foote, 9 Bush (Ky.) 264, Whittier v. Portland &c. R. Co., 38 Maine 26; Robinson v. Great Northern &c. R. Co., 48 Minn. 445, 51 N. W. 384; Uline v. New York &c. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Conklin v. New York &c. R. Co., 102 N. Y. 107, 6 N. E. 663; Rauenstein v. New York &c. R. Co., 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768; Wead v. St. Johnsbury &c. R. Co., 64 Vt. 52, 24 Atl. 361. See also Hyde v. Boston &c. R. Co., 194 Mass. 80, 80 N. E. 517; Smith v. Boston &c. R. Co., 181 N. Y. 132, 73 N. E. 679.

[13] In addition to many of the cases cited in last preceding note, see ante, § 1441; Sauer v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. ed. 1176; Alabama &c. R. Co. v. Williams, 92 Ala. 277, 9 So. 203; Colorado Springs v. Stark, 57 Colo. 384, 140 Pac. 794 (subway, municipality liable); Burritt v. New Haven &c. R. Co., 42 Conn. 174; Shrader v. Cleveland &c. R. Co., 242 Ill. 227, 89 N. E. 997, 26 L. R. A. (N. S.) 226 and note; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013, 1135 (subway, municipality liable); Morris v. Indianapolis, 177 Ind. 396, 94 N. E. 705, Ann. Cas. 1915A, 65; Indianapolis &c. R. Co. v. Smith, 52 Ind. 428; Nicks v. Chicago &c. R. Co., 84 Iowa 27, 50 N. W. 222; Buchner v. Chicago &c. R. Co., 60

been said in general terms that "a railroad cannot be laid across a highway without compensation to the owner of the fee."[14] This is a different question, however, from the question of liability for change of grade, for if the construction of a railroad track across a highway is an additional burden and there are any abutters who are entitled to compensation it may still be true that damages occasioned by a change of grade are not an element of such compensation and, on the other hand, damages might be recovered for a change of grade, as for instance, where the constitution or statute so provides, even if there could be no recovery on account of the construction of a crossing without change of grade. We have elsewhere treated so fully of the rights and remedies of abutters where their easement of access or light and air is destroyed and where they are especially injured by the unlawful or negligent acts of the railroad company, that nothing further need be said in this connection.

§ 1582 (1114). **Gates, watchmen and signals at crossings.**— Under its police power, a state or a municipality when authorized, may require railroad companies to keep gates or flagmen at highway crossings, or to give signals, at or near such places by ringing a bell or blowing a whistle.[15] There is some conflict

Wis. 264, 19 N. W. 56, 14 Am. & Eng. R. Cas. 447; Shealy v. Chicago &c. R. Co., 72 Wis. 471, 40 N. W. 145; Pabst Brewing Co. v. Milwaukee, 157 Wis. 158, 147 N. W. 46.

[14] Lewis' Em. Dom. § 118, citing Trustees v. Auburn &c. R. Co., 3 Hill (N. Y.) 567; Starr v. Camden &c. R. Co., 24 N. J. L. 592. But where the railroad company owns its right of way in fee on each side of the street, the adjoining land-owners are not strictly abutters upon that portion of the street crossed by the railroad.

[15] Illinois &c. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. 242; Pittsburgh &c. R. Co. v. Brown, 67 Ind. 45, 33 Am. Rep. 73; State v. East Orange, 41 N. J. L. 127; People v. Boston &c. R. Co., 70 N. Y. 569; Kaminitzky v. Northeastern R. Co., 25 S. Car. 53; Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118, 1122 (citing text); ante, §§ 782, 855, 860. See also Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604; Seibert v. Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72. The New York statute authorizing the court, or judge on application of the local authorities, to order a flagman to be stationed, or gates to be erected, at such crossings is held to be constitu-

among the authorities as to whether such a statute applies where the railroad crosses on a bridge or viaduct above the highway, or the like, or only where the crossing is at grade,[16] but this is usually determined by the particular statute in question. The failure to comply with such a police regulation is considered prima facie evidence of negligence in some jurisdictions and negligence per se in others, but in either case it must be a proximate cause of the injury in order to render the company liable, and even where it is said to be negligence per se it is not, as we understand it, conclusive evidence of actionable negligence in the sense that it may not be open to explanation and excuse. On the other hand, it may be the duty of the company to do more than to merely comply with the statute in order to escape liability, and, even where no such statute or regulation exists, the failure to give signals or to otherwise exercise reasonable care, under the circumstances, may constitute negligence for which the company will be liable to a traveler who is injured thereby while exercising reasonable care on his part.[17] It is frequently provided by statute that signboards

tional. People v. Long Island R. Co., 134 N. Y. 506, 31 N. E. 873. So is the part of the Vermont statute authorizing the public service commission to investigate and require gates in a proper case. Sabre v. Rutland R. Co. 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269, where the general subject is elaborately considered in principal and dissenting opinion and note.

[16] In Johnson v. Southern Pac. R. Co., 147 Cal. 624, 82 Pac. 306, 1 L. R. A. (N. S.) 307; Ruppard v. Chesapeake &c. R. Co., 88 Ky. 280, 11 S. W. 70, 72 L. R. A. 316; and Toledo &c. R. Co. v. Jump, 50 Ohio St. 651, 35 N. E. 1054, it is held to apply even where the railroad crosses on a bridge above the highway; but in Lewis v. Southern R. Co., 143 Ala. 133, 38 So. 1023; Barton v. Southern Ry. Co., 132 Ga. 841, 64 S. E. 1079, 22 L. R. A. (N. S.) 915, and other cases, it is held to apply only to grade crossings. See post § 1652, and note in 1 L. R. A. (N. S.) 307, et seq. As holding that it applies to a crossing of a road though not laid out and maintained at the expense of the county, see St. Louis &c. R. Co. v. Tomlinson, 78 Ark. 251, 94 S. W. 613. See generally St. Louis &c. R. Co. v. Morrison, 73 Kans. 265, 85 Pac. 295 and authorities cited; Ray v. Chesapeake &c. R. Co., 57 W. Va. 333, 50 S. E. 413.

[17] See Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; Lapsley v. Union Pac. R. Co., 50 Fed. 172; Chicago

shall be erected at crossings, and the failure to comply with the statute is at least evidence of negligence.[18] But is not necessarily conclusive of the liability of the company, for it may not be a proximate cause of the injury,[19] or the plaintiff may be guilty of such contributory negligence as will defeat him. Thus, it has been held that the failure to erect a signboard in compliance with the statute is not, of itself, sufficient to justify a recovery by one who is familiar with the crossing,[20] or, by the exercise of ordinary care, ought to have discovered it in time without any signboard,[21] and, in the absence of any statute upon the subject, it has been held that it is for the jury to say whether reasonable care required the erection of such a board at the particular crossing in question, and whether its absence was a proximate cause of the injury.[22] In states requiring the

&c. R. Co. v. Netolicky, 67 Fed. 665; Chicago &c. R. Co. v. Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. 559; Pennsylvania Co. v. Krick, 47 Ind. 368; Gates v. Burlington &c. R. Co., 39 Iowa 45; Atchison &c. R. Co. v. Hague, 54 Kans. 284, 38 Pac. 257, note in 45 Am. St. 278; Linfield v. Old Colony R. Co., 10 Cush. (Mass.) 562, 57 Am. Dec. 124, and note; Loucks v. Chicago &c. R. Co., 31 Minn. 526, 18 N. W. 651; Vandewater v. New York &c. R. Co., 135 N. Y. 583, 32 N. E. 636, 18 L. R. A. 771; Hinkle v. Richmond &c. R. Co., 109 N. Car. 472, 13 S. E. 884, 26 Am. St. 581; Winstanley v. Chicago &c. R. Co., 72 Wis. 375, 39 N. W. 856. But see New York &c. R. Co. v. Hackett (N. J.), 32 Atl. 265; post, §§ 1650, 1651, 1652.

[18] Dodge v. Burlington &c. R. Co., 34 Iowa 276; Lang v. Holiday &c. R. Co., 49 Iowa 469; Denver &c. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pac. 261.

[19] Field v Chicago &c. R. Co., 14 Fed. 332, 8 Am. & Eng. R. Cas. 425. See also Denver &c. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pa. 261; Jennings v. St. Louis &c. R. Co., 99 Mo. 394, 11 S. W. 999; East Tennessee &c. R. Co. v. Feathers, 10 Lea (Tenn.) 103, 15 Am. & Eng. R. Cas. 446. But compare Beisiegel v. New York &c. R. Co., 34 N. Y. 622, 90 Am. Dec. 741, and note; O'Mara v. Hudson River &c. R. Co., 38 N. Y. 445, 98 Am. Dec. 61, and note.

[20] Haas v. Grand Rapids &c. R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268.

[21] Gulf &c. R. Co. v. Greenlee, 62 Tex. 344, 23 Am. & Eng. R. 322; Payne v. Chicago &c. R. Co., 39 Iowa 523, 44 Iowa 236.

[22] Shaber v. St. Paul &c. R. Co., 28 Minn. 103, 9 N. W. 575, 2 Am. & Eng. R. Cas. 185; Heddles v. Chicago &c. R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. 106 and note; Baltimore &c. R. Co. v. Whitacre, 35 Ohio St. 627; Elkins v. Boston &c. R. Co., 115 Mass. 190.

erection of warning signboards at crossings it is not a defense that the statute is openly and commonly violated throughout the state.[23] Neither is it a defense that the delinquent road was in the hands of a receiver.[24] But the mere fact that there is a slight deviation from the statute in the form of a warning sign rightly placed will not sustain a verdict for the plaintiff based solely thereon, where the sign, as constructed, does not deceive travelers and in the case in question the failure to exactly comply with the statute was not the proximate cause of the plaintiff's injuries.[25] Municipal corporations are frequently authorized by the legislature to require safety gates or flagmen or watchmen at crossings by ordinance,[26] but it is usually held that a mere general grant of power to pass necessary ordinances for the general welfare or to control streets is not sufficient to authorize an ordinance requiring safety gates or flagmen at crossings.[27]

§ 1583 (1114a). **Lights at crossings.**—The state under its police power may constitutionally require railroad companies to light their tracks at streets crossed by them. And this power residing in the state may be delegated to cities and towns.[28]

[23] Henn v. Long Island R. Co., 51 App. Div. 292, 65 N. Y. S. 21.

[24] Arkansas Central R. Co. v. State, 72 Ark. 252, 79 S. W. 772.

[25] Wellbrock v. Long Island R. Co., 31 Misc. 424, 65 N. Y. S. 592. See also Hasting v. Southern Ry. Co., 143 Fed. 260.

[26] Chicago &c. R. Co. v. Ottowa, 65 Ill. App. 631; Chicago &c. R. Co. v. Averill, 127 Ill. App. 275, affirmed in 224 Ill. 516, 79 N. E. 654; Missouri &c. R. Co. v. Hackett, 54 Kans. 316, 38 Pac. 294; Green v. Eastern R. Co., 52 Minn. 79, 53 N. W. 808; Seibert v. Missouri Pac. R. Co., 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72. See also City of Council Bluffs v. Illinois Cent. R. Co., 158 Iowa 679, 138 N. W. 891.

[27] Pittsburgh &c. R. Co. v. Crown Point, 146 Ind. 425, 45 N. E. 587, 35 L. R. A. 684; Chesapeake &c. R. Co. v. Harmon, 153 Ky. 669, 156 S. W. 121, 45 L. R. A. (N. S.) 946; Red Wing v. Chicago &c. R. Co., 72 Minn. 240, 75 N. W. 223, 71 Am. St. 482; Pennsylvania R. Co.'s Appeal, 213 Pa. St. 373, 62 Atl. 986, 3 L. R. A. (N. S.) 140; Ravenna v. Penn. Co., 45 Ohio St. 118, 12 N. E. 445.

[28] Chicago &c. R. Co. v. Salem, 170 Ind. 153, 82 N. E. 913, 19 L. R. A. (N. S.) 658; Cincinnati &c. R. Co. v. Sullivan, 32 Ohio St. 152; ante, §§ 668, 724. But it has been held that a company which has ele-

While the municipality may in some respects prescribe the kind of light and the duration of their maintenance, it cannot under the guise of such power require, arbitrarily and without control or restraint, light either in volume or at times, entirely unnecessary for the security and safety of citizens.[29] Thus an ordinance compelling a railroad company to keep a flagman by day and a red lantern by night at a crossing where it had but one track, and it did not appear that the crossing was unusually dangerous or more so than ordinary crossings, was held to be an unreasonable exercise of this power.[30] So, a statute empowering a city to require all railroads to maintain lights similar to those maintained by the city at streets crossed by their tracks, has been held to authorize an ordinance requiring electric lights, such as were used by the city, but not lights of the "arc pattern."[31] Ordinances of this character should specify particularly or with sufficient certainty the character of the light and the time within which the lights are to be maintained.[32] But ordinances doing this in a somewhat general way have been upheld.[33] In one case it was held that an ordinance enacted in conformity with a state law granting cities the power to require lights at street crossings of the character maintained by the city

vated its tracks pursuant to city ordinance cannot be compelled by the city to light the street below, and that an ordinance requiring the company to maintain lights at street crossings is not applicable to such a situation. Chicago v. Penna. Co., 252 Ill. 185, 96 N. E. 833, Ann. Cas. 1912D, 400, 36 L. R. A. (N. S.) 1081.

[29] Cleveland &c. R. Co. v. Connersville, 147 Ind. 277, 46 N. E. 579, 62 Am. St. 418, 37 L. R. A. 175. (But compare Chicago &c. R. Co. v. Crawfordsville, 164 Ind. 70, 72 N. E. 1025); Cleveland v. St. Bernard, 15 Ohio C. C. 588.

[30] Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37.

[31] Shelbyville v. Cleveland &c. R. Co., 146 Ind. 66. See also Cleveland &c. R. Co. v. Connersville, 147 Ind. 277.

[32] Lake Erie &c. R. Co. v. St. Mary's, 14 Ohio C. C. 202; Shelbyville v. Cleveland &c. R. Co., 146 Ind. 66; Chicago &c. R. Co. v. Salem, 166 Ind. 71, 76 N. E. 631.

[33] Chicago &c. R. Co. v. Salem, 170 Ind. 153, 82 N. E. 913, 19 L. R. A. (N. S.) 658; Pittsburgh &c. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 20 L. R. A. (N. S.) 461; St. Mary's v. Lake Erie &c. R. Co., 60 Ohio St. 136, 53 N. E. 795; Cincinnati &c. R. Co. v. Bowling Green, 57 Ohio St. 339, 49 N. E. 121, 41 L. R. A. 422.

on all nights that the city might direct, was not invalid for indefiniteness because it excused the railroad company from lighting the crossing at times when the moon furnished sufficient light and at all times when the city lights were not in operation.[34] On the failure or refusal of a railroad company to comply with an ordinance requiring lights at crossings it has been held that the city council may procure it to be done and may declare a lien upon the real estate of the railroad company within the municipality for the expense.[35] In all cases it is to be understood that the failure of the railroad company to perform this duty of lighting will not relieve travelers attempting to cross the highway from the exercise of reasonable care for their safety.[36]

§ 1584 (1114b). Bell signals.—Crossings are sometimes safeguarded by means of bells which are caused to sound by a current of electricity set in motion by approaching trains when within a given distance of the crossing. This method is regarded as effective for the purpose and is likely to come into general use. There is already authority that a municipality has the power to compel the installation of these bells at particularly dangerous crossings under a statute authorizing municipalities to order the maintenance of flagmen and gates at crossings and to make "such other orders respecting the crossings as may be deemed proper."[37] A railroad company having installed an electric bell signal equipment at a crossing must maintain its efficiency and where a traveler is injured by venturing on a crossing at a time when the bells were not ringing the railroad company cannot successfully urge as a defense that the bells were out of order if this condition had existed for

[34] Chicago &c. R. Co. v. Crawfordsville, 164 Ind. 70, 72 N. E. 1025.

[35] Cincinnati &c. R. Co. v. Sullivan, 32 Ohio St. 152.

[36] Gulf &c. R. Co. v. Riordan, 85 Tex. 511, 22 S. W. 519.

[37] Patchogue Street Crossings, In re, 74 Hun 46, 26 N. Y. S. 293. It has also been held that an ordinance making it unlawful for a street car to cross the track or tracks of a steam railroad until the conductor crosses on foot and signals the motorman is valid. Indianapolis Trac. &c. Co. v. Romans, 40 Ind. App. 184, 79 N. E. 1068.

a time reasonably sufficient to repair them.[38] But if the signal has been abandoned as a failure after a long trial and allowed to remain, though out of order, a person who is in daily use of the crossing will be presumed to know this fact and he cannot, in case of injuries, base his action for damages on the ground that the signal was not in a fit condition to sound warnings.[39] Yet it has been held that the mere fact that he may have crossed before when the bell or gong did not ring is not conclusive,[40] and that the fact that it did not ring on the occasion of the injury may be considered on the question of contributory negligence.[41]

§ 1585 (1114c). Duty to maintain crossings as between lessor and lessee.—The duty to restore and maintain highway crossings is a continuing duty and rests alike on both a road negligent of this duty and its lessee operating the road under a lease thereafter executed.[42] The rule is well supported that a railroad company cannot devolve a primary obligation upon another company without the consent of the state in such a manner as to exonerate itself from performing the duty.[43] It follows therefore that a railroad company leasing its road to another corporation without the consent of the state will still be liable for injuries to persons caused by negligent defects in

[38] Henn v. Long Island R. Co., 51 App. Div. 292, 65 N. Y. S. 21; McSweeney v. Erie R. Co., 93 App. Div. 496, 87 N. Y. S. 836.

[39] Wellenhoffer v. New York &c. R. Co., 66 Hun 634, 21 N. Y. S. 866.

[40] Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179. And the company may be held liable where the bell does not ring and no other equivalent protection is furnished even though the traveler had never crossed before and did not know of the existence of such a bell. Conger v. Baltimore &c. R. Co., 31 App. D. C. 139. See also Louisville &c. R. Co. v. Kimble, 140 Ky. 759, 131 S. W. 790.

[41] Cleveland &c. R. Co. v. Heine, 28 Ind. App. 163, 62 N. E. 455; Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179.

[42] Thayer v. Flint &c. R. Co., 93 Mich. 150, 53 N. W. 216; ante § 1580.

[43] 5 Thomp. Corp. § 6293, Indianapolis Un. Ry. Co. v. Sample, 58 Ind. App. 461, 108 N. E. 400, 404, citing §§ 530, 533, ante. See also Herbert v. Atlanta &c. R. Co., 74 S. Car. 13, 53 S. E. 1001; Smalley v. Atlanta &c. R. Co., 73 S. Car. 572, 53 S. E. 1000. But compare Curtis v. Cleveland &c. R. Co., 140 Fed. 777.

the crossing, though the lessee was in control and operating the road at the time of the accident.[44]

§ 1586 (1114d). **Maintenance where different railroads cross at grade.**—It is the general rule—made so by statute in most states—that both railroad companies at a railroad crossing are required to cooperate in maintaining and keeping such crossing in repair, and are jointly liable for injuries resulting from a neglect of their duty in this respect.[45] In Ohio the statute imposes upon railroad companies, the tracks of whose roads cross each other at common grade, the joint duty and obligation of keeping the crossing in repair and maintaining a watchman thereat, and requires this expense to be borne by the companies jointly. The burden of this duty is common to all the companies, and where either performs the whole duty and pays the whole expense it is entitled to recover from the other its equal proportion thereof.[46] These, however, are matters that depend largely upon statutory provisions, and relate to the crossing of railroads by railroads rather than to the immediate subject of this chapter.

§ 1587 (1114e). **Width of crossings to be maintained.**—The question is sometimes important as to the width of the highway crossing to be maintained by a railroad company. Here it seems a sensible rule that the railroad company must construct and maintain crossings and approaches for the entire width of the street in populous and busy cities where great numbers of vehicles and people use them. But where few people and vehicles use the crossings, the width to be constructed and maintained is to be determined largely by what is reasonably required to accommodate the public travel over such crossings and it has

[44] Freeman v. Minneapolis &c. R. Co., 28 Minn. 443. See also Seymore v. Boise R. Co., 24 Idaho 7, 132 Pac. 427; Lucas v. Perunia &c. R. Co., 171 Ill. App. 1; Quigley v. Toledo R. &c. Co., 89 Ohio St. 68, 105 N. E. 185; Jenkins v. Atlantic &c. R. Co., 89 S. Car. 408, 71 S. E. 1010.

[45] Indiana &c. R. Co. v. Barnhart, 115 Ind. 339, 16 N. E. 121; post, § 1614.

[46] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 16 N. E. 475; post, § 1614.

been observed that this "is fixed, for the time being at least, by the actual crossings and approaches which are made by the railroad companies with the acquiescence of the public and the public authorities."[47]

§ 1588 (1115). **Accidents and injuries at crossings.**—The subject of injuries at crossings and the relative rights and duties of the company and of travelers, will be treated in a subsequent chapter. The company is liable to a traveler upon the highway who is injured by a collision with its train at a crossing on account of its negligence, where he is not guilty of contributory negligence, and is also liable for wilfully injuring him, notwithstanding he may be guilty of contributory negligence, or where the exercise of reasonable care upon its part would have prevented the injury after it discovered, or in a proper case ought to have discovered, his danger and inability to take care of himself. So, it is generally liable where a traveler, without contributory negligence is injured by defects in the track or crossing which it was the duty of the company to keep in repair.[48] But it has been held that if the construction of an approach to a crossing does not make the street more dangerous than it was before the railroad was built, the company is not required to correct defects that existed prior thereto.[49]

[47] Cleveland &c. R. Co. v. Johns, 106 Ill. App. 427, citing Bloomington v. Illinois Central R. Co., 154 Ill. 539, 39 N. E. 478; Illinois Central R. Co. v. Truesdell, 68 Ill. App. 324. See also Ellis v. Wabash &c. R. Co., 17 Mo. App. 126. Compare Radnor v. Philadelphia &c. R. Co., 214 Pa. St. 299, 63 Atl. 694; Commonwealth v. Delaware &c. R. Co., 215 Pa. St. 149, 64 Atl. 417; State v. Northern Pac. R. Co., 36 Minn. 207, 110 N. W. 975.

[48] Post, Ch. LI. See also St. Louis &c. Ry. Co. v. Smith, 118 Ark. 72, 175 S. W. 415, 416 (citing text).

[49] Whitby v. Baltimore &c. R. Co., 96 Md. 700, 54 Atl. 674.

CHAPTER XLIX.

CROSSING OF RAILROADS BY RAILROADS.

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§ 1595 (1116). **Right of one railroad to cross another.**—The general rule is that every railway company acquires its franchises, rights and privileges upon condition that its tracks may be crossed by the tracks of other railway companies. Rights of way are acquired subject to the right of the public to have other roads, and whenever it is necessary for one railway company in the construction of its line to cross the right of way of another company, the right to cross that company's line, subject to certain conditions hereafter referred to, always exists.[1] This

[1] St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274; Newcastle &c. R. Co. v. Peru &c. R. Co., 3 Ind. 464; Chicago &c. R. Co. v. Chicago &c. R. Co., 91 Iowa 16, 58 N. W. 918; Fitchburg R. Co. v.

right is based on public interest and necessity. The rights of the public are superior to the interests of any particular railroad company, and the public have a right to demand the construction of railroads across the lines of other railway companies so long as the rights of the companies crossed are not materially and unlawfully impaired. The right which any particular company acquires to its line and right of way is not, in this sense, exclusive; it is taken subject to the exercise of the right of eminent domain in favor of the public or public corporations.[2] And

New Haven &c. R. Co., 134 Mass. 547; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co., 35 Mich. 265, 24 Am. Rep. 545, and note; St. Louis &c. R. Co. v. St. Louis &c. R. Co., 111 Mo. 666, 55 Am. & Eng. R. Cas. 17; Jersey City &c. R. Co. v. Central &c. R. Co., 48 N. J. Eq. 379, 22 Atl. 728, 49 Am. & Eng. R. Cas. 256; Morris &c. R. Co. v. Central &c. R. Co., 31 N. J. L. 205; Buffalo &c. R. Co. v. New York &c. R. Co., 72 Hun 587, 25 N. Y. S. 155; Boston &c. R. Co., Matter of, 79 N. Y. 64; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604, 16 Am. Ry. R. 291, 6 Am. & Eng. Encyc. Law, p. 537; Western Penn. R. Co.'s Appeal, 99 Pa. St. 155; South Carolina &c. R. Co. v. Columbia &c. R. Co., 13 Rich. Eq. (S. Car.) 339; Central &c. R. Co. v. Woodstock R. Co., 50 Vt. 452. "The right of one railroad to cross another which is intersected by its route, is so plainly essential to its construction for any considerable distance that it has become indisputably established by implication from mere authority to build a railroad between given points." National Docks &c. R. Co. v. State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. 421, 4 Lewis' Am. R. Corp. 560, 47 Am. & Eng. R. Cas. 87, citing Morris &c. R. Co. v. Central R. Co., 31 N. J. L. 205; State v. Easton &c. R. Co., 36 N. J. L. 182; New Jersey &c. R. Co. v. Long Branch Commissioners, 39 N. J. L. 28; State v. Drummond, 46 N. J. L. 644. "There is no doubt as to the right of one railroad company, upon the payment of compensation, to construct its road across that of another road already in existence, but the terms and conditions upon which it can be done are such as the law prescribes." Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 116 Ind. 578, 19 N. E. 440.

[2] The rule is very clearly expressed in the recent case of Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599, 24 S. W. 478, 57 Am. & Eng. R. Cas. 624, in the following language: "The rights of defendants in building their road, and the acquisition of their right of way and switch grounds, were by no means exclusive. They accepted their charter and franchises, and own and use their tracks, subject to the power of the state to authorize the construction of other railroads across

the fact that a proposed crossing may inconvenience the company whose line is crossed is no excuse for not granting the crossing.[3] The right of one railway company to cross the right of way of another company does not necessarily depend on express authority contained in the charter of the company seeking the crossing; it may exist, although no such express power is given in its charter.[4] But where a company was given power by its charter to cross all railroads laid or to be laid on a certain street, it was held that an unlimited right to cross was not conferred, but only such as would enable the company to build along the street; and that if the track could be built along the street without crossing the tracks of other companies, the company seeking the crossings would be permanently enjoined from attempting to cross.[5] The right to cross exists in

their tracks, whenever the public welfare may require. Neither priority in the date of one charter over another, nor the prior location or construction of the one road over the other, affects this right." The court cited the following cases: Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604; Lake Shore &c. R. Co. v. Chicago &c. R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440; East St. Louis &c. R. Co. v. East St. Louis &c. R. Co., 108 Ill. 265, 17 Am. & Eng. R. Cas. 163; Hannibal v. Hannibal &c. R. Co., 49 Mo. 480; Kansas City &c. R. Co. v. St. Joseph R. Co., 97 Mo. 457, 3 L. R. A. 240.

[3] Butte &c. R. Co. v. Montana &c. R. Co., 16 Mont. 504, 41 Pac. 248, 31 L. R. A. 298, 50 Am. St. 508, where it was said: "That railroad crossings are inconvenient particularly when they are on grade, and frequent, is indisputable. But the law, in regarding railroads as public necessities has not extended its generous privileges to them altogether without some possible attending inconveniences. Among the latter are awful crossings, intersections, and connections of a rival company legally competing for the transportation of freight."

[4] Morris &c. R. Co. v. Central &c. R. Co., 31 N. J. L. 205. The right to construct a railroad between certain termini carries with it, by necessary implication, the right to cross other railway tracks between those termini. Perry County &c. R. Co. v. Newport &c. R. Co., 150 Pa. St. 193, 24 Atl. 709. The place and manner of crossing are matters that are now frequently left to railroad or public service commissions to determine under late statutes. See Newport News &c. Co. v. Hampton Roads &c. Co., 102 Va. 847, 47 S. E. 858. State v. Railroad Com., 140 Wis. 145, 121 N. W. 919.

[5] Market Street &c. R. Co. v. Un-

cases where the line sought to be crossed was acquired by purchase the same as in cases where it was acquired by the right of eminent domain, and property devoted to a railroad use is entitled to the same protection against an impairment of that use, whether acquired by purchase or by the right of eminent domain.[6] The question as to whether or not a railway company is entitled to invoke the exercise of the right of eminent domain in its favor or to have the right of eminent domain exercised in the matter of railway crossings, is not conclusively determined by the fact that the road may have been organized for private purposes. The true test is whether or not the road is one that the public have a right to use and enjoy. If the road is such a one it may successfully invoke the aid of the right of eminent domain to secure a crossing over the tracks of another road.[7]

§ 1596 (1117). **Crossings secured by agreement of companies.** —The right of one railroad company to cross the track of another may be acquired in either one of two ways, that is, by contract between the companies, or under the provisions of statutes, authorizing the condemnation of such crossings.[8] In this section we propose to discuss the question of crossings secured by agreement of the companies. Crossings secured under statutory authority will be discussed in a subsequent section.[9] Railroad companies being free to contract in reference to the matters concerning the purposes for which they

ion &c. R. Co., 10 Phila. (Pa.) 43. But we suppose that under the settled rule that a railroad company acting in good faith may choose its own location, it may cross an existing road at such places and as often as it may be necessary to enable it to discharge its duty to the public.

[6] See Providence &c. R. Co., In re, 17 R. I. 324, 21 Atl. 965.

[7] Colorado &c. R. Co. v. Union Pac. R. Co., 41 Fed. 293; Butte &c. R. Co. v. Montana &c. R. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. 508. If, however, the railroad is a purely private one, and cannot be used or enjoyed by the public, it cannot exercise the right of eminent domain. See ante, § 1206.

[8] Chicago &c. R. Co. v. Cincinnati &c. R. Co., 126 Ind. 513, 26 N. E. 204. Or under order of a railroad commission or the like invested by statute with jurisdiction and authority in the premises.

[9] Post, § 1598.

are organized and matters connected with their legitimate business, it follows that they may properly and lawfully contract with each other in reference to crossing each other's tracks and lines. Courts look with favor upon contracts by which two railway companies mutually agree upon the place, manner, compensation, and other matters connected with a crossing of their lines.[10] Indeed, it is expressly provided in many of the statutes giving one railroad company the right to cross the line of another that the statutory right thereby given can not be invoked until the companies have made an effort to agree and have failed or are unable to agree.[11] The location and manner of crossing may be determined by agreement, provided the agreement contemplates such a crossing as the law allows, and the company which desires the crossing may agree not only to construct the crossing at its own expense, but to keep and maintain it in good order and repair.[12] A stipulation

[10] The supreme court of Pennsylvania thus expressed itself on the wisdom of such contracts: "The litigant parties to this contention undertook, wisely, to settle the terms upon which the crossing of their tracks should be conducted, by an agreement which seems to us to be extremely sensible, plain and simple." Cornwall &c. R. Co. Appeal of, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889, and note, 42 Am. & Eng. R. Cas. 233. See also Chicago &c. Ry. Co. v. Old Colony Trust Co., 216 Fed. 577.

[11] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 116 Ind. 578, 19 N. E. 440; Chicago &c. R. Co. v. Cincinnati &c. R. Co., 126 Ind. 513, 26 N. E. 204; Boston &c. R. Co., Matter of, 79 N. Y. 64; Boston &c. R. Co., Matter of, 79 N. Y. 69; Richmond &c. R. Co. v. Durham &c. R. Co., 104 N. Car. 650, 10 S. E. 659, 40 Am. & Eng. R. Cas. 488; "The petitioner had no right to resort to the court until a failure to agree as to the matter specified. Such failure was a condition precedent to any standing in court; and there could be no failure or inability to agree, within the meaning of the statute, until some efforts to agree had in good faith been made." Lockport &c. R. Co., Matter of, 77 N. Y. 557, 563. See post, § 1598.

[12] See Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62; Seattle &c. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. 866; Hydell v. Toledo &c. R. Co., 74 Ohio St. 138, 77 N. E. 1066. In the last case cited it is held that companies may agree, as between themselves, upon the terms of crossing, including the compensation for the right to so cross and the payment of the ex-

that the company desiring the crossing shall have the "perpetual and free use of the right of way" of the other company at such point not only contemplates its uninterrupted use, but also, relieves the crossing company from the payment of compensation other than that agreed upon for the crossing.[13] So, where one company agreed for a certain consideration that another company should have the right to cross its main and side tracks and afterwards permitted the latter to construct its road and locate its right of way over a strip of ground owned by the former, but not devoted to public use, it was held that the first company could not thereafter enjoin the second company from constructing a side-track on said strip of ground within the limits of its right of way, so long, at least, as the same did not affect the operation of trains on the first company's road or in any way interfere with the transaction of its business.[14] And it has been held that the mere commencement of an action by one company to condemn a crossing over the road of another would not prevent them from afterwards entering into an agreement fixing their rights.[15]

§ 1597 (1118). Enforcing agreement as to crossing.—Since railway companies may lawfully contract in reference to crossings over each other's tracks it follows that there must be a remedy for the aggrieved party in case of a breach of such contract. The general rule is that the law applicable to ordinary contracts is applicable to such contracts and that the remedies are, in the main, the same as in cases of breach of contracts between individuals. A contract between two railway companies by which one receives the right to construct

pense of constructing and maintaining the crossing and the installing and maintaining of an interlocking system, as well as to which of them shall employ, control, and pay the necessary flagman or towerman to operate the interlocking system.

[13] Alabama &c. R. Co. v. South &c. R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. 401. See Illinois Cent. R. Co. v. Chicago &c., 122 Ill. 473, 13 N. E. 140.

[14] Chicago &c. R. Co. v. Cincinnati &c. R. Co., 126 Ind. 513, 26 N. E. 204.

[15] Baltimore &c. R. Co. v. Wabash R. Co., 31 Ind. App. 201, 67 N. E. 544.

its line over the right of way of the other is, however, usually of such a nature that it is not possible to redress the breach of such a contract by a mere recovery of money damages.[16] The usual remedy in a case of this kind is by a resort to equity for a specific performance of the contract. This remedy has been sought and applied in a number of cases.[17] Where the two companies have voluntarily entered into the contract, equity will not refuse to enforce the contract on the ground that it is not equitable in all its parts. The courts will not decide whether the contract was for the best interests of the parties, or wise or discreet, or profitable or unprofitable or otherwise, as those were questions for the companies to decide before entering into the contract.[18] But where two companies entered into a contract concerning a crossing of their tracks, by the terms of which one company was bound to keep the crossing in repair, the contract providing that if such company failed, after thirty days' notice, to renew or repair the crossing, the other company could do so at the expense of the former company, the court held that a breach of that part of the contract entailed only a money liability and a court of equity would not retain jurisdiction of a case involving the validity of the contract for the sole purpose of enforcing the clause referred to.[19]

[16] Appeal of Cornwall &c. R. Co., 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889 and note, 42 Am. & Eng. R. Cas. 233.

[17] South & North &c. R. Co. v. Highland Avenue &c. R. Co., 98 Ala. 400, 39 Am. St. 74, 57 Am. & Eng. R. Cas. 271; Rome &c. R. Co. v. Ontario &c. R. Co., 16 Hun (N. Y.) 445. "The enforcement of such a contract as the one made between these parties can only be secured by means of a decree in equity; an action at law for breach of its terms would be of no avail. It would not be possible to represent the consequences of a breach by money damages, and a literal performance of its stipulations is essential, not only in the interests of the contracting parties, but also in the interests of the traveling public." Appeal of Cornwall &c. R. Co., 125 Pa. St. 232, 11 Am. St. 889 and note, 42 Am. & Eng. R. Cas. 233.

[18] South & North &c. R. Co. v. Highland Avenue &c. R. Co., 98 Ala. 400, 13 So. 682, 39 Am. St. 74, 57 Am. & Eng. R. Cas. 271.

[19] South & North &c. R. Co. v. Highland Avenue &c. R. Co. 98 Ala. 400, 13 So. 682, 39 Am. St. 74, 57 Am. & Eng. R. Cas. 271.

§ 1598 (1119). Crossings secured under statutory authority. —Where companies fail, or are unable to agree upon the terms on which their lines shall cross, resort must usually be had to statutory proceedings to secure the crossing. In nearly all of the states statutes are in force prescribing the terms upon which one company may secure a crossing over another company's line or right of way.[20] Such statutes are valid so long as they do not violate some constitutional provision against the taking of property without due compensation, or take away from the person in whose favor damages may be assessed the constitutional right to a hearing. But it has been held that a statute, which does not provide for compensation to the company whose line is crossed, is unconstitutional upon the ground that the crossing is deemed such a taking of property within the provision of the constitution that compensation must be made.[21] So a statute which provided that the assessment of damages should be made by commissioners, but did not provide that there should be an appeal from their decision, was held unconstitutional on the ground that it violated a provision of the constitution which prohibited the general assembly from depriving any person of an appeal from any preliminary assessment of damages made by reviewers or otherwise.[22] Statutes authorizing one company to condemn a cross-

[20] In Texas the state constitution contains a provision that railroads shall have the right to cross each other's lines. It was held that this did not of itself give the right to cross, but that there must be some act of the legislature fixing the manner in which the right should be exercised. Missouri &c. R. Co. v. Texas &c. R. Co., 10 Fed. 497. See San Antonio &c. R. Co. v. State, 79 Tex. 264, 14 S. W. 1063, 45 Am. & Eng. R. Cas. 586.

[21] Memphis &c. R. Co. v. Birmingham &c. R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166; Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; Georgia &c. R. Co. v. Columbus &c. R. Co., 89 Ga. 205, 15 S. E. 305, 51 Am. & Eng. R. Cas. 538. A statute which provides that the company whose road is crossed shall bear part of the expense of making the crossing has been held unconstitutional. Toledo &c. R. Co. v. Detroit &c. R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875. Contra, Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 16 N. E. 475.

[22] Memphis &c. R. Co. v. Birmingham &c. R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166, 57 Am. & Eng. R. Cas. 639.

ing over another company's line usually provide that an attempt must be made by the companies to agree upon the matter of the crossing between themselves. Where such a provision is found in the statute, it has the effect of a condition precedent to the right to invoke the aid of the statute, and a complaint or instrument to condemn under the statute must show that the companies failed or were unable to agree.[23] The things which the statutes require are in their nature jurisdictional, and the petitioner must affirmatively show that the provisions of the statute have been complied with or the court will not assume jurisdiction.[24] If there is a waiver of an agreement or of an effort to agree, that fact should be alleged in the petition.[25] Negotiations had with officers of the road sought to be crossed, who assume to act in its behalf, although they have no authority to so act, will be sufficient to constitute an effort to agree, unless the person with whom such officers act has knowledge of their lack of authority.[26] The burden of proof has been held to be upon the petitioner to show that there was a failure to agree.[27] It must be made to appear before a crossing will be granted, when so required by the statute authorizing the condemnation, that the crossing is necessary.[28]

[23] St. Louis &c. R. Co. v. Southwestern Tel. &c. Co., 121 Fed. 276, 282 (citing text); Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 116 Ind. 578, 19 N. E. 440; Toledo &c. R. Co. v. Detroit &c. R. Co., 62 Mich. 564, 4 Am. St. 875; Lockport &c. R. Co., Matter of, 77 N. Y. 557; Boston &c. R. Co., Matter of, 79 N. Y. 64; Boston &c. R. Co., Matter of, 79 N. Y. 69; Richmond &c. R. Co. v. Durham &c. R. Co., 104 N. Car. 658, 10 S. E. 659; Seattle &c R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. 866. See Chicago &c. R. Co. v. Kansas City &c. R. Co., 110 Mo. 510, 9 S. W. 826. It has been held, however, that the lapse of a month, after the company desiring to cross has made a proper proposition for such crossing to the other company, without any response thereto by the latter, is sufficient to justify a finding that they were unable to agree. Eastern Wisconsin R. &c. Co., In re, 127 Wis. 641, 107 N. W. 496.

[24] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 116 Ind. 578, 19 N. E. 440.

[25] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 116 Ind. 578, 19 N. E. 440.

[26] Saratoga &c. R. Co., In re, 58 Hun 287, 12 N. Y. S. 318.

[27] Lockport &c. R. Co., In re, 77 N. Y. 557.

[28] St. Paul &c. R. Co., In re, 37 Minn. 164, 33 N. W. 701, 30 Am. &

The company seeking the crossing must ordinarily state in its petition to condemn the point and manner of crossing, so as to afford to the commissioners sufficient information to form a basis on which they can calculate the compensation to be paid.[29] After the filing of such a petition or instrument to condemn as is sufficient to give the court jurisdiction, the determination of the place of crossing and the amount of damages

Eng. R. Cas. 294. See also State v. District Court, 35 Minn. 461, 29 N. W. 60; Seattle &c. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. 866. An absolute necessity need not appear. If it appear that the proposed crossing is reasonably necessary to enable the company seeking the crossing to carry out the project of the construction of its line the right to cross will be adjudged. Colorado &c. R. Co. v. Union Pac. R. Co., 41 Fed. 293. In Butte &c. R. Co. v. Montana &c. R. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. 508, the following statement from Mobile &c. R. Co. v. Alabama &c. R. Co., 87 Ala. 501, 6 So. 404 was quoted with approval: "It may be observed generally that 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view under the particular circumstances of the case." See also Anniston &c. R. Co. v. Jacksonville &c. R. Co., 82 Ala. 297, 2 So. 710; Peoria &c. R. Co. v. Peoria &c. R. Co., 66 Ill. 174; New York &c. R. Co. v. Boston &c. R. Co., 36 Conn. 196. But in Pennsylvania it is held that, to justify such a taking, there must be "a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It must not be created by the company for its own convenience or for the sake of economy." Pennsylvania Railroad Co.'s Appeal, 93 Pa. St. 150. See also to the same effect, Appeal of Sharon R. Co., 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. 133 and note; Appeal of Pittsburgh &c. R. Co., 122 Pa. St. 511, 6 Atl. 364, 9 Am. St. 128. It seems to us that the Pennsylvania cases go a little too far in declaring and enforcing the doctrine of absolute necessity. The cases of that state, at least, go much further than the cases in any other jurisdiction, and are opposed to the weight of authority. In Wisconsin it is held that the necessity of the crossing is to be determined by the legislature, and not by the court or commissioners. Eastern Wisconsin R. &c. Co., In re, 127 Wis. 641, 107 N. W. 496.

[29] Lake Shore &c. R. Co. v. Chicago &c. R. Co., 100 Ill. 21; Lake Shore &c. R. Co. v. Chicago &c. R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440.

is usually left with commissioners appointed for that purpose. Since the procedure in these cases depends so largely upon the terms of the statute under which the proceedings to condemn, are prosecuted, and since the statutes in the different states are so dissimilar, it is unsafe to attempt to lay down rules that will be applicable to all cases. As a general rule, a commission appointed to determine a crossing and to fix the amount of damages, has no power to change the location described in the petition,[30] unless the statute expressly confers upon the commission power to locate the crossing.[31] A broad discretion is usually vested in the commissioners as to the manner in which the crossing shall be made. It has also been held that the award of the commissioners stands in the place of a contract between the companies, and may be enforced in the same way as if it had been made by voluntary agreement,[32] and in such award it has been held proper for the commissioners to provide for all the details of construction and operation of the crossing which the companies might have agreed upon between themselves in case they had been able to agree.[33] It

[30] Central &c. R. Co., In re, 1 Thomp. & C. (N. Y.) 419. But see, as to power of the court in West Virginia, Wellsburg &c. R. Co. v. Panhandle Tract. Co., 56 W. Va. 18, 48 S. E. 746; and see post, § 1599.

[31] A decision of the commissioners, as to the necessity for the manner of crossing and the award therefor, is final unless appealed from. Union Terminal &c. R. Co. v. Board, 54 Kans. 352, 38 Pac. 290. In Maine, and some other states, the whole question of the construction of railroad crossings is left to the railroad commissioners, and their decision is final unless an appeal is taken as provided by statute. Boston &c. R. Co. v. Saco Valley &c. Co., 98 Maine 78, 56 Atl. 202.

[32] In Chicago &c. R. Co. v. Kansas City &c. R. Co., 110 Mo. 510, 19 S. W. 826, it was said: "It is perfectly clear, we think, that the statute intended the award of the commissioners to stand as a contract between the parties; and we are also of the opinion that the parties have the same rights, and we may enforce the award, the same as if it had been their voluntary agreement." See Winona &c. R. Co. v. Chicago &c. R. Co., 50 Minn. 300, 52 N. W. 657.

[33] Chicago &c. R. Co. v. Kansas City &c. R. Co., 110 Mo. 510, 19 S. W. 826. In this case it was held that the commissioners had power to award that temporary pile piers should be replaced within a year by stone masonry.

is the duty of the commissioners, after they have agreed upon the crossing and the matters for which they were appointed, and have prepared their report, to present it to the court by which they were appointed, or in which the petition seeking the crossing was filed. Such reports will not be held invalid for any informal defect. Thus it has been held that the report of the commissioners need not show that the commissioners viewed the premises,[34] and a report showing that the commissioners allowed the company seeking the crossing a latitude of ten feet in which to make their connections, explaining that this latitude was necessary in order to secure the proper alignment and connections of the frogs, was held valid.[35] When the report of the commissioners has been filed, the matter may be said to be in the hands of the court until action is taken on the report, either confirming or disaffirming it, and the safest course for a condemning company to pursue would be to wait until action is taken on the commissioners' report before commencing the actual construction of the crossing.[36]

§ 1599 (1120). **Location of crossing.**—Where two companies agree upon a crossing of their lines the location of the crossing can be fixed once for all by the agreement. But where the companies are not able to agree upon a crossing and resort must be had to statutory authority to condemn a crossing the point of crossing often becomes a matter of much contention between

[34] St. Louis &c. R. Co. v. St. Louis &c. R. Co., 100 Mo. 419, 13 S. W. 710.

[35] St. Louis &c. R. Co. v. St. Louis. &c. R. Co., 100 Mo. 419, 13 S. W. 710.

[36] See Richmond &c. R. Co. v. Durham &c. R. Co., 104 N. Car. 658, 10 S. E. 659, where the crossing company proceeded without attempting to agree or to condemn under the statute. See also Toledo &c. R. Co. v. Detroit &c. R. Co., 63 Mich. 645, 30 N. W. 595. In Missouri the determination of the commissioners as to the point and manner of crossing is not conclusive, but is open to review by the court. State v. Dearing, 173 Mo. 492, 73 S. W. 485. But the other company has no right, pending appeal, to stop the physical crossing by the company that has secured an adjudication in the lower court giving it the right to cross. Vandalia R. Co. v. Lafayette &c. R. Co., 175 Ind. 391, 94 N. E. 483.

the parties and can only be settled by the courts, unless the statute confers upon one company the power to name the point of crossing. The general rule is that the point of crossing sought should be designated in the petition or instrument to condemn and that point is usually the point at which the crossing is made.[37] The point of crossing may be subject to slight change by the commissioners for it is not always possible in a petition to condemn to designate with mathematical certainty the exact point of crossing.[38] A crossing should be so located as to do no unnecessary injury to the line to be crossed, and the theory of some of the cases is that in giving a company power to cross another company's line and to locate the point of crossing the condemning company will always seek a point where the injury will be as small as possible. So far as consistent with the performance of the object for which the condemning company is organized, its interest, as well as the interest of the company whose line is to be crossed, demands that the condemning company should locate a crossing where the least injury will be done and where the consequential damages will be as small as possible.[39] Where there is dispute as

[37] Central &c. R. Co., In re, 1 Thomp. & C. (N. Y.) 419.

[38] The court is not bound to fix the exact point mentioned in the petition as the point of crossing. If there is an identity of purpose of the crossing petitioned for, and that fixed by the court, that will be sufficient. State v. District Court, 35 Minn. 461, 29 N. W. 60.

[39] The supreme court of Illinois, in speaking of the power of the condemning company to designate the point of crossing, said: "The security against a wanton and arbitrary exercise of this power, upon mere whim or caprice, and that in all cases the point and manner of taking selected will be that least injurious to the owner and yet suited to the public necessity, is found in the fact that such corporations will be induced by considerations of their own best interest to select, in making such crossings, that practical place and that practical mode which will be the least detrimental to the owner, because the corporation so selecting is required by law to make the owner full compensation, and the more injurious to the owner the place selected and the mode chosen the greater will be the amount of necessary compensation to be paid. It is assured that no corporation formed under this act will ever do so foolish a thing as to demand, under these proceedings, from the owners of an inter-

to the best point of crossing and the location is left to the court the matter is to be determined as a question of fact upon all the evidence in the case.[40]

§ 1600 (1121). Franchise must not be impaired.—The general rule is that one railroad will not be allowed to cross another at such a place or in such a manner as to impair the franchise of the company across whose line the crossing is sought.[41] When there is a mere crossing of one railroad over another at a point where there is nothing but the track of the company whose line is crossed, the franchise is not thereby impaired for the crossing can be used by both companies, and the ability of both companies to perform their public duties does not come in conflict.[42] In such a case the trains of both companies can

vening railroad, the privilege of crossing at a point and in a mode so destructive of the interests of such owners that full compensation therefor will be so enormous that the new company could get no profit or gain by the payment thereof." Lake Shore &c. R. Co. v. Chicago &c. R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440.

[40] California &c. R. Co. v. Southern Pac. Railroad Co., 67 Cal. 59, 7 Pac. 123; Minneapolis &c. R. Co., In re, 36 Minn. 481, 32 N. W. 556, 30 Am. & Eng. R. Cas. 279.

[41] The rule is thus stated in National Docks &c. R. Co. v. State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. 421, 4 Lewis Am. R. & Corp. 560: "As has been stated, in the acquisition of a right to cross, the ability of the existing company to fully, fairly and freely exercise its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another. The purpose is to preserve, multiply and maintain highways for the development of the country and the general public benefit, and this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of land, used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such use should not yield, if the proposed interference with it is necessary, and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchise of the company whose road is crossed."

[42] Boston &c. R. Co., In re, 79 N. Y. 64; State v. Dover &c. R. Co., 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87; New Jersey &c. R. Co. v. Long Branch Commissioners, 39 N. J. L. 28; Hornellsville &c. R. Co. v. New York &c. R. Co., 31 N. Y. S. 745.

run subject only to the slight inconvenience of being required to stop at the crossing. Such an inconvenience does not amount to an impairment of a company's franchise. But where a crossing is sought at such a point that some permanent improvement of the company whose line is already constructed will be taken and completely destroyed, this is held to be an impairment of the franchise, and a crossing at such a point and in such a manner will usually be denied.[43] "The manner of crossing is not to be destructive of the ability of the road crossed to fully and freely exercise its franchises."[44] Where, however, the proposed crossing was near the edge of a yard of the company whose line was to be crossed so that about 180 feet of storage track was destroyed, it was held that such a crossing would not constitute an impairment of the franchise of the company crossed.[45] It is no excuse for the impairment of a company's franchise that the company seeking the crossing is not able to pay the expense of such a crossing as would not impair the franchise of the company crossed.[46] No distinction can be made on the basis of the wealth of the company seeking the crossing. In those cases where the proposed crossing would totally destroy a part of a permanent yard or permanent buildings or structures, the condemnation of the crossing will as a rule be enjoined. But it must clearly appear that such impairment of

[43] Pittsburgh &c. R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128; Boston &c. R. Co. v. Lowell &c. R. Co., 124 Mass. 368; Central &c. R. Co. v. Ft. Clark &c. R. Co., 81 Ill. 523.

[44] National Docks &c. R. Co. v. State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. 421, 4 Lewis Am. R. & Corp. 560. See also State v. Easton &c. R. Co., 36 N. J. L. 181; New Jersey &c. R. Co. v. Long Branch Commissioners, 39 N. J. L. 28; State v. Dover &c. R. Co., 43 N. J. L. 528; State v. Drummond, 46 N. J. L. 644; Jersey City &c. R. Co. v. Central R. Co., 48 N. J. Eq. 379, 22 Atl. 728, 49 Am. & Eng. R. Cas. 256.

[45] Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599, 24 S. W. 478, 57 Am. & Eng. R. Cas. 628. See also Norfolk &c. R. Co. v. Tidewater R. Co., 105 Va. 129, 52 S. E. 852.

[46] Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128, 28 Am. & Eng. R. Cas. 266; Pennsylvania Co.'s Appeal, 93 Pa. St. 150; Perry County R. Co. v. Newport &c. R. Co., 150 Pa. St. 193, 24 Atl. 709, 55 Am. & Eng. R. Cas. 12.

the franchise will take place. A mere prospective permanent use of the grounds or lands across which the crossing is sought must give way to the necessities of the petitioning company.[47] "Mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches upon the greater necessities of the other franchise."[48]

§ 1601 (1122). **Crossings at grade.**—The tendency of modern legislation and judicial authority is to discourage the construction of grade crossings of railways whenever it is possible to avoid the same,[49] at least unless some interlocking device is

[47] Colorado &c. R. Co. v. Union Pac. R. Co., 41 Fed. 293; Board &c. Illinois &c. Canal v. Chicago &c. R. Co., 14 Ill. 314; Easton R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co., 35 Mich. 265, 24 Am. Rep. 545 and note.

[48] Colorado &c. R. Co. v. Union Pac. R. Co., 41 Fed. 293, citing East St. Louis &c. R. Co. v. East St. Louis &c. R. Co., 108 Ill. 625; Lake Shore &c. R. Co. v. Chicago &c. R. Co., 97 Ill. 506.

[49] The supreme court of Pennsylvania thus expresses itself: "The evident intendment of the statute is to discourage crossings at grade. This is a question in which the company, whose road is to be crossed, is not the only party liable to injury thereby. It involves the safety and security of the public. Crossings at grade are always attended with danger. As our population becomes more dense, travel and traffic will increase, and the injuries resulting from grade crossings will be multiplied. Each succeeding year will increase the necessity for avoiding them. Their construction should now and henceforth be discouraged." Pittsburgh &c. R. Co. v. Southwest &c. R. Co., 77 Pa. St. 173. See also Malott v. Collinsville &c. R. Co., 108 Fed. 313; Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915A, 65; Wabash R. Co. v. Cincinnati &c. R. Co., 29 Ind. App. 546, 63 N. E. 325; Delaware &c. Co. v. Lackawanna &c. R. Co. (Pa. Com. Pl.), 3 Lack. Jur. 413; Pennsylvania R. Co., Appeal of, 116 Pa. St. 55, 8 Atl. 914; Chester Tract. Co. v. Philadelphia &c. R. Co., 188 Pa. St. 105, 41 Atl. 449, 44 L. R. A. 269; Pittsburg &c. R. Co. v. Ft. Pitt &c. R. Co., 192 Pa. St. 44, 43 Atl. 352. In many of the states there are positive statutes interdicting the construction of grade crossings wherever it is found practicable to cross in any other way. See Pennsylvania R. Co. v. Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780. They are, however, expressly authorized in West Virginia. Wellsburg &c. R. Co. v. Panhandle Tract. Co., 56 W. Va. 18, 48 S. E. 746, and in a

provided for. Crossings at grade are not only a source of inconvenience and delay to the companies operating trains over the crossings, but they are also a source of danger on account of collisions between trains and consequent injuries to employes and passengers. In a great many parts of the country where the surface of the ground over which the railway grades are constructed is level and unbroken, it is almost impossible to avoid crossings at grade. But, it has been held that whenever it is practicable to avoid a crossing at grade equity may interfere to prevent such a crossing.[50] In Pennsylvania the courts are imperatively required by statute to enjoin the crossing of one railroad of another at grade whenever it is reasonably practicable to avoid a crossing at grade.[51] Where the point at which

number of other states, in most of which, however, an interlocking device or system is provided for.

[50] Chicago &c. R. Co. v. Chicago &c. R. Co., 6 Biss. (U. S.) 219; Missouri &c. R. Co. v. Texas &c. R. Co., 10 Fed. 497; Toledo &c. R. Co. v. Detroit &c. R. Co., 63 Mich. 645; 28 Am. & Eng. R. Cas. 280; Fort Street &c. Co. v. State Railroad Board, 81 Mich. 248, 45 Am. & Eng. R. Cas. 113; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604; Central Vermont R. Co. v. Woodstock R. Co., 50 Vt. 452. The prima facie presumption of law is that a crossing at grade can be reasonably avoided, and the burden of proof is on the company seeking the crossing to show that, in the particular case, a crossing at grade cannot be avoided. In Appeal of Baltimore &c. R. Co. (Pa.), 10 W. N. C. 530, 3 Am. & Eng. R. Cas. 244, it was said: "Where the public safety can be reasonably secured at a grade crossing by appliances of signals and watchmen and stoppage of trains, and the expense of an overgrade crossing would be so considerable as to seriously interfere with the profitable construction of the new line, it is not, as we view it, reasonably practicable to avoid the grade crossing."

[51] Baltimore &c. R. Co.'s Appeal, (Pa.), 10 W. N. C. 530, 3 Am. & Eng. R. Cas. 242; Pittsburgh &c. R. Co.'s Appeal (Pa.), 28 Am. & Eng. R. Cas. 266; Appeal of Moosic &c. R. Co. (Pa.), 13 Atl. 915; Pennsylvania R. Co. v. Braddock &c. R. Co., 152 Pa. St. 116, 25 Atl. 780, 55 Am. & Eng. R. Cas. 1. The Pennsylvania Supreme Court, in the very recent case of Perry Co. R. &c. Co. v. Newport &c. R. Co., 150 Pa. St. 193, 24 Atl. 709, gave its reasons why grade crossings should be avoided in the following language: "The time for grade crossings in this state has passed. They ought not to be permitted, except in case of imperious necessity. They admittedly involve great danger to life and property. In the earlier period of railroads

a crossing was sought was on a grade of the line crossed, the track extending both directions from such point on a down grade, and it appearing that a crossing at grade would endanger life and be of great harm to the company whose line was being crossed on account of being compelled to start its trains on an up-grade after stopping for such crossing and that a crossing below grade could be constructed at a somewhat larger expense than the grade crossing, it was held that a crossing at grade would be permanently enjoined.[52] The fact that the company seeking the crossing is unable to pay the expense of constructing a crossing above or below the grade of the company whose line is crossed will not justify the condemnation of a grade crossing.[53] In New Jersey the road seeking the crossing may decide for itself whether it will cross at grade or otherwise, the right to cross at grade being subject only to the restrictions that the crossing shall not be made at less than a certain angle and shall not impair the franchises of the road crossed.[54] Where a crossing can not be made otherwise than at grade it will not be denied because it will necessitate the raising of spur tracks of the company crossed eighteen inches,

this danger was overlooked, or at least disregarded. The desire of the people for this species of improvements tended to close their eyes to the dangers involved. The traffic then upon railroads was comparatively light, and trains ran at long intervals. The rapid development of the country, the enormous growth in wealth, population, and business, have materially changed the relations of railroads to the public and to each other. The result is, that we now see railroad companies and municipalities spending enormous sums in correcting the defects of earlier railroad construction, and especially in avoiding grade crossings." See also Baltimore &c. R. Co. v. Butler &c. Co., 207 Pa. St. 406, 56 Atl. 959.

[52] Humeston &c. R. Co. v. Chicago &c. R. Co., 74 Iowa 554, 38 N. W. 413, 35 Am. & Eng. R. Cas. 263. See also Southern R. Co. v. Washington &c. R. Co., 102 Va. 483, 46 S. E. 784.

[53] Perry County &c. R. Co. v. Newport &c. R. Co., 150 Pa. St. 193, 24 Atl. 709.

[54] Jersey City &c. R. Co. v. Central &c. R. Co., 48 N. J. Eq. 379, 22 Atl. 728, 49 Am. & Eng. R. Cas. 256. As to duty of new company crossing at grade to pay expense, see West Jersey &c. R. Co. v. Atlantic City &c. R. Co., 65 N. J. Eq. 613, 56 Atl. 890.

it appearing that the new grade is necessary because of another crossing.[55] But to authorize such a crossing it must appear that such a change in the grade of the company whose line is crossed can be made and that without such a change the crossing would be defeated. The general rule is that the company seeking the crossing where it is to be made at grade must adopt such plans as will make its grade conform to that of the line to be crossed.[56]

§ 1602 (1122a). Interlocking devices.—As intimated in the last preceding section, when grade crossings are permitted under modern statutes they are usually permitted only when it is impracticable to cross in any other way or when some interlocking device or system is provided for, and the statutes often require stops to be made before crossing. Where such a system or device is provided, however, some of the statutes excuse the companies from stopping at such crossings. In some jurisdictions the subject of interlocking devices is left largely to railroad commissioners, or the like, and in some of them the device or system must be approved by them or by some state officer. This subject, however, is more fully considered elsewhere.[57]

[55] Butte &c. R. Co. v. Montana &c. R. Co., 16 Mont. 504, 41 Pac. 248, 31 L. R. A. 298, 50 Am. St. 508.

[56] United New Jersey &c. Co. v. National Docks &c. R. Co., 52 N. J. L. 90, 18 Atl. 574, 44 Am. & Eng. R. Cas. 226.

[57] For recent cases upon the subject, see Hydell v. Toledo &c. R. Co., 74 Ohio St. 138, 77 N. E. 1066; Chicago &c. R. Co. v. Indianapolis &c. Co., 165 Ind. 453, 74 N. E. 513; Minneapolis &c. R. Co. v. Gowrie &c. Co., 123 Iowa 543, 99 N. W. 181; Minneapolis &c. R. Co. v. Cedar Rapids &c. R. Co., 114 Iowa 502, 87 N. W. 410. Under an Indiana statute it was held that, while an appeal lies from any rate, charge, classification, or general regulation of the railroad commissioners, no such appeal lies from their order requiring an interlocking device at a crossing on petition of one of the companies. Grand Rapids &c. R. Co. v. Hunt, 38 Ind. App. 657, 78 N. E. 358; Grand Rapids &c. R. Co. v. Railroad Commissioners, 167 Ind. 214, 78 N. E. 981. A statute leaving it to the railroad commission to determine at what crossings such a device shall be installed is not unconstitutional as taking property without due process of law nor as denying equal protection of the laws. Cincinnati &c. R. Co. v.

§ 1603 (1123). Crossings above or below grade.—Railroad crossings may be made in one of three ways, by an underground way or tunnel, by an overhead crossing or by a crossing at grade.[58] In the preceding section we have seen that the tendency is to discourage the use of grade crossings, so that it follows that where a grade crossing will not be allowed the crossing must be made either by a tunnel or an overhead way. In those jurisdictions where the policy of the law is to avoid grade crossings, an overhead or tunnel crossing will be ordered wherever it is reasonably practicable to avoid a crossing at grade. In determining whether it is reasonably practicable to avoid a grade crossing many factors enter into a consideration of the subject. The location and surroundings of the proposed crossing, the character and use of the intersecting lines, the increased cost of construction and operation, public safety and convenience and the interest and convenience of the road to be crossed are all proper matters to be considered in determining whether an overhead crossing should be ordered.[59] Where it appeared that the increased cost of an overhead crossing would be from $300,000 to $600,000, that a troublesome grade would

Railroad Co., 180 Ind. 243, 102 N. E. 852. Under a Washington statute a railroad company which is granted the right to cross another railroad on payment of the expenses of crossing has been held not required to pay the entire expense of installation and maintenance of a safety device ordered by the public service commission, but the same should be apportioned equally between the companies. State v. Northern Pac. Ry. Co., 94 Wash. 10, 161 Pac. 850.

[58] "Such a crossing will be effected by a tunnel which leaves the surface intact, and provides support for the use it has been applied to; or by an overhead bridge at such a height as will not interfere with the free use of its route by the existing railroad; or by a passage on the surface, and at grade, where the rails of the existing railroad are temporarily cut, and frogs inserted, which thereafter permit the continuous use of the route by the existing railroad, except when the trains of the new railroad are crossing." United New Jersey &c. Co. v. National Docks &c. R. Co., 52 N. J. L. 90, 18 Atl. 547, 44 Am. & Eng. R. Cas. 226.

[59] Northern Central R. Co.'s Appeal, 103 Pa. St. 621. See also Wheeling &c. Ry. v. Toledo Ry. &c. Co., 33 Ohio Circ. Co. R. 303, affirmed in 81 Ohio St. 550, 91 N. E. 1143.

result and the construction of switches and side-tracks be prevented and other inconveniences result, the court refused to order an overhead crossing.[60] Tunnel crossings or under-way crossings stand on the same basis as overhead crossings, within the policy of avoiding grade crossings, and will be ordered to avoid a crossing at grade whenever it appears that it is practicable to construct such a crossing. Thus, where a crossing was sought at such a point on the company's line as to cause it great inconvenience because of a heavy grade, if a crossing at grade should be ordered, it was held that the company seeking the crossing should be compelled to cross by an underway, it appearing that such a way could be constructed at a somewhat greater expense than a grade crossing.[61] And under similar conditions as to expense an overhead crossing may be ordered.[62]

§ 1604 (1124). Number of crossings.—Ordinarily the company seeking the crossing is not limited to a single crossing. More than one crossing may be secured, but each crossing must be secured on the ground that it is necessary. In the absence of any statute regulating the subject there is no limit to the

[60] Northern Central R. Co.'s Appeal, 130 Pa. St. 621. And where the costs of an overhead crossing would be so great as to compel an abandonment of the new road, a crossing at grade will be permitted. Pennsylvania &c. R. Co. v. Philadelphia &c. R. Co., 160 Pa. St. 277, 28 Atl. 784. Where it is practicable for an electric street railroad to cross the tracks of a steam railroad by an overhead viaduct, at an expense not greatly exceeding $7,000, an injunction will issue to restrain the street railroad from constructing a grade crossing which would be extremely perilous to human life, by reason of the descending grade and curvature of the tracks of the steam railroad, the obstructed view, the large number of trains (over two hundred daily) passing over such tracks, and the difficulty of keeping electric cars at all times under perfect control. Pennsylvania R. Co. v. Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780.

[61] Humeston &c. R. Co. v. Chicago &c. R. Co., 74 Iowa 554, 38 N. W. 413, 35 Am. & Eng. R. Cas. 263; Chicago &c. R. Co. v. Chicago &c. R. Co., 91 Iowa 16, 58 N. W. 918.

[62] Pennsylvania R. Co. v. Braddock &c. R. Co., 152 Pa. St. 116, 25 Atl. 780; Altoona &c. R. Co. v. Tyrone &c. R. Co., 160 Pa. St. 623, 28 Atl. 997.

number of crossings which one company may secure across another company's line, provided it be made to appear that all the crossings are necessary to the construction and operation of the company seeking the crossings,[63] and do not materially impair the franchises of the company whose line is crossed. But where it appears that the crossings which a company seeks are not necessary, but are sought for the mere convenience of the new company, the number will be limited. Thus, where a company sought two crossings at near intervals over another company's line, and it appeared that neither of the crossings was necessary, and that both could be avoided by constructing the new line over a route nearly as practicable as that sought, at a slight additional expense, it was held that both crossings would be denied.[64]

§ 1605 (1125). **Enjoining construction of crossings.**—Where one railway company seeks to condemn and construct a crossing over the right of way and tracks of another at a place or in a manner not authorized by law, resort may often be had to equity for relief. If a company seeks a crossing at an improper place, or seeks an unnecessary crossing or attempts to erect one in such a manner as to materially interfere with the franchises of the company whose line is crossed or in excess of lawful authority, the remedy by injunction is appropriate.[65] The general principles applicable to the remedy by injunction are applicable to such cases and a plaintiff who seeks such relief must bring his case within those principles.[66] The cases in

[63] Boston &c. R. Co., Matter of, 79 N. Y. 64.

[64] Perry County R. Co. v. Newport &c. R. Co., 150 Pa. St. 193, 24 Atl. 709, 55 Am. & Eng. R. Cas. 12.

[65] See Chicago &c. R. Co. v. Chicago &c. R. Co., 6 Biss. (U. S.) 219, 5 Fed. Cas. 590. A court of equity will always interfere in a proper case and control the rights of two railway companies in reference to a proposed crossing of their tracks. National Docks &c. R. Co. v. State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. 421; National Docks &c. R. Co. v. Pennsylvania R. Co. (N. J.), 30 Atl. 1102; Cincinnati &c. R. Co. v. Chattanooga &c. R. Co., 44 Fed. 470. See also Kanawha &c. R. Co. v. Glen Jean &c. R. Co., 45 W. Va. 119, 30 S. E. 86, 91 (citing text); Denver &c. R. G. R. Co. v. Arizona &c. R. Co., 233 U. S. 601, 34 Sup. Ct. 691, 58 L. ed. 1111.

[66] See Pennsylvania Co. v. Lake Erie &c. R. Co., 146 Fed. 446.

which injunctions have been granted are numerous. Thus, where a crossing at grade is sought, injunction is held to be the appropriate remedy to prevent such a crossing where it appears that it is practicable to construct an overhead or underway crossing.[67] Injunction has also been held to be the appropriate remedy to prevent the condemnation of a crossing through another's yards or permanent structures.[68] And equity will interfere to prevent a company from constructing a crossing before condemnation proceedings have been had and terminated, or the condemnation of more crossings than are necessary.[69] But where a complainant has an adequate remedy at law equity will not interfere by injunction.[70] Thus, where one railway company, pending an appeal from an award establishing a crossing and fixing the amount of compensation to which the older company was entitled, without paying or depositing the compensation required by law, entered upon the right of way and constructed its tracks, it was held that its action was a mere naked trespass, for the redress of which there was an adequate legal remedy.[71] And a crossing will not be enjoined where it appears that all damage caused can be adequately compensated in money.[72] Where commissioners have been appointed to condemn a right of crossing of one railway over another, they will not be enjoined from considering a certain plan of crossing, which presents slight but not material

[67] Missouri &c. R. Co. v. Texas &c. R. Co., 4 Woods (U. S.) 360, 10 Fed. 497; Humeston &c. R. Co. v. Chicago &c. R. Co., 74 Iowa 554, 38 N. W. 413, 35 Am. & Eng. R. Cas. 263; Toledo &c. R. Co. v. Detroit &c. R. Co., 63 Mich. 645, 30 N. W. 595; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Pittsburg Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 28 Am. & Eng. R. Cas. 266; Reynoldsville &c. R. Co. v. Buffalo &c. R. Co., 134 Pa. St. 541, 19 Atl. 674; Central Vermont R. Co. v. Woodstock R. Co., 50 Vt. 452.

[68] See Cincinnati &c. R. Co. v. Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. 285.

[69] Pennsylvania R. Co. v. Consolidated Coal Co., 55 Md. 158.

[70] Anniston &c. R. Co. v. Jacksonville &c. R. Co., 82 Ala. 297, 2 So. 710; Tennessee &c. R. Co. v. East Alabama &c. R. Co., 75 Ala. 516, 51 Am. Rep. 475 and note.

[71] Mobile &c. R. Co. v. Alabama Midland &c. R. Co., 87 Ala. 520, 6 So. 407.

[72] Chicago &c. R. Co. v. Illinois &c. R. Co., 113 Ill. 156.

differences from that described in the petition seeking to condemn.[73] Injunction will also be denied where there is an adequate remedy by appeal or certiorari.[74]

§ 1606 (1126). Compensation—Taking property.—The right of one railroad company to lay and operate its tracks across the roadway of another company is well established. As we have seen, every railroad company takes its right to construct its road upon the implied contract that other railroad companies may lay their tracks across its tracks and right of way. It is held by many of the adjudged cases that the right of one company to cross the tracks of another rests upon the power of eminent domain, and that in constructing a crossing there is a "taking" of property within the meaning of the constitution. It seems to us that some of the cases state the doctrine too broadly. While it is perhaps true that there is a "taking" within the meaning of the constitution, still there is not in all cases a "taking" in the same sense that there is where private property is appropriated. If it be true, as unquestionably it is, that a railroad company secures its franchise subject to the right of the public to have other railroads constructed across its tracks, then it cannot be true that the mere fact that another company constructs a track across its roadway is a "taking" in the strict sense. We think that there is a "taking" only in a very narrow and limited sense, and that the right to compensation is very different from that which exists in favor of a private owner whose property is seized under the right of eminent domain, for the exclusive use is not taken and the award of damages must be governed by consideration somewhat different from those applied where the company seeks to condemn a right of way over lands of private persons. The mere fact of crossing does not add a burden, since the company took its franchise subject to the right of crossing by other railroads; but where there is an interference with the roadway or tracks,

[73] Pennsylvania R. Co. v. National Docks &c. R. Co., 56 Fed. 697.

[74] Pennsylvania R. Co. v. National Docks &c. R. Co., 56 Fed. 697. See also Cincinnati &c. R. Co. v. Wabash R. Co., 162 Ind. 303, 70 N. E. 256.

or where there is an injury to the prior railroad, or where there is expense caused by the crossing, then there may be right to compensation. As we have said, in such cases, the construction of a crossing by one company over the tracks of another is generally regarded as a taking of private property for public use, and compensation must be made before the right to cross can be exercised.[75] Since such a crossing is deemed a taking of

[75] Cincinnati &c. R. Co. v. Chattanooga &c. R. Co., 44 Fed. 470; Mobile &c. R. Co. v. Alabama &c. R. Co., 87 Ala. 501, 6 So. 404; Anniston &c. R. Co. v. Jacksonville &c. R. Co., 82 Ala. 297, 2 So. 710; Birmingham Tract. Co. v. Birmingham R. &c. Co., 119 Ala. 129, 24 So. 368; Georgia &c. R. Co. v. Columbus &c. R. Co., 89 Ga. 205, 15 S. E. 305, 51 Am. & Eng. R. Cas. 538; Chicago &c. R. Co. v. Springfield &c. R. Co., 67 Ill. 142; Chicago &c. R. Co. v. Englewood &c. R. Co., 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173; Chicago &c. R. Co. v. Englewood &c. R. Co., 17 Ill. App. 141; Massachusetts &c. R. Co. v. Boston &c. R. Co., 121 Mass. 124; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co., 35 Mich. 265, 24 Am. Rep. 545 and note; Flint &c. R. Co. v. Detroit &c. R. Co., 64 Mich. 350, 31 N. W. 281; National Docks &c. R. Co. v. State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. 421; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604. In Memphis &c. R. Co. v. Birmingham &c. R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166, 57 Am. & Eng. R. Cas. 639, in a railway crossing case, the court, after referring to the constitutional limitations and restrictions that private property shall not be taken for public use without just compensation, said: "If, therefore, the crossing or intersection of the road of one railway company by the road of another is taking, injuring or destroying private property, by the construction or enlargement of the works, highways or improvements of such company, within the meaning of the constitution, then the constitutional restrictions or limitations to which we have referred are applicable; and the exercise of such right can only be sustained when it is claimed under a valid legislative enactment by which the rights contemplated by these constitutional restrictions are secured to the owner of the property so taken, injured or destroyed. There is abundant authority in the textbooks and adjudicated cases for the proposition that the crossing or intersecting of the road of one railway company by that of another is the taking of property, within the meaning of constitutional provisions requiring compensation to be made." In Lake Shore &c. R. Co. v. Chicago &c. R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440, the court, in speaking of the right to condemn a railway crossing over another line, under the Illinois constitution, said: "This 14th

private property for public use, it follows that just compensation must be made.[76] Where, however, there is no damage, no compensation need be made; but the fact that there may be no damage, and therefore no compensation, does not change the nature of the right under which the crossing is secured. It seems to us that, under such circumstances, the crossing would still be secured under the right of eminent domain, and might still be, in a sense, a taking of private property for public use.

§ 1607 (1127). Damages—Elements of.[76a]—We have seen in the preceding section that the condemnation and construction of a railroad across the right of way and tracks of another company may be a taking of property within the constitutional limitations that just compensation must be made. Since compensation must be made in such cases it follows that there must be some rule for estimating the compensation and defining what elements shall be considered in making up such estimate. In the very nature of things there must usually be some injury to a railway company by constructing another railway line across its tracks and right of way. While there are many elements of injury, which result in greater or less damage and loss to the company whose line is crossed, compensation for every such element will not be allowed. The general rule is that the

section of article 11 was inserted out of abundant caution, and simply declares such property to be subject to the recognized power of eminent domain, and, like other private property, protected by the limitation that private property shall not be taken without just compensation, to be ascertained by a jury, unless the same is to be made by the state. . . In so far as the private rights of the railroad company in such property are concerned, such rights, like other private property, are subject to the power of the state to condemn and take the same for the new use, upon the payment of just compensation."

[76] Memphis &c. R. Co. v. Birmingham &c. R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166, 57 Am. & Eng. R. Cas. 639; Georgie &c. R. Co. v. Columbus &c. R. Co., 89 Ga. 205, 51 Am. & Eng. R. Cas. 538; Jersey City &c. R. Co. v. Central R. Co., 48 N. J. Eq. 379, 22 Atl. 728, 49 Am. & Eng. R. Cas. 256, authorities cited next preceding note.

[76a] This and the next section are cited in Waterloo &c. Ry. Co. v. Chicago &c. R. Co., 186 Iowa 630, 173 N. W. 81, 83.

company whose line is crossed is entitled to recover compensation for everything which renders its property less valuable, causes it additional expense in restoring its property to a safe condition for use, renders it less able to transact its business, or makes the transaction of its business more expensive.[77] Thus a recovery can be had for the land or property actually taken,[78] for the destruction of buildings, fences or the like,[79] for the cost of restoring the tracks and right of way to a safe condition,[80] for the expense of the erection of new structures made neces-

[77] The rule is thus stated in the case of Peoria &c. R. Co. v. Peoria &c. R. Co., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129: "It is the injury which depreciates the value of the property, whether by taking a portion of it or rendering the portion left less useful, or, in case of a railroad company, or other corporation body less capable of transacting its business, such a hindrance and inconvenience as to occasion loss, or diminish and limit its capacity to transact its business, by decreasing the power to transact as much, or necessarily, the expense of what may be done, although not diminished." See also Chicago &c. R. Co. v. Springfield & N. R. Co., 67 Ill. 142; Chicago &c. R. Co. v. Englewood &c. R. Co., 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173. In Michigan the rule is laid down as follows: "Any additional expense created in the ordinary use of respondent's track, or any other injury or damage to its track, right of way, or franchises, occasioned by the crossing, and which may properly be considered as the natural, necessary and approximate cause thereof, should be allowed the respondent in all cases of this kind." Toledo &c. R. Co. v. Detroit &c. R. Co., 63 Mich. 645, 30 N. W. 575, 28 Am. & Eng. R. Cas. 272. The delay, interference and obstruction while the crossing is being put in is a proper element of damage. Chicago &c. R. Co. v. Chicago &c. R. Co., 15 Ill. App. 587.

[78] Chicago &c. R. Co. v. Englewood &c. R. Co., 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173, 23 Am. & Eng. R. Cas. 56; Memphis &c. R. Co. v. Birmingham &c. R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166, 57 Am. & Eng. R. Cas. 639; Chicago &c. R. Co. v. Springfield &c. R. Co., 67 Ill. 142; Lockport &c. R. Co., In re, 19 Hun (N. Y.) 38. But see Flint &c. R. Co. v. Detroit &c. R. Co., 64 Mich. 350, 31 N. W. 281.

[79] Kansas City v. Kansas City &c. R. Co., 102 Mo. 633, 14 S. W. 808, 10 L. R. A. 851, 57 Am. & Eng. R. Cas. 624. See also Kansas Cent. R. Co. v. Board &c. Jackson County, 45 Kans. 716; Old Colony &c. R. Co. v. County of Plymouth, 14 Gray (Mass.) 155.

[80] St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274.

sary by reason of the crossing,[81] and, also, it has been held, on account of contingent loss which may result because of additional exposure to hazards by fire or otherwise.[82] Compensation is not confined to such elements of damage as may arise at the actual place of crossing. It has been held that a company whose line is crossed is entitled to recover damages for a diminution in its capacity to do business,[83] or for increased expense[84] in transacting its business caused by the construction of the crossing. Where a large part of the line is rendered less useful or practically valueless, this should be considered in estimating the damages.[85] Where new structures, such as embankments, abutments or the like, must be erected because of the crossing, the expense of maintaining these and keeping them in repair may be considered as an element of damage.[86] And it has also been held that the additional expense of providing a watchman, where the same has been rendered necessary because of the great hazard resulting from the construction of the crossing, may be taken into account in estimating the measure of damages.[87] There are many things, however, which result in more or less damage to a railway company whose line is crossed by the line of another company which cannot be considered as elements of damage for which compensation must be made. No damages will be allowed for mere temporary interruption or inconvenience occasioned in the transaction of its business,[88] for increased liability to accidents at the cross-

[81] Old Colony &c. R. Co. v. County of Plymouth, 14 Gray (Mass.) 155; St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274; Flint &c. R. Co. v. Detroit &c. R. Co., 64 Mich. 350, 31 N. W. 281.

[82] St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274. See ante, § 1262.

[83] Lake Shore &c. R. Co. v. Chicago &c. R. Co., 100 Ill. 21. See also Chicago &c. R. Co. v. Englewood, 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173.

[84] Lake Shore &c. R. Co. v. Chicago &c. R. Co., 100 Ill. 21.

[85] Poughkeepsie &c. R. Co., In re, 63 Barb. (N. Y.) 151.

[86] St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274.

[87] St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274. But see Kansas City &c. R. Co. v. Louisiana &c. R. Co., 116 La. 178, 40 So. 627; Massachusetts Cent. R. Co. v. Boston &c. R. Co., 121 Mass. 124.

[88] Boston &c. R. Co. v. Old Colony R. Co., 3 Allen (Mass.) 142;

ing,[89] for being required by statute or ordinance to stop at the crossings, while the trains of the other company pass or before crossing,[90] for the additional expense and trouble of ringing the bell on approaching the crossing,[91] for the risk of being ordered to provide additional safeguards at such crossings, nor for the

Boston R. Co. v. Old Colony R. Co., 12 Cush. (Mass.) 605; Old Colony R. Co. v. Inhabitants &c., 14 Gray (Mass.) 155; Massachusetts R. Co. v. Boston R. Co., 121 Mass. 124; Flint &c. R. Co. v. Detroit, 64 Mich. 350, 31 N. W. 281; St. Louis &c. R. Co. v. St. Louis &c. R. Co., 111 Mo. 666, 20 S. W. 319; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604. See also Chicago &c. R. Co. v. Joliet &c. Co., 105 Ill. 388, 44 Am. Rep. 799.

[89] Peoria &c. R. Co. v. Peoria &c. R., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129. In this case it was said: "Accidents can be avoided by proper care. Nor are we warranted in presuming the employes would be negligent of their duty. If they observe their duty, a collision need never occur. To allow damages on this claim would violate the rule that they cannot be allowed on mere conjecture, speculation, fancy or imagination; they must be real, tangible and proximate." See also Kansas City &c. R. Co. v. Louisiana &c. R. Co., 116 La. 178, 40 So. 627; Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599, 24 S. W. 478, 57 Am. & Eng. R. Cas. 624; Old Colony &c. R. Co. v. Inhabitants &c., 14 Gray (Mass.) 155; Bridgeport v New York &c. R. Co., 36 Conn. 255, 4 Am. Rep. 63. The opinion of witnesses as to the probability of collisions and accidents at crossings is inadmissible in fixing the damages. Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599, 24 S. W. 478, 57 Am. & Eng. R. Cas. 624.

[90] Peoria &c. R. Co. v. Peoria &c. R. Co., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129; Flint &c. R. Co. v. Detroit &c. R. Co., 64 Mich. 350, 31 N. W. 281; Massachusetts &c. R. Co. v. Boston &c. R. Co., 121 Mass. 124; Kansas City &c. Co. v. St. Joseph &c. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; St. Louis &c. R. Co. v. St. Louis &c. R. Co., 111 Mo. 666, 20 S. W. 319; Kansas City &c. R. Co. v. Kansas City &c. R. Co., 118 Mo. 599, 24 S. W. 478, 57 Am. & Eng. R. Cas. 624; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604.

[91] Peoria &c. R. Co. v. Peoria &c. R. Co., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129; Old Colony &c. R. Co. v. Inhabitants &c., 14 Gray (Mass.) 155. Or operating gates. Boston &c. R. Co. v. Cambridge, 159 Mass. 283, 34 N. E. 382. See also Massachusetts Cent. R. Co. v. Boston &c. R. Co., 121 Mass. 124; Detroit F. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 390, 23 Sup. Ct. 540, 47 L. ed. 860 (nor for the possibility that safety gates or the like may be required in the future).

probable loss or decrease of business which may result because of such crossing.[92] A company seeking the crossing, and against whom the damages are assessed, cannot set off as an element of gain to the company crossed, a supposed benefit which may result to it in the way of securing additional business because of such crossing.[93]

§ 1608 (1128). Expense of constructing crossing.—The expense of constructing the crossing must as a rule be borne by the company seeking the crossing. In the absence of any statutory enactments regulating the subject, the rule seems to be that the latest company must at its own expense construct the crossing. In several states it is provided by statute that the original expense of constructing the crossing shall be borne by the newest or latest company. We have before seen that all such expenses as result from the construction of the crossing must either be borne by the crossing company or allowed as an element of damages to the company whose line is crossed.[94]

[92] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604. The text, including nearly all of this section, is quoted with approval in Kansas City &c. R. Co. v. Louisiana &c. R. Co., 116 La. Ann. 178, 40 So. 627, 630, where it is held that, "Where the plaintiff company takes nothing but the easement of crossing, the compensation should be based on the depreciation in value of the property resulting from the joint use of the tracks. The value of the portion actually used, and the consequent depreciation, if any, of the value of the remainder for railroad purpose, should be considered; but mere interruption or inconvenience in the transaction of business, increased liability to accidents, and the stopping or flagging of trains at crossings, if required by statute or ordinances, do not constitute elements of damage."

[93] Old Colony &c. R. Co. v. Inhabitants &c., 14 Gray (Mass.) 155; Boston &c. R. Co. v. County of Middlesex, 1 Allen (Mass.) 324.

[94] Ante, § 1607. See also Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62; Illinois Cent. R. Co. v. Waterloo &c. R. Co., 182 Iowa 550, 164 N. W. 208, 165 N. W. 993; Waterloo &c. Ry. Co. v. Chicago &c. R. Co. (Iowa), 173 N. W. 81, 83 (citing text). But compare People ex rel. International Ry. Co. v. Public Service Com., 168 N. Y. S. 331, 180 App. Div. 773. An operating road by changing its grades or putting in double tracks does not thereby become a junior road in relation to one constructed after it was, so as to impose on it the expense of a new cross-

And in some cases it has been held that the company seeking the crossing may make a valid agreement in the condemnation proceedings not only to put in the crossing at its own expense, but also to keep and maintain all necessary frogs and crossing appliances.[95] In the state of Ohio there is a statute in force which provides that, where "the tracks of two railroads cross each other, or in any way connect, at a common grade, the crossing shall be made and kept in repair . . . at the joint expense of the companies owning the track." This statute has been held valid and enforced by the Supreme Court of the state of Ohio.[96]

§ 1609 (1129). Watchmen and flagmen at crosings.—In the absence of statutory enactments requiring a watchman to be kept at the crossing of two railroad tracks, no duty ordinarily rests upon the companies to provide such watchman.[97] But where there is a statutory provision to the effect that such watchman must be maintained, the statute must be complied with by the companies.[98] And where the statute provides that watchmen must be furnished at the joint expense of the companies whose lines cross, it has been held that the expense of keeping such watchmen must be borne equally by the two companies, nothwithstanding the fact that one company runs more trains and uses the crossing more frequently than the other company.[99] Companies may, and often do, for their own protection, keep

ing. Chicago &c. Ry. Co. v. Old Colony Trust Co., 216 Fed. 577.

[95] Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. R. 799, 14 Am. & Eng. R. Cas. 62; Seattle &c. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. 866. See also Chicago &c. Ry. Co. v. Old Colony Trust Co., 216 Fed. 577.

[96] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 16 N. E. 475, 35 Am. & Eng. R. Cas. 271; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604. But see Toledo &c. R. Co. v. Detroit &c. R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875.

[97] See Sellars v. Richmond &c. R. Co., 94 N. Car. 654, 25 Am. & Eng. R. Cas. 451.

[98] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 35 Am. & Eng. R. Cas. 271; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co., 30 Ohio St. 604.

[99] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 35 Am. & Eng. R. Cas. 271.

watchmen at crossings to notify employes in charge of trains when the crossings are safe and when trains may pass without danger. Though not absolutely required, the maintenance of such watchmen is an effective means of preventing accidents and facilitating the transaction of business, and for that reason companies often so equip their crossings. The expense of maintaining such watchmen may be arranged between the companies by contract, or in some cases it may be that the services of a watchman has been rendered so imperatively necessary by the construction of the crossing that the latter company in point of time will be required to bear the expense of keeping a watchman at the crossing. In some cases it has been held that the cost of maintaining a watchman at the crossing is a proper element of damages to be taken into account in estimating the compensation to which the company whose line is crossed is entitled,[1] but there is also authority to the effect that the burden of such an outlay cannot be placed upon the condemning company.[2] The company seeking the crossing may agree, as a condition precedent to the right to cross, that it will keep a watchman at the crossing at its own expense.[3] Where such is the case, the contract is a valid one, and the company making it will be held liable for its breach.

§ 1610 (1130). **Stopping at crossings—Duty imposed by contract.**—As a precaution against collisions and consequent injuries, railway companies are usually required to stop their trains before crossing the tracks of another company. This duty is ordinarily imposed by statute, but it may, in some cases, be imposed by contract between the two companies whose lines cross.[4] Such contracts are valid, and will be enforced by the courts. Where two companies whose lines cross agreed

[1] Flint &c. R. Co. v. Detroit &c. R. Co., 64 Mich. 350, 31 N. W. 281.

[2] Massachusetts &c. R. Co. v. Boston &c. R. Co., 121 Mass. 124.

[3] New York &c. R. Co. v. Grand Rapids &c. R. Co., 116 Ind. 60, 18 N. E. 182.

[4] As to what is a "crossing," and for construction of rule as to crossing or intersection, see Southern Ind. R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722.

upon the manner and order in which their trains should cross, and adopted a code of signals to be observed, it was held that one company which violated the code of signals, thereby causing injury to the other company, was liable for damages for breach of the contract.[5] The companies may agree that the trains of one company shall have priority over the trains of the other company,[6] and such a contract may be enforced in equity by a decree for specific performance.[7] Where two companies, by an agreement in reference to the use of a crossing, stipulated that one of the companies should bring its trains to a stop at least two hundred feet from the crossing before attempting to cross, it was held that it was not a sufficient compliance with the contract to stop at a point eight hundred or nine hundred feet from the crossing, but that such stop should be made at a point from two hundred to three hundred feet from the crossing, notwithstanding the fact that the stop at the farther point was more convenient because of the curve and grade.[8]

§ 1611 (1131). Stopping at crossings—Duty imposed by statute.—[8a]In nearly every state in the Union statutes are in force

[5] New York &c. R. Co. v. Grand Rapids &c. R. Co., 116 Ind. 60, 18 N. E. 182, 35 Am. & Eng. R. Cas. 283. In the course of the opinion, in commenting on the contract, the court said: "It is obvious that what the parties intended was that the appellant should secure a way across the track of the appellee, and should provide means of making and keeping the crossing safe for the use of both parties. Whatever was reasonably necessary to carry into execution this object was implied, and it was therefore entirely competent for the parties to give effect to the contract by establishing a code of signals. As they did establish such a code under the contract, and the appellant refused or failed to obey them, there was a breach of contract, and hence a clear right of action. This right of action came into existence the moment the contract was violated and loss resulted."

[6] Cornwall &c. R. Co., Appeal of, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889 and note, 42 Am. & Eng. R. Cas. 233.

[7] Cornwall &c. R. Co., Appeal of, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 899 and note, 42 Am. & Eng. R. Cas. 233.

[8] Cornwall &c. R. Co., Appeal of, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 899 and note, 42 Am. & Eng. R. Cas. 233.

[8a] This section is cited in Illinois Cent. R. Co. v. Hudson, 136 Tenn. 1, 188 S. W. 589, 2 A. L. R. 147, 152.

which provide that, where two railways cross each other at grade, the employes engaged in operating trains on either of the lines shall bring them to a full stop at a specified distance from the crossing before attempting to cross. In some of the states the statutes excuse the companies from stopping at crossings, where interlocking switches or other devices for the safety of trains are erected and maintained. These statutes are applicable to all railway companies, and in some of the states they have been held to apply to dummy lines.[9] But where an ordinary steam railway company's line is crossed by the track of a mere street railway it has been held that the steam railway company is not required to stop its trains before attempting to cross.[10] There seems to be a distinction made between a dummy line operated by steam and the ordinary street railway, the former being classed as an ordinary commercial railway.[11] Statutes requiring companies to stop their trains at railway crossings are generally penal, and a failure to comply with them renders the company or the employes liable to a criminal prosecution.[12]

But compare Billingsly v. Nashville &c. R. Co., 177 Ala. 342, 58 So. 433.

[9] Birmingham &c. R. Co. v. Jacobs, 92 Ala. 187, 9 So. 320, 12 L. R. A. 830, 49 Am. & Eng. R. Cas. 263. In that case it was said, in speaking of the statute requiring railroads to stop at crossings: "The purpose of the statute was to guard against collisions at these crossings. Prior to the adoption of the code of 1886, the distance within which trains were required to stop was fifty feet, and the distance was extended to one hundred feet on account of the difficulty of controlling the large engines and heavily loaded trains. The purpose of the statute, as we have said, is to prevent collision, and the fact that engines and trains, by reason of their structure and appliances, are more easily managed than others, and may be stopped within a distance of twenty, thirty or fifty feet, is no reason why the law should not apply to them." In Katzenberger v. Lawo, 90 Tenn. 235, 16 S. W. 611, 13 L. R. A. 185 and note, 25 Am. St. 681, it was said: "A train pulled by a small engine called a 'dummy,' although exclusively engaged in carrying passengers, is a railroad, within the meaning of the statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railways as to the ordinary railroads of commerce."

[10] Byrne v. Kansas City, &c. R. Co., 61 Fed. 605, 24 L. R. A. 693.

[11] Byrne v. Kansas City &c. R. Co., 61 Fed. 605, 24 L. R. A. 693.

[12] See Commonwealth v. Chesapeake &c. R. Co., 16 Ky. L. 481, 29 S. W. 136.

§ 1612 (1132). **Collisions at crossings.**—What will be said here regarding collisions at crossings refers more particularly to rights and liabilities as they exist between the companies whose trains collide. The rights of employes, passengers, and other persons who are injured in railway collisions at crossings will be fully treated in a subsequent portion of this work, and that branch of the subject will be only incidentally referred to at this place. It is generally provided by agreement, statute or custom, the order and manner in which trains shall cross at grade crossings. The necessity for some system regulating the passage of trains at crossings grows out of the great danger which would result to life and property if no system were adopted. As a general rule, it may be stated that, where the tracks of two railway companies cross at grade, and there is in force a system regulating the manner and order in which trains shall pass, the company which violates the provisions of the rules governing the crossing will be liable for all damages resulting from such failure.[13] Where a rule was in force which provided that the train which first reached and stopped at the stopping-post maintained at a certain specified distance from the crossing had the right of way, it was held to be actionable negligence on the part of a company to attempt to cross when a train on the other line had first reached the stopping-post and was in the act of starting to make the crossing.[14] In an action brought to recover for injuries sustained in a collision of trains at a railway crossing, both companies may be liable,[15] and where the

[13] New York &c. R. Co. v. Grand Rapids &c. R. Co., 116 Ind. 60, 18 N. E. 182. In the first case cited the companies had agreed upon a code of rules governing the order and manner in which trains should cross. A violation of the code of rules resulting in injury to the other company was held to be a breach of the contract, and damages were awarded the complaining company. Compare Albert v. Sweet, 116 N. Y. 363, 22 N. E. 762, 42 Am. & Eng. R. Cas. 216. See Grand Rapids &c. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135. See also Cleveland &c. R. Co. v. Gray, 148 Ind. 266, 46 N. E. 675.

[14] Chicago &c. R. Co. v. Chambers, 68 Fed. 148.

[15] Downey v. Philadelphia &c. R. Co., 161 Pa. St. 588, 28 Atl. 1019, 58 Am. & Eng. R. Cas. 594; Kansas City &c. R. Co. v. Stoner, 49 Fed. 209. See also Brecher v. Chicago &c. R. Co., 119 Ill. App. 554; Cin-

action is brought against one company only, it cannot escape liability by setting up the fact that the other company was also guilty of negligence.[16] A presumption of negligence may arise against one or both companies where a collision occurs on a level grade crossing in broad daylight, and each of the companies seeks to fasten the blame upon the other.[17]

§ 1613 (1133). Priority of passage.—Where two trains approach a railway crossing at the same time, as is often the case, it is necessary that there be some regulation defining which train shall have the prior right to cross.[18] It is obvious that without some regulation defining the rights of the respective companies confusion and injury would often result. The matter is usually regulated by statutes of the different states, and we can here give only a reference to such statutes. These statutes are very different in their provisions, and the statute of the particular state should be examined to find the ultimate rule in force in that state. Among these statutes will be found provisions giving the road first built priority, trains on a main track precedence over trains on side tracks, passenger trains precedence over freight trains, regular trains precedence over trains behind time, and engines with cars precedence over engines without cars.[19] Companies whose lines cross may, and often do, agree upon rules governing the crossing of their trains and which trains shall have priority. Such contracts, when not contrary to statute, are valid and will be enforced. A violation

cinnati &c. R. Co. v. Acrea, 40 Ind. App. 150, 81 N. E. 213. Where interlocking devices are used it is held to be the duty of both companies to keep them in order in Gorman v. New York &c. R. Co., 194 N. Y. 488, 87 N. E. 682.

[16] Kansas City &c. R. Co. v. Stoner, 51 Fed. 649. See also Baltimore &c. R. Co. v. Kleespies, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252; Pittsburgh &c. R. Co. v. Spencer, 98 Ind. 186; McDonald v. Randolph &c. Ry., 165 N. Car. 622, 81 S. E. 1017.

[17] Kansas City &c. R. Co. v. Stoner, 49 Fed. 209.

[18] In Missouri Pac. R. Co. v. Chicago &c. R. Co., 98 Mo. App. 214, 71 S. W. 1081, it is held that, in the absence of statute or agreement, the right of one company cannot be held subservient to that of the other.

[19] Moulder v. Cleveland &c. R. Co. (Ohio C. P.), 1 Ohio N. P. 361, 2 Ohio Leg. News 540.

of such contract will make the violator liable for all damages which proximately result therefrom,[20] and a violation of such contract may be enjoined in a court of equity,[21] or the contract may be specifically enforced by a decree in equity.[22] Where by the rules governing priority of passage the company whose train first reaches the stopping-post has prior right of passage, it is negligence for the employes of the other company to attempt to cross in advance of the train on the other track.[23] "Each train," it is said, "may indulge the presumption that the other will comply with the mandates of the statute, but this presumption will not protect either from liability for want of care in proceeding when it becomes apparent, or reasonably so, that the other train is negligent or disobedient."[24]

§ 1614 (1134). Maintenance and repair of crossings.—In a former section[25] we discussed the duty of constructing a railway crossing; here we propose to discuss the duty of keeping

[20] New York &c. R. Co. v. Grand Rapids &c. R. Co., 116 Ind. 60, 18 N. E. 182.

[21] Cornwall &c. R. Co., Appeal of, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889 and note, 42 Am. & Eng. R. Cas. 233.

[22] Cornwall &c. R. Co., Appeal of, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889 and note, 42 Am. & Eng. R. Cas. 233.

[23] Chicago &c. R. Co. v. Chambers, 68 Fed. 148. But see, as to construction of rule, or waiver and presumption in favor of general verdict as against answers to special interrogatories, Southern Ind. R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722. Long continued practice may constitute practical and binding construction of rule. Bassy v. Hannibal &c. Co., 98 Mo. 62, 14 Am. St. 610; Texas &c. Co. v. Leighty, 88 Tex. 604, 32 S. W. 799; Louisville &c. R. Co. v. East Tenn. Co., 60 Fed. 993; Spaulding v. Chicago &c. R. Co., 98 Iowa 205, 67 N. W. 227.

[24] Southern R. Co. v. Bryan, 125 Ala. 297, 28 So. 445, 447, citing text, and Birmingham &c. R. Co. v. Jacobs, 101 Ala. 149, 13 So. 408. That such a presumption as to compliance with the statutes, rules, custom or arrangement may usually be indulged, see New York &c. R. Co. v. Grand Rapids &c. Co., 116 Ind. 60, 18 N. E. 182; Kansas City &c. R. Co. v. McDonald, 51 Fed. 178; Louisville &c. R. Co. v. East Tenn. Co., 60 Fed. 993; Van Orman v. Lake Shore &c. R. Co., 152 Mich. 185, 115 N. W. 968; Thompson v. Chicago &c. R. Co., 71 Minn. 89, 73 N. W. 707; Chicago &c. R. Co. v. Kansas City &c. Co., 78 Mo. App. 245.

[25] § 1608, ante.

up and repairing crossings after they have been constructed. As a general rule the duty rests upon both companies to see that a crossing of their tracks is kept in proper repair. This duty does not rest upon any obligation which one company owes to the other, but upon the duty which both companies owe to the public. Safety of property and passengers carried on railway trains demands that the company should use every reasonable precaution for their safety, and it is for this reason that the duty is imposed upon both companies to see that crossings are properly maintained and kept in repair.[26] In some of the states there are express statutory provisions imposing upon both companies the duty of keeping the crossing in proper repair,[27] but we are of the opinion that this duty, at least, so far as the public is concerned, rests upon both companies independent of any statute.[28] Where the duty is imposed by statute, it has been held negligence per se to disregard it.[29] The obliga-

[26] Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 1121. In Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. C. 62, it was said: "Both parties are common carriers of passengers and freight and both are under the highest obligations to the public to observe that this crossing is kept in repair, so that it may be entirely safe for the passage of trains, and it may reasonably be presumed both companies will omit no duty in that regard. One party is as much interested in its maintenance in a suitable condition as is the other, and should it become unsafe through use, or for other cause, either party might, and it would be its duty to, make all needed repairs, and on the party obligated to maintain such crossing would rest the expense of such repairs, and the same might be recovered in an action." See also Gorman v. New York &c. R. Co., 194 N. Y. 488, 87 N. E. 682.

[27] Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 35 Am. & Eng. R. Cas. 271; Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 36 Am. & Eng. R. Cas. 492.

[28] The companies may, of course, provide by contract for constructing and maintaining the crossing, and designate what portion of the expense shall be borne by each, but the companies can not by a contract between themselves absolve themselves from the duty owing the public. If there is a violation of the contract, the company in the wrong may doubtless be held liable for all damages resulting to the other from the breach, but the rights of the public are not affected.

[29] Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121.

tion to repair may rest upon a lessee operating a line the same as upon an owner.[30] As between the two companies using a crossing, the expense of maintaining and repairing the crossing may be provided for either by statute or by contract. Where the statute provides that the expense of keeping up the crossing after it is constructed shall be borne by both companies, both companies are bound to contribute to such expense.[31] If the statute is silent as to the proportion of the expense which should be borne by each company, it would seem that the true rule would be to make the older company contribute at least such a proportion of the expense as it would have cost to have kept in repair the portion of the track affected by the crossing, if the crossing had not been made.[32] The duty of contributing to the expense exists whether the crossing is made on, above, or below grade.[33] As a condition precedent to the right to construct a crossing the company seeking the crossing may legally bind itself to maintain and keep in repair the crossing at its own expense.[34] Where one of the companies, jointly bound to keep in

[30] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 35 Am. & Eng. R. Cas. 271, 36 Am. & Eng. R. Cas. 492.

[31] Toledo &c. R. Co. v. Detroit &c. R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875, 28 Am. & Eng. R. Cas. 272; Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 36 Am. & Eng. R. Cas. 492.

[32] In Toledo &c. R. Co. v. Detroit &c. R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875, 28 Am. & Eng. R. Cas. 272, it was said: "The provision of the section which requires that the company whose road is crossed shall bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case growing out of the connecting of the two tracks, for the reason that no repairs can be made at the point of crossing which will not extend to both tracks; and the extent of such expense required to be borne by the company whose track is crossed should always be limited as near as may be to what would have been necessary to keep the respondent's track in repair at the crossing had the same not been made." See also Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 36 Am. & Eng. R. Cas. 492.

[33] Toledo &c. R. Co. v. Detroit &c. R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875, 28 Am. & Eng. R. Cas. 272.

[34] Seattle &c. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. 866; Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62.

repair the crossing, at its own expense makes repairs, it may enforce contribution from the other company,[35] or where one company has bound itself by contract to keep up the crossing at its own expense and fails to do so, the other company may make the repairs and recover from the company upon which the duty of making the repairs legally rested.[36]

§ 1615 (1135). Street railways crossing steam railroads.—Street railways have a right to cross steam railways, and it has been held that the general statutes in force regulating the manner in which railways shall cross each other are applicable in such cases.[37] And under a statute which authorizes a court to order a crossing other than at grade a street railway may be ordered to construct an overhead crossing.[38] So, where a street railway has lawfully laid its track across the track of a steam railway in conformity to the grade thereof, the steam railroad

[35] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577, 36 Am. & Eng. R. Cas. 492.

[36] Chicago &c. R. Co. v. Joliet &c. R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62, 68.

[37] Elizabethtown &c. R. Co. v. Ashland &c. R. Co., 96 Ky. 347, 26 S. W. 181; Buffalo &c. R. Co. v. New York &c. R. Co., 25 N. Y. 265; Port Richmond &c. R. Co. v. Staten Island &c. R. Co., 144 N. Y. 445, 39 N. E. 392; Pennsylvania R. Co. v. Conshohocken R. Co., 15 Pa. Co. Ct. 454; Pennsylvania R. Co. v. Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780, 55 Am. & Eng. R. Cas. 1. See also Chester Tract. Co. v. Philadelphia &c. R. Co., 188 Pa. St. 105, 41 Atl. 449, 44 L. R. A. 269; Malott v. Collinsville &c. R. Co., 108 Fed. 313; Stillwater &c. St. R. Co. v. Boston &c. R. Co., 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489. But compare Wabash R. Co. v. Ft. Wayne &c. Tract. Co., 161 Ind. 295, 67 N. E. 674; Kansas City &c. R. Co. v. Railroad Commissioners, 73 Kans. 168, 84 Pac. 755. It is evident that this is not true of some of such statutes for they sometimes contain provisions that would be impracticable and clearly inapplicable to such a crossing. The right to cross is not acquired by acquiescence of the steam railroad during a short period in which the street railroad is allowed to use the crossing, while the matter is in negotiation between the companies. Port Richmond &c. R. Co. v. Staten Island &c. R. Co., 144 N. Y. 445, 39 N. E. 392.

[38] Pennsylvania R. Co. v. Braddock &c. R. Co., 152 Pa. St. 116, 25 Atl. 780, 55 Am. & Eng. R. Cas. 1. See also New York &c. R. Co. v. Bridgeport Tract. Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

company will be enjoined from tearing up or injuring the street railway company's track.[39] Where a steam railway crosses a highway or a street, a street railway which has a right to lay its track in the street or highway may cross the track of the steam railway,[40] and the steam railway is not entitled to recover any compensation for such crossing, as for an additional burden.[41] This rule rests on the theory that, where a steam railroad crosses a street or public highway, it takes its right subject to the rights of the public to use the street in a reasonable and lawful manner, and since a street railway is not an additional burden to the street, but such a use as the public are entitled to have made of the street, therefor the railroad takes its right in the street subject to the right of street railway companies to lay their tracks across its tracks. The construction of a street railway under such circumstances imposes no addi-

[39] Buffalo &c. R. Co. v. DuBois &c. R. Co., 149 Pa. St. 1, 24 Atl. 179.

[40] Chicago &c. R. Co. v. Whiting &c. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. 264, 26 L. R. A. 337, 1 Am. & Eng. R. Cas. (N. S.) 181. The same view is taken in Chicago &c. R. Co. v. West Chicago Street R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485 and note. In the last case it was held that an injunction would not lie at the suit of the steam railroad company. See also Morris &c. R. Co. v. Newark &c. R. Co., 51 N. J. Eq. 379, 29 Atl. 184. But compare Cincinnati &c. R. Co. v. Chattanooga &c. R. Co., 44 Fed. 470.

[41] Chicago &c. R. Co. v. Whiting &c. R. Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. 264, 1 Am. & Eng. R. Cas. (N. S.) 181. See also Chicago &c. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; New York &c. R. Co. v. Bridgeport Tract. Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Consolidated Tract. Co. v. South Orange &c. Co., 56 N. J. Eq. 569, 40 Atl. 15. But see People's R. Co. v. Syracuse &c. R. Co., 22 Abb. N. Cas. (N. Y.) 427; Central &c. R. Co. v. Philadelphia &c. R. Co., 95 Md. 428, 52 Atl. 752. As to the right of one street railroad to cross another, see Brooklyn &c. R. Co. v. Brooklyn &c. R. Co., 33 Barb. (N. Y.) 420; Citizens' &c. R. Co. v. East Harrisburg &c. R. Co., 164 Pa. St. 274, 30 Atl. 159; Market St. R. Co. v. Central R. Co,. 51 Cal. 583; Omaha Horse R. Co. v. Cable &c. Co., 32 Fed. 727. As to the right of a commercial railroad to cross a street railway, see Lynn &c. R. Co. v. Boston &c. Co., 114 Mass. 88, and compare Georgia &c. R. Co. v. Columbus &c. R. Co., 89 Ga. 205, 15 S. E. 305.

tional burden upon the steam railway for which compensation must be made.[42] This branch of the subject, however, has already been sufficiently treated in the chapters on eminent domain and street railways where the later authorities are cited. After a street railroad has constructed its track across the track of a steam railroad the crossing does not become such a railroad crossing as to require the steam railroad to stop its trains before attempting to cross.[43] It has been held that at such crossings the same duty rests upon the street railway to stop and look and listen, before attempting to cross, that rests upon persons riding in ordinary vehicles, and where the employe in charge of a street car fails to take such precautions, and injury results, the street railway company will be liable to its passengers for all resulting injury.[44] In some cases, however, both companies may be guilty of negligence, and where such is the case a joint action may be maintained against both.[45] Additional authorities will be found in a subsequent section, where the subject is more fully treated.[46]

§ 1616 (1135a). Further of street railways crossing steam railroads.—The tendency of legislatures and courts to discourage the construction of steam railroad crossings at grade where it is possible to avoid such crossings is for even stronger reasons extended in some jurisdictions to the crossing of street and steam railroads.[47] The Supreme Court of Pennsylvania has announced it as the settled policy of that state to permit of no such grade crossings, except in cases of manifest and unavoidable

[42] Braddock &c. R. Co. v. Braddock Ry. Co., 1 Pa. Dist. R. 44, 49 Leg. Intel. 25; Pennsylvania &c. R. Co. v. Braddock &c. R. Co., 1 Pa. Dist. 626, 49 Leg. Intel. 74; Chicago &c. R. Co. v. Whiting &c. R. Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. 264, 1 Am. & Eng. R. Cas. (N. S.) 181; New York &c. R. Co. v. Bridgeport Tract. Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

[43] Byrne v. Kansas City &c. R. Co., 61 Fed. 605, 24 L. R. A. 693.

[44] Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

[45] Downey v. Philadelphia &c. R. Co., 161 Pa. St. 588, 29 Atl. 126, 58 Am. & Eng. R. Cas. 594.

[46] Post, § 1675, and authorities there cited.

[47] See Ante, § 1601.

necessity,[48] and in determining whether it is practicable to avoid a grade crossing it has been held that the courts will not consider the expense of an overhead structure, nor its unsightliness, nor the fact that damages may have to be paid to the owner of private property by reason of the erection of such structure; nor that an overhead structure will interfere with property on the street, will frighten horses, and will obstruct the view of coming trains, nor that local sentiment is in favor of such grade crossings.[49] In defining the duty of the courts in the grade crossing statute of that state the court says: "So far as the possible may be considered the practicable, there are very few points on the surface of the state where other than grade crossings are not practicable. . . . In the first place we must assume, because the legislature in this enlightened age has impliedly so assumed, that it is unwise, if not reckless and barbarous, to unnecessarily subject the traveling public and the employes of carrying corporations to the death, maiming and horrors of collisions which inevitably result from grade crossings. And, if it be reasonably practicable to avoid a grade crossing, then the question as to what extent the risk of such a crossing may be reduced is immaterial, for the law assumes and experience demonstrates that extraordinary care by both parties using such crossing, aided by all the advances in science and mechanics, has only resulted in lessening the risk and not abolishing it. In deciding, therefore, what is reasonable we are bound to keep in mind the consequences to be avoided. . . . Safety is the object in view, and, therefore, in determining what

[48] Baltimore &c. R. Co. v. Butler Pass. R. Co., 207 Pa. St. 406, 56 Atl. 959.

[49] Baltimore &c. R. Co. v. Butler Pass. R. Co., 207 Pa. St. 406, 56 Atl. 959; Pennsylvania R. Co. v. Warren St. R. Co., 188 Pa. St. 74, 41 Atl. 331. The construction of a grade crossing by a street railway company over a steam railroad company's track will be enjoined where it is in a depression, the street ascending in either direction from the tracks, and being very much traveled, and where thirty-four scheduled trains, beside extra trains, pass daily, where it was practicable to build an overhead crossing about eight hundred feet in length. Baltimore &c. R. Co. v. Butler Pass. R. Co., 207 Pa. St. 406, 56 Atl. 959.

is reasonable, we must balance expense and difficulty against loss of life and limb."[50]

§ 1617 (1135b). **Interurban railway crossing steam railroads.**—In many states it seems that the law does not make any distinction calling for a different procedure from that between steam railroads, in a case where a crossing over a steam railroad is sought by an interurban railway. The crossing may be settled by contract between the parties,[51] and if an agreement can not be reached then resort may be had to the court,[52] or duly authorized commissioners,[53] to determine the question. Bills filed in these proceedings are governed by the rules of equity pleading applicable to bills in general and a bill so filed is generally regarded sufficient if it so states the plaintiff's case as to inform the defendant of what he is called upon to meet.[54] It is incumbent on the petitioner to show it had lawful power to construct its road.[55] The question on the hearing is determined by the situation of the parties, the public interest, the expense, and all the facts affecting the public and the rights of the parties concerned, and the court may, after such a hearing, direct a crossing other than the one prayed for.[56] In states where the matter is left to the judgment of the railroad commissioners their decision has been held final unless an appeal

[50] Scranton &c. Tract. Co. v. Delaware &c. Canal Co., 180 Pa. St. 634, 37 Atl. 122.

[51] Chicago &c. R. Co. v. Old Colony Trust Co., 216 Fed. 577. An agreement between a railroad company and a traction company, whereby the former allows the latter to construct a traction road across the line of the railroad at grade, and settling, as between these parties, the mode of crossing, is not void because made without application to the chancellor to define such made under the statute. Raritan River R. Co. v. Middlesex &c. Tract. Co., 70 N. J. L. 732, 58 Atl. 332.

[52] Wellsburg &c. R. Co. v. Panhandle Tract. Co., 56 W. Va. 18, 48 S. E. 746.

[53] Boston &c. R. Co. v. Saco Valley Elec. R. Co., 98 Maine 78, 56 Atl. 202.

[54] Wellsburg &c. R. Co. v. Panhandle Tract. Co., 56 W. Va. 18, 48 S. E. 746.

[55] Mercer County Tract. Co. v. United Jersey R. &c. R. Co., 61 N. J. Eq. 715, 61 Atl. 461.

[56] Wellsburg &c. R. Co. v. Panhandle Tract. Co., 56 W. Va. 18, 48 S. E. 746.

is taken.[57] There is authority to the effect that the board of railroad commissioners have no power to modify or change a decree once rendered by them for the construction and maintenance of an interurban railway crossing except on a new application, notice, or hearing. And it has been further held that they can not before appeal make a temporary decree not purporting to represent their judgment in the matter.[58] In other jurisdictions the right of an interurban railway company to cross a railroad, at least when not in a public highway, is usually acquired by condemnation proceedings.[59]

[57] Boston &c. R. Co. v. Saco Valley Elec. R. Co., 98 Maine 78, 56 Atl. 202.

[58] Boston &c. R. Co. v. Saco Valley &c. R. Co., 98 Maine 78, 56 Atl. 202. See also Eastern &c. R. Co., In re, 127 Wis. 641, 107 N. W. 496. In Kansas City &c. R. Co. v. Railroad Com'rs, 73 Kans. 168, 84 Pac. 755, it is held that an electric railway is not such a railroad as comes within the jurisdiction of the board of railroad commissioners and they can not entertain an application by a railroad company to cross its track with an electric railway.

[59] Vandalia R. Co. v. Lafayette &c. Traction Co., 175 Ind. 391, 94 N. E. 483; Galveston Ry. Co. v. Houston Elec. Co., 57 Tex. Civ. App. 170, 122 S. W. 287; Malott v. Collinsville Ry. Co., 108 Fed. 313. See also Cleveland Ry. Co. v. Urbana Ry. Co., 26 Ohio C. C. 180.

CHAPTER L.

PRIVATE CROSSINGS.

Sec.
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§ 1620 (1136). **Definition.**—Private or farm crossings, as distinguished from public crossings, are those crossings which are constructed not for the use of the public, but for the benefit of a single individual or group of individuals, and are crossings in which the general public have no interest. They are usually constructed between different parcels of land which have been severed by the construction of the railway, so as to afford the owner access from one parcel to the other. Private crossings may, however, include those sometimes constructed between parcels of land owned by different individuals, or between parcels of land and highways located on opposite sides of the

right of way,[1] but farm or private crossings, as the term is generally or frequently used in this connection, are private crossings between different portions of the same tract of land, or parcels thereof severed by the road, rather than between separate farms or different individuals, or a farm all on one side and a highway on the other.[2]

§ 1621 (1137). **Who entitled to.**—The number of persons who are entitled to claim and secure private or farm crossings must depend, in a measure, at least, on the manner in which it is sought to secure the crossing. Where the crossing is secured by agreement between the person seeking the crossing and the railroad company, any one who may be able to secure an agreement with the company may obtain a crossing, and, if not prohibited by statute, a company may grant any number of private crossings it sees fit, so long as it does not impair its ability to perform its public functions.[3] The general rule is that only the person to be benefited by the crossing has a right to demand its construction.[4] Aside from the crossings secured by agreement between the person for whom the crossing is constructed and the railway company granting it, the subject is so largely a matter of statutory regulation in the different states that it is almost impossible to lay down general rules applicable to the subject. The question as to who are entitled to private and farm crossings is so closely connected with the sections which are to follow that the discussion there made completely covers

[1] For a definition and explanation of what amounts to and is included in a highway crossing, see § 1565, ante, Highway Crossing.

[2] See Louisville &c. R. Co. v. Hughes, 2 Ind. App. 682, 28 N. E. 158; Wheeler v. Rochester &c. R. Co., 12 Barb. (N. Y.) 227.

[3] In the case of Kansas City &c. R. Co. v. Kregelo, 32 Kans. 608, 5 Pac. 15, 20 Am. & Eng. R. Cas. 241, this language was used: "As a general rule, the land-owner has a reasonable right to farm crossings at such places as the necessities of his farm demand, provided such crossings, and the use thereof will not interfere with the paramount rights of the railroad company."

[4] Henderson v. Chicago &c. R. Co., 48 Iowa 216. It has been held that where a landlord would be entitled to a private crossing, his tenant is entitled to it. Hugo v. Great Western &c. R. Co., 16 U. C. Q. B. 506.

the subject, and, therefore, we do not deem it necessary to further consider it at this place. It has been held that a statute requiring a railway company to put in and maintain private farm crossings for adjoining land-owners applies only to those cases where the farm was bisected by the construction of the road, and not to those cases where an owner acquired lands on both sides of the right of way, after the road was constructed.[5]

§ 1622 (1138). **Effect of conveyance of right of way by landowner.**—Where a landowner, through whose land a railroad company seeks to secure a right of way, executes to the company a conveyance which is silent as to private crossings between the different parts of his land, the question sometimes arises as to the effect of such a conveyance. After the conveyance has been made, and the railway company has constructed its line, the owner of the different parcels of land may desire a crossing over the railway tracks from one part of the land to another. Where such cases have arisen the contention of the railway company has been that the execution of an unconditional deed by an owner to a right of way through his land estops him to claim any further interest in such strip of land, such as a right to have a private way across the same. The rule, however, is that such a conveyance does not constitute a waiver of a right to a private crossing, and the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding his unconditional instrument of conveyance.[6] One of the authorities which we have

[5] Stumpe v. Missouri &c. R. Co., 1 Mo. App. 633. But see Miller v. Quincy &c. R. Co., 56 Mo. App. 72. See generally Carroll v. Great Western R. Co., 14 U. C. Q. B. 614; Louisville &c. R. Co. v. Hughes, 2 Ind. App. 68, 28 N. E. 158. In Iowa the right of one whose land is bisected by a railroad right of way to have at least one crossing is absolute, and it is the duty of the company to furnish an adequate crossing. O'Malley v. Chicago &c. Ry. Co., 183 Iowa 749, 165 N. W. 1002.

[6] New York &c. R. Co. v. Railroad Commissioners, 162 Mass. 81, 38 N. E. 27; Powell v. Atchison &c. Ry. Co., 215 Mo. 339, 114 S. W. 1067, 1072 (citing text); Smith v. New York &c. R. Co., 63 N. Y. 58. Gulf &c. R. Co. v. Rowland, 70

cited seems to rest on the ground that, where there is a statute securing to owners, whose lands are severed by a railroad right of way, the right to private crossings from one part to another, it is applicable to cases where the right of way is secured by conveyance from the owner as well as to cases in which the right of way is secured under the right of eminent domain,[7] while another rests on the ground that, where a strip of land is conveyed from the middle of a parcel, leaving the remainder in two separate tracts, a right of way from one to the other is implied independent of any statute securing such right.[8] It is

Tex. 298, 7 S. W. 718. See also Vandalia R. Co. v. Furnas, 182 Ind. 306, 106 N. E. 401, 402 (citing text). So, he may resort to the statute notwithstanding an agreement by the company to provide the crossing and is not confined to a suit for specific performance, which, indeed it seems he could not maintain because the statute provides an adequate remedy. Indiana Un. Trac. Co. v. Seisler, 58 Ind. App. 507, 106 N. E. 911, 108 N. E. 44. A railroad company buying a right of way through a farm has been held to take it subject to the right of the occupants of the farm to use an established pathway across it. Louisville &c. R. Co. v. O'Neil, 119 Va. 611, 89 S. E. 862.

[7] "The statute is general and applies to cases where the lands are acquired by purchase, as well as to those where they are acquired by the power of eminent domain. It may be assumed that the owner has power to waive or release this obligation in respect to his lands, but we do not think that a conveyance in fee of a right of way has this effect. Such a conveyance is not inconsistent with the duty imposed upon the corporation. It gives the company a title in fee to the land for their roadway, and nothing more. In the conveyance of this land there is not a word indicating a purpose to waive or release the right to enforce the duty to make a farm crossing, and the presumption is, that the parties intended to leave the duty unaffected. The obligation imposed is not connected with the acquisition of land by purchase or otherwise, but is enjoined independently, and upon the assumption of ownership, and without regard to the manner of acquisition." Smith v. New York &c. R. Co., 63 N. Y. 58.

[8] "But it is familiar law that, if one conveys a part of his land in such a form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties, and from the terms of the grant, when applied to the subject-matter. The law presumes that one will not sell land to another without the understanding that the grantee shall have a legal

possible that the latter case carries the doctrine a little too far, at least when applied to railroads.[9] But it seems to be the correct doctrine that a private crossing over a railroad may exist in a proper case as a way of necessity.[10]

§ 1623 (1139). **Right to crossing where right of way has been condemned.**—Where a railroad right of way has been condemned through the lands of a landowner, and damages have been assessed and paid to such landowner, his right to a private crossing from one portion of his land to another seems to depend in a great measure upon what he was allowed compensation for in the condemnation proceedings. If, in estimating the damages, compensation has been allowed for the reduced value of the land because of the owner being deprived of access from one parcel to another, and compensation has been made on the theory that no crossing would be put in, then, ordinarily, the railroad company is entitled to exclusive possession of its right of way, and the landowner has no right to a private crossing.[11] Where it appears that compensation was not made on

right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold, if he can reach it in no other way. This presumption prevails over the ordinary covenants of a warranty deed." New York &c. R. Co. v. Railroad Commissioners, 162 Mass. 81, 38 N. E. 27. See also Gulf &c. R. Co. v. Rowland, 70 Tex. 298; Gulf &c. Ry. Co. v. Clay, 28 Tex. Civ. App. 176, 66 S. W. 1115.

[9] As a general rule no obligation rests upon the company to construct and maintain such crossings at its own expense unless required by statute or agreement. Cook v. North &c R. Co., 50 Ga. 211; Atchison &c. R. Co. v. Gough, 29 Kans. 94; Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156; People v. Detroit &c. R. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717.

[10] Cleveland &c. R. Co. v. Smith, 177 Ind. 524, 97 N. E. 164; Pittsburgh &c. R. Co. v. Kearns, 58 Ind. App. 694, 108 N. E. 873; Dubbs v. Philadelphia &c. R. Co., 148 Pa. St. 66, 23 Atl. 883.

[11] Chicago &c. R. Co. v. Cosper, 42 Kans. 561, 22 Pac. 634; Baltimore &c. R. Co. v. Lansing, 52 Ind. 229; Springfield &c. R. Co. v. Rhea, 44 Ark. 258; Cedar Rapids &c. R. Co. v. Raymond, 37 Minn. 204, 33 N. W. 704, 30 Am. & Eng. R. Cas. 345. But the right to a crossing by necessity or under the statute may be reserved by implication, Cleveland &c. R. Co. v. Smith, 177 Ind. 524, 539, 97 N. E. 164.

the theory that there should be no crossings, and the owner was not compensated for the damages resulting from being deprived of access from one parcel of his land to the other, the award of damages and the acceptance of compensation under the award does not estop the owner from claiming and securing a private crossing over the railroad right of way from one parcel of his land to the other.[12] And where an award of damages has been made, unless it appears that it was made on the theory that the landowner should be limited to a certain kind of crossing, it has been held that he is not thereby estopped from compelling the railroad company to construct an underground crossing.[13]

§ 1624 (1140). **Private crossings by prescription.**—It seems to be well settled that a landowner may acquire a right to a private crossing over a railroad right of way by adverse user.[14] The right to acquire a crossing in this way has been declared in a number of cases. Thus, where a crossing was used continuously for forty-nine years, and no effort was made by the railroad company to discontinue it, it was held that the railroad company was liable for its maintenance.[15] Twenty years' user

[12] Lind v. Chicago &c. R. Co., 42 Kans. 352, 22 Pac. 423; Kansas City &c. R. Co. v. Kregelo, 32 Kans. 608, 5 Pac. 15; Beardsley v. Lehigh Valley &c. R. Co., 142 N. Y. 173, 36 N. E. 877.

[13] Beardsley v. Lehigh Valley &c. R. Co., 142 N. Y. 173, 36 N. E. 877; Van Wagner v. Central &c. R. Co., 30 N. Y. S. 165. See also Powell v. Atchison &c. Ry. Co., 215 Mo. 339, 114 S. W. 1067.

[14] Bubenzer v. Philadelphia &c. R. Co. (Del. Ch.), 57 Atl. 242; Cleveland &c. R. Co. v. Munsell, 94 Ill. App. 10; Turner v. Fitchburg R. Co., 145 Mass. 433, 14 N. E. 627; Hardy v. Alabama &c. R. Co., 73 Miss. 719, 19 So. 661; Gulcane v. Canadian Vac. R. Co., 27 Ont. App. Rep. 64. "Twenty years of appropriate user is sufficient to prove the establishment of a public way across a railroad, or the grant of a private way. Fisher v. New York &c. R. Co., 135 Mass. 107." See Gay v. Boston &c. R. Co., 141 Mass. 407, 6 N. E. 236; Powell v. Atchison &c. Ry. Co., 215 Mo. 339, 114 S. W. 1067, 1070 (citing text); Easley v. Missouri Pac. Ry. Co., 113 Mo. 236, 20 S. W. 1073; Herndon v. Durham &c. R. Co., 161 N. Car. 650, 77 S. E. 683. And compare also Lamb v. Pontiac &c. R. Co., 156 Mich. 340, 113 N. W. 1110.

[15] Prince v. New York &c. R. Co., 14 N. Y. S. 817.

has been held sufficient to acquire the right to a private crossing.[16] And where a railway company, in constructing its line, left under a trestle an open subway which an adjoining owner used, openly and continuously, for a period of twenty-five years, as a passway from one portion of his land to another, it was held that he had acquired such right to such passage-way as would entitle him to maintain an action for damages against the railway company for filling up and destroying it.[17] But the use must be as a matter of right, and not merely permissive,[18] and there are many cases in which the right to a crossing has been held not to have been acquired either on this ground or because the use was not continuous and uninterrupted for the necessary period.[19]

§ 1625. Private crossings by necessity.—The right to cross may also exist as a right of way of necessity.[20] It has

[16] Fisher v. New York &c. R. Co., 135 Mass. 107, 17 Am. & Eng. R. Cas. 80; Gay v. Boston &c. R. Co., 141 Mass. 407, 6 N. E. 236. See note in 35 Am. & Eng. R. Cas. 320.

[17] Wells v. Northern R. Co., 14 Ont. R. 595, 35 Am. & Eng. R. Cas. 314. See also Louisville &c. R. Co. v. Brooks, 25 Ky. L. 1307, 77 S. W. 693; Farwell v. Boston &c. R. Co., 72 N. H. 335, 56 Atl. 751.

[18] Currie v. Bangor &c. R. Co., 105 Maine 529, 75 Atl. 51; McCreary v. Boston &c. R. Co., 153 Mass. 300, 26 N. E. 864, 11 L. R. A. 359; Concklin v. New York &c. R. Co., 149 App. Div. 739, 134 N. Y. S. 191. See also post, § 1647; and to same effect see Hastings v. Chicago &c. R. Co., 148 Iowa 390, 126 N. W. 786; Witham v. Chicago R. Co., 178 Iowa 1296, 160 N. W. 913; Louisville &c. R. Co. v. Hagan, 141 Ky. 20, 131 S. W. 1018, 35 L. R. A. (N. S.) 189; Thompson v. Louisville &c. R. Co., 25 Ky. L. 529, 76 S. W. 44.

[19] Chicago &c. R. Co. v. Hammond, 210 Ill. 187, 71 N. E. 376; Chicago &c. R. Co. v. Ives, 202 Ill. 69, 66 N. E. 940; Atchison &c. R. Co. v. Conlon, 62 Kans. 416, 63 Pac. 432, 53 L. R. A. 781; Brayden v. New York &c. R. Co., 172 Mass. 225, 51 N. E. 1081; Sprow v. Boston &c. R. Co., 163 Mass. 330, 39 N. E. 1024; Claflin v. Boston &c. R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638. Statutes also sometimes prevent the right from being acquired. See Simpson v. Boston &c. R. Co., 176 Mass. 359, 57 N. E. 674; Childs v. Boston &c. R. Co., 213 Mass. 91, 99 N. E. 957; Hall v. Boston &c. R. Co., 211 Mass. 174, 97 N. E. 914; Costello v. Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265.

[20] Cleveland &c. R. Co. v. Smith, 177 Ind. 524, 97 N. E. 164; Pitts-

been so held where a landowner conveys to a railroad company a right of way which bisects his property, and where he can not otherwise reach one part of it without going across the right of way sold, the law presumes that such a right was intended by the parties to be retained by him and this presumption is said to prevail even over the ordinary covenants of a warranty deed.[21] So, it is held that a right of way of necessity is reserved in the landowner under such circumstances by legal implication where condemnation proceedings are had.[22]

§ 1626 (1141). Private crossings by agreement.—The terms and conditions upon which private crossings are secured may be, and often are, determined by contract between the railway company and the person seeking the crossing.[23] Such contracts are valid, and will be enforced by the court. Resort may be had to equity to enforce such a contract if there is no adequate remedy at law for the person aggrieved,[24] but where there is an

burgh &c. Co. v. Kearns, 58 Ind. App. 694, 108 N. E. 873; Dubbs v. Philadelphia &c. R. Co., 148 Pa. St. 66, 23 Atl. 883; Rollo v. Nelson, 34 Utah 116, 96 Pac. 263, 26 L. R. A. (N. S.) 315; Uhl v. Ohio &c. R. Co., 47 W. Va. 59, 34 S. E. 934.

[21] Vandalia R. Co. v. Furnas, 182 Ind. 306, 106 N. E. 401, 402; New York &c. R. Co. v. Railroad Com'rs., 162 Mass. 81, 38 N. E. 27. See also Pittsburgh &c. R. Co. v. Kearns, 58 Ind. App. 694, 108 N. E. 873; Powell v. Atchison &c. Ry. Co., 15 Mo. 339, 114 S. W. 1067, 1072.

[22] Cleveland &c. R. Co. v. Smith, 177 Ind. 524, 539, 97 N. E. 164.

[23] In Gay v. Boston &c. R. Co., 141 Mass. 407, 6 N. E. 236, the court said "That a land-owner, in conveying land for a railway, may reserve a right of way, which must operate as a grant; that the railroad corporation, when settling with the land-owner for damages for land taken, may make a valid agreement to allow or maintain a crossing as one of the terms of settlement, and that a railroad corporation may, to the extent of its interest as owner of the land, or holder of the easement and franchise, grant a private right of way over its road—are propositions which we believe have never been questioned, and which are recognized by statutes and decisions." See also Speer v. Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197, 198.

[24] See Clouse v. Canada &c. R. Co., 4 Ont. R. 28, 14 Am. & Eng. R. Cas. 456; Speer v. Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197, 70 N. J. Eq. 318, 62 Atl. 943; Indianapolis Northern Trac. Co. v. Essington, 54 Ind. App. 286, 99 N. E. 757; Cincinnati &c. R. Co. v. Wall, 48 Ind. App. 605, 96 N. E. 389; Louisville

adequate remedy at law equity will not interfere. So, where it was sought to enforce specific performance of a contract for a private crossing, and it appeared that the crossing would be of slight or doubtful value to the landowner after constructed, the court refused to decree specific performance, and left the party to his remedy for damages.[25] And where a company, in consideration of the conveyance of a right of way by a landowner, agreed to construct farm crossings for him, and refused to do so, and it appeared that there was in force a statute which provided that landowners could secure private crossings, it was held that equity would not enforce the contract, but would leave the owner to his remedy at law for damages for a breach of the contract or his right to secure the crossings under the statute.[26] Damages will be allowed for the obstruction of a crossing by gates when the agreement provides that the crossing shall be open,[27] and where the company refuses altogether to construct

&c. R. Co. v. Brooks, 25 Ky. L. 1307, 77 S. W. 693; Marsh v. Lehigh &c. R. Co., 215 Pa. St. 141, 64 Atl. 366.

[25] Murdfeldt v. New York &c. R. Co., 102 N. Y. 703, 7 N. E. 404, 1 Sil. App. N. Y. 93, 25 Am. & Eng. R. Cas. 144. See also Clark v. Rochester R., 18 Barb. (N. Y.) 350.

[26] Illinois Central R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862, 26 Am. & Eng. R. Cas. 358; Indiana Un. Trac. Co. v. Seisler, 58 Ind. App. 507, 106 N. E. 911 (citing text). In the first case it was said: "Whether they (the land-owners) are entitled to have a crossing constructed by the company for their use, either under the covenant in the right of way deed, or under the statute, or both, their remedy is clearly in a court of law, and they will be remitted to that forum, where such matters are purposely cognizable. The remedy for the complaint made against the railroad company for the omission of duty, whether it arises out of a contract or under the statute, is full, complete and adequate at law, and no reason appears why a court of equity should assume jurisdiction." See Canada &c. R. Co. v. Erwin, 13 Can. S. C. R. 162, 35 Am. & Eng. R. Cas. 311. When there was an alleged agreement as to a crossing, and plaintiff sued to redress a breach of it and it appeared that he did not rely upon his contract, but upon the law to secure his crossing, it was held that he had no rights under the alleged contract. Canada &c. R. Co. v. Clouse, 13 Can. S. C. R. 139, 35 Am. & Eng. R. Cas. 296. See for alleged agreement held insufficient, Owazarzak v. Gulf &c. Ry. Co., 31 Tex. Civ. App. 229, 71 S. W. 793.

[27] Williams v. Clark, 140 Mass. 238, 5 N. E. 802, 24 Am. & Eng. R.

the crossing.[28] When once a valid contract has been made for a crossing, the railway company will not be excused from performing the contract and constructing the crossing because the cost will be somewhat heavy.[29] It has been held that the sale of the land after suit is brought will not defeat the action for damages.[30] The measure of damages for failure to con-

Cas. 460. But where a railroad company, in compromise of a claim for obstructing the landowner's underground crossing, made a cash payment and agreed to give a grade crossing and permission to use space under a creek bridge for cattle crossing, obstruction of such use by concrete piers which became a public necessity on account of increased traffic was held not to violate the agreement. Whitham v. Chicago &c. Ry. Co., 178 Iowa 1296, 160 N. W. 913.

[28] Indiana &c. R. Co. v. Koons, 105 Ind. 507, 5 N. E. 549. In this case the contract provided that the company should fence the track and build a private crossing. The owner sued and recovered damages for a failure to construct the crossing. Afterward he brought a second suit for the failure to fence. It was held that the first suit was an adjudication of the breach of contract and that the second suit would not lie.

[29] Cincinnati &c. R. Co. v. Hudson, 88 Ky. 480, 11 S. W. 509, 39 Am. & Eng. R. Cas. 693. See Clouse v. Canada &c. R. Co., 4 Ont. R. 28, 14 Am. & Eng. R. Cas. 456.

[30] Cincinnati &c. R. Co. v. Hudson, 88 Ky. 480, 11 S. W. 509, 39 Am. & Eng. R. Cas. 693. And that such an agreement does not run with the land nor bind the lessee of the road. Cook v. Milwaukee &c. R. Co., 36 Wis. 45. In Speer v. Erie R. Co., 70 N. J. Eq. 318, 62 Atl. 943, a strip of land through a farm was conveyed to a railroad for a right of way by a deed in which the railroad covenanted to provide the grantor with a convenient road crossing. One of the severed portions of the farm was intersected by a road, but there was no method of egress from the other portion, except over the railroad crossing, and through the intersected portion to the road. A bill to restrain the company and for specific performance had been filed but the court, finding that specific performance could not be granted, retained the case for assessment of damage caused by destruction of the crossing, and it was held that the right to use the crossing was not limited to the use of it as a farm crossing, but that the original grantor and his grantees had a right to use it for any purpose to which the land became adapted; that the right to use the crossing was not restricted to the grantors but extended to her grantees even of subdivisions, and that after the land had ceased to be used for agricultural purposes and had been divided into lots, the railroad company had no right to maintain bars at the crossing.

struct a private crossing has been held to be the cost of constructing the crossings, together with such damages as may have resulted from the loss of the use of the crossing up to the time of the trial.[31]

§ 1627. Parol agreement for crossing—Statute of frauds.—Although, as stated in the last preceding section, a valid agreement for a private crossing may be made, yet, either because of the rule prohibiting the admission of parol evidence to contradict or vary the terms of a written contract or because of the statute of frauds, it has often been held that a parol agreement for a private right of way or crossing is invalid or can not be shown.[32] Thus, where a right of way is deeded to a railroad company it is generally held that the grantor can not show a parol agreement by the company as part of the consideration to construct and maintain a private crossing.[33]

§ 1628 (1142.) Private crossings under statutory authority.—In a great many of the states statutes are in force which pro-

[31] Cincinnati &c. R. Co. v. Hudson, 88 Ky. 480, 11 S. W. 509, 39 Am. & Eng. R. Cas. 693. See also Pittsburgh &c. R. Co. v. Kearns, 58 Ind. App. 694, 108 N. E. 873, to same effect (also holding it reversible error to instruct that the measure of damages for destruction of a farm crossing was the difference between the value of the farm with a crossing and its value without a crossing where a crossing could be compelled either under the statute or covenant in the deed granting the right of way). Compare Port v. Huntingdon &c. R. Co., 168 Pa. St. 19, 31 Atl. 950.

[32] Mattison v. Chicago &c. R. Co., 42 Nebr. 545, 552, 60 N. W. 925; Meade v. Norfolk &c. R. Co., 89 Va. 296, 15 S. E. 497; Hubenthal v. Spokane &c. R. Co., 43 Wash. 677, 86 Pac. 955. See also Lincoln v. Great Northern Ry. Co., 144 N. W. 713, 26 N. Dak. 504.

[33] Louisville &c. R. Co. v. Willbanks, 133 Ga. 15, 65 S. E. 86, 24 L. R. A. (N. S.) 375; Schrimper v. Chicago &c. R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731; Trout v. Norfolk &c. R. Co., 107 Va. 576, 59 S. E. 394. See also Doan v. Cleveland &c. R. Co., 54 Ind. App. 620, 98 N. E. 321, 100 N. E. 95. But compare Perkiomen R. Co. v. Broomer, 217 Pa. St. 263, 66 Atl. 359. In Stafford v. Big Sandy R. Co., 32 Ky. L. 154, 105 S. W. 389, it is held that the deed may be reformed in a proper case to show such an agreement.

vide a method by which landowners whose lands border on the right of way of a railroad company may secure private or farm crossings. There is some conflict in the authorities as to the constitutionality of such statutes. That such statutes are constitutional as to all railway companies which are chartered and constructed after the enactment of the statutes the authorities are agreed,[34] but where the statute requiring a railroad company to construct and maintain private crossings was enacted after the railway company was chartered and its line constructed, it was held unconstitutional as depriving the company of its property without due compensation.[35] Other well reasoned authorities, however, hold that the enactment of such a statute is a valid exercise of the police power of the state, and applies to those companies chartered before as well as those chartered after its passage.[36] If the decisions which uphold the

[34] Illinois &c. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862, 26 Am. & Eng. R. Cas. 358. A railway company which is reorganized after purchase at foreclosure sale is estopped to question the constitutionality of an act requiring farm crossings which was in effect at the time of such reorganization. Alabama &c. R. Co. v. Odeneal, 73 Miss. 34, 19 So. 202.

[35] People v. Detroit &c. R. Co., 79 Mich. 471, 44 N. W. 934, 42 Am. & Eng. R. Cas. 257, 7 L. R. A. 717; Gulf &c. R. Co. v. Rowland, 70 Tex. 298, 7 S. W. 718, 35 Am. & Eng. R. Cas. 286. See also Milliman v. Oswego &c. R. Co., 10 Barb (N. Y.) 87; Owazarzak v. Gulf &c. R. Co., 31 Tex. Civ. App. 229, 71 S. W. 793. In the case of New York &c. R. Co. v. Railroad Comrs., 162 Mass. 81, 38 N. E. 27, the statute was upheld, but the court placed its opinion upon the ground that the statute did not create a new right, but simply declared a right which existed independent of statute. The court intimated that if the statute attempted to create a new right or to impose a new burden it would be held unconstitutional. The court, among other things, said: "If the statute assumed to create a right of way where none before existed, and to put upon the railroad corporations the burden of establishing and maintaining crossings for private persons over land held by a railroad corporation under a perfect title, subject to no rights or privileges, it might well be held unconstitutional."

[36] New York &c. R. Co. v. Railroad Comrs., 162 Mass. 81, 38 N. E. 27; Illinois &c. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862, 26 Am. & Eng. R. Cas. 358.

constitutionality of such statutes can be placed upon the ground that the statutes rest upon the police power of the state, they are undoubtedly correct, but some of the authorities hold, and, we think, with some reason, that such statutes do not rest upon and are not within the police power of the state.[37] The state usually exercises the police power for the benefit and safety of the public, and it seems to us that the construction of private and farm crossings over railway tracks can hardly be said to be for the benefit of the public. The same reason cannot exist, in all respects at least, for placing a statute requiring a railway company to construct private crossings upon the police power that exists for resting a statute requiring a company to fence its tracks upon the police power, for in one case the safety of the public who use the railway is endangered, while in the other it is secured.[38] The provisions of the various statutes are so different that it will be impossible to notice them all. The right to a crossing under such statutes is not confined to one for agricultural purposes.[39] Lessees may be compelled to furnish

[37] People v. Detroit &c. R. Co., 79 Mich. 471, 44 N. W. 934, 42 Am. & Eng. R. Cas. 257, 7 L. R. A. 717. But they may also be valid where the power to amend or repeal has been reserved, and much may depend upon the provisions of the particular statute in question. In Dwyer v. Chicago &c. Ry. Co., 40 S. Dak. 84, 166 N. W. 237, it is held that statutes giving a right to private farm crossings for the benefit of the landowners and not to safeguard public travel are not an exercise of the police power and they will not be so construed as to endanger the public safety and convenience.

[38] "It is apparent that every open crossing into the public highway across a railroad track increases rather than diminishes, the danger of travel, by giving animals an opportunity to get upon the track in front of passing trains. These residence crossings can not, therefore, be justified on the ground of protection and safety to passengers and property." People v. Detroit &c. R. Co., 79 Mich. 471, 34 N. W. 934, 42 Am. & Eng. R. Cas. 257, 7 L. R. A. 717.

[39] Buffalo &c. Co. v. Delaware &c. R. Co., 130 N. Y. 152, 29 N. E. 121. In the case cited it was said: "The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, like stone and minerals." As to who are adjoining owners and what lands are included within various statutes requiring the construction of private crossings for the benefit of

private crossings under the statute,[40] as well as the owners of the railway, and so may a receiver.[41] The procedure in securing a crossing under statutory authority depends on the particular statute under which the crossing is sought, and since the statutes are so different in their provisions it follows that the procedure must vary.[42] In some of the states the owner must put the crossing in at his own expense, while in others the expense must be borne by the company.[43] Some of the statutes provide that, if the company fail, after being notified, to put in the crossing, the landowner may do so and recover the expense from the railroad company,[44] or, if the railroad company refuse, the owner may recover damages for such refusal.[45]

§ 1629 (1143). **Location and number of crossings.**—The manner in which the location of a crossing shall be determined depends in a great measure upon the terms of the statute. Where the statute confers upon the landowner the right to select the

lands designated, see note in L. R. A. 1917D, 909.

[40] Buffalo &c. R. Co. v. Delaware &c. R. Co., 130 N. Y. 152, 29 N. E. 121.

[41] Peckham v. Dutchess County R. Co., 145 N. Y. 385, 40 N. E. 15.

[42] It has been held that where the obligation to put in farm crossings is purely statutory, the statutory method of enforcing that obligation is exclusive. Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156; Baltimore &c. R. Co. v. Campbell, 109 Ill. App. 25. But see Swinney v. Chicago &c. R. Co., 123 Iowa 219, 98 N. W. 635. In O'Malley v. Chicago &c. Ry. Co., 183 Iowa 749, 165 N. W. 1002, it is held that the statute empowering the Railroad Commission to order private crossings over railroads does not exclude the power of the courts to enforce the rights of a landowner to such a crossing, whether grade or otherwise.

[43] Omaha &c. Co. v. Severin, 30 Nebr. 318, 46 S. W. 842, 45 Am. & Eng. R. Cas. 122.

[44] Sheridan v. Atchison &c. R. Co., 56 Mo. App. 68. See also Illinois Cent. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; Birlew v. St. Louis &c. R. Co., 104 Mo. App. 561, 79 S. W. 490.

[45] Port v. Huntingdon &c. R. Co., 68 Pa. St. 19, 31 Atl. 950. In Green v. Baltimore &c. R. Co., 245 Pa. St. 35, 91 Atl. 248, it is held that right to a private crossing where the right of way is acquired by condemnation is a vested right and that a court of equity may by mandatory injunction require the company to restore a private crossing which it has wrongfully destroyed.

place of crossing, he may do so, but his selection must be reasonable and such as not to interfere with the paramount rights of the railway company.[46] And, on the other hand, where the statute permits the railway company to select the place of crossing, it may do so, provided the location is a suitable one and such as not to subject the owner to great inconvenience.[47] Whether the landowner or the railroad company has the right to select the place of crossing, the purposes of the crossing and the respective rights of each of the parties must be considered, and neither party will be allowed to arbitrarily select a place of crossing to the manifest injury or detriment of the other party.[48] The remedy, where the company fails to construct

[46] Van Vrankin v. Wisconsin &c. R. Co., 68 Iowa 576, 27 N. W. 761. See also Chalcraft v. Louisville &c. R. Co., 113 Ill. 86. "As a general rule the landowner has a reasonable right to farm crossings at such places as the necessities of his farm demand, provided such crossings and the use thereof will not interfere with the paramount rights of the railroad company. Kansas &c. Railway Co. v. Allen, 22 Kans. 285, 31 Am. Rep. 190; Atchison &c. Railroad Co. v. Gough, 29 Kans. 94." Kansas City &c. R. Co. v. Kregelo, 32 Kans. 608, 5 Pac. 15, 20 Am. & Eng. R. Cas. 241.

[47] Wademan v. Albany &c. R. Co., 51 N. Y. 568; Boggs v. Chicago &c. R. Co., 54 Iowa 435, 6 N. W. 744.

[48] In Jones v. Seligman, 81 N. Y. 190, 3 Am. & Eng. R. Cas. 236, the court said: "The location of a crossing is to be made somewhat with reference to the needs, necessities and convenience of the owner of the farm, and he is entitled to be reasonably and fairly accommodated. The circumstances are to be considered, and the crossings should be located in view of all the surroundings, and according to the situation of the adjacent land. The railroad corporation, in the exercise of its duty in providing farm crossings, is not vested with any absolute discretion or arbitrary power that its decision is final and conclusive and can not be reviewed or disturbed, while under the provisions of the general railroad act, requiring the corporation to erect farm crossings, etc., for the use of the proprietor of lands adjoining, the interest of neither party is alone controlling, the power must be exercised in a proper manner, having due regard to the convenience of the owner of the land, and without subjecting him to needless and unreasonable injury." See also Van Kleeck v. Dutchess County R. Co., 28 N. Y. S. 902; Clarke v. Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696. As to right of company to change location when necessary, see Costello v. Grand Trunk R., 70 N. H. 403, 47 Atl. 465.

the crossing at a place convenient for the landowner, is by an action for damages,[49] or by an action to compel the construction of a crossing at a proper place.[50] And where the landowner selects a place for a crossing at a point where the expense to the company will be enormous in proportion to the benefit to the landowner, the company may properly refuse to construct the crossing at such place.[51] The number of crossings to which a landowner is entitled is limited. The general rule is that, when the railroad has granted a reasonable number of crossings, and offered the owner a reasonable opportunity to pass from one part of his farm to another, its duty, at least so far as the number of crossings is concerned, is at an end.[52] When the statute

[49] Wademan v. Albany &c. R. Co., 51 N. Y. 568. In this case the plaintiff sued for damages and for the construction of a crossing at a suitable place. The court held that as the construction of a new crossing would entail such a heavy expense on the railroad in proportion to the benefit to the land-owner, he should be awarded damages and nothing more. See also Sheridan v. Atchison &c. R. Co., 56 Mo. App. 68.

[50] See Jones v. Seligman, 81 N. Y. 190; Sheridan v. Atchison &c. R. Co., 56 Mo. App. 68. In Chesapeake &c. Ry. Co. v. Herringer, 158 Ky. 267, 164 S. W. 948, it is held that where the company in consideration of the easement across the land agreed to construct a crossing and the company and owner could not agree as to the location the owner could not maintain an action for damages but should resort to a court of equity to fix the location.

[51] The company, however, can not refuse to construct a crossing at a proper place. Gray v. Burlington &c. R. Co., 37 Iowa 119.

[52] See, on the general subject, Van Kleeck v. Dutchess County R. Co., 28 N. Y. S. 902; Jones v. Seligman, 81 N. Y. 190; Canada S. R. Co. v. Clouse, 13 Can. S. C. 139, 35 Am. & Eng. Cas. 296. The law is very clearly expressed in the recent case of Clarke v. Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696, as follows: "When once the company has put in suitable crossings, can it be required later to put in additional ones? No authority has been cited to the exact point, and I have found none. In Wademan v. Albany &c. R. Co., 51 N. Y. 568, under such a statute, it was held that if the statute give no election in terms to the landowner, it is the right of the company to say where the crossings shall be; but in the exercise of this right regard must be had to the convenience of both parties, and such a location must be made as will not subject the owner to needless and unreasonable injury. Must the company change the crossings in place, or add new ones, with the changing caprices, or even needs, of the owner? If the owner sell

under which the crossing is sought provides that the company must furnish adjoining owners "necessary" farm crossings, it has been held that it must furnish such crossings, and as many as are reasonably necessary, and that what are "necessary" crossings is a question for the jury.[53]

§ 1630 (1144). **Construction of crossing—Sufficiency.**—Where the railway company is under an obligation to put in private crossings for the adjoining landowners, such crossings must be adequate and sufficient for all the usual purposes for which such crossings are used. The company cannot discharge its duty by constructing a crossing which would enable only persons on foot or animals to cross. The crossing must be adequate, and an adequate means of crossing has been held to be such a crossing as would enable the owner to cross the track and right of way on foot or horseback, with wagon or carriage, or with domestic animals under his control.[54] It is difficult to lay down any general rule that can apply to all cases for the adequacy of any particular private crossing must necessarily depend largely on its position and the surrounding circumstances.[55]

§ 1631 (1145). **Enforcing construction.**—Different methods are provided for enforcing the construction of private or farm

part of his land, must the company then make a crossing on the part sold, and must it keep on adding crossings as further sales of parts are made? I think not."

[53] Alabama &c. R. Co. v. Odeneal, 13 Miss. 34, 19 So. 202. See Dubbs v. Phila. &c. Railroad Co., 148 Pa. St. 66, 23 Atl. 883.

[54] Omaha &c. R. Co. v. Severin, 30 Nebr. 318, 46 N. W. 842, 45 Am. & Eng. R. Cas. 122. See also Fremont &c. R. Co. v. Lamb, 11 Nebr. 592, 10 N. W. 493, 5 Am. & Eng. R. Cas. 367. An adequate crossing has been held not to mean an open crossing, so that animals may wander across the track from one part of a farm to another. Curtis v. Chicago &c., 62 Iowa 418, 17 N. W. 591, 13 Am. & Eng. R. Cas. 593. See also Missouri &c. R. Co. v. Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55.

[55] Horne v. Atlantic &c. R. Co., 36 N. H. 440; Gray v. Burlington &c. R. Co., 37 Iowa 119. It may be necessary to consider future as well as present use. Hespenheide v. King, 31 Pittsb. Leg. J. (N. S.) 242. But see People v. New York &c. R. Co., 168 N. Y. 187, 61 N. E. 172.

crossings. The methods must, of course, vary, because, in some cases, the right to the crossing rests on a contract, while in others it rests on statutory enactments. Where the right to the crossing rests on a contract between the landowner and the railway company there is some conflict as to whether or not such a contract can be enforced by a decree of specific performance. Unless the landowner has a full, complete and adequate remedy at law for damages for a violation of the contract, we are of the opinion that the contract may be enforced by a decree in equity, but where full and adequate compensation can be made,[56] or where it appears that to decree specific performance will result in little advantage to the landowner and great expense to the railroad company, specific performance will be denied.[57] Where the right to a crossing rests upon statute the statute usually provides a method for enforcing a construction of the crossing. The methods provided by the statutes are not at all uniform, varying, of course, in the different states. Some of the statutes provide that the construction of the crossing may be secured by mandamus against the railway company.[58] Others provide that the landowner may give

[56] Ante, § 1626. Compare Indianapolis N. Trac. Co. v. Essington, 54 Ind. App. 286, 99 N. E. 757, where specific performance was enforced and there was held to be no other adequate remedy, with Indiana Un. Trac. Co. v. Seisler, 58 Ind. App. 507, 106 N. E. 911, where it was held that there was another adequate remedy and specific performance could not be had.

[57] Murdfeldt v. New York, &c. R. Co., 102 N. Y. 703, 7 N. E. 404, 1 Sil. App. (N. Y.) 93, 25 Am. & Eng. R. Cas. 144; ante, § 1626.

[58] Boggs v. Chicago &c. R. Co., 54 Iowa 435, 6 N. W. 744; State v. Mason City &c. R. Co., 85 Iowa 516, 52 N. W. 490. See Buffalo &c. Co. v. Delaware &c. R. Co., 130 N. Y. 152, 29 N. E. 121; State v. Wisconsin Cent. R. Co., 128 Wis. 79, 107 N. W. 295. In State v. Chicago &c. R. Co., 79 Wis. 259, 12 L. R. A. 180, and note, 49 Am. & Eng. R. Cas. 304, it was said: "This provision (the one providing for a penalty for the failure to construct a farm crossing) enables the owner to use the corporation and recover damages or penalties for its failure to perform its legal duty; but that will not secure the construction of the necessary farm crossing, nor will it afford an adequate remedy. The writ of mandamus would seem to be most efficient, if not the only adequate means for compelling the corporation to do its legal duty. . . . It seems to us

notice to the railway company to construct the crossing, and, on its failure to do so within the time specified by the statute, he may do so and recover the expense from the railway company.[59] Some of the statutes provide that double the cost of the crossing may be recovered.[60] The right given by statute to require the establishment of a private crossing is a private individual right rather than a public right and the State Railroad Commission has no authority to enforce it, especially where the statute provides that the crossing must be made by the railroad company under a money penalty to be recovered by the person interested.[61]

§ 1632 (1146). **Repair and maintenance.**—The general rule is that the duty of repairing and maintaining private crossings rests upon the person whose duty it was to construct the crossing.[62] The statutes imposing upon railway companies the duty of constructing farm crossings usually provide that the company shall "construct and maintain" suitable farm crossings, and under such provisions the duty of keeping in repair falls upon the railway company.[63] The obligation to

clear that mandamus is the only legal remedy to which the relator can resort in this case to enforce his rights to compel the corporation to perform the duty which the law imposes." Mandamus, however, is not an exclusive remedy. State v. Mason City &c. R. Co., 85 Iowa 516, 52 N. W. 490.

[59] Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156; Green v. Morris &c. R. Co., 24 N. J. L. 486. See also Indiana Union Trac. Co. v. Seisler, 58 Ind. App. 507, 106 N. E. 911.

[60] Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156.

[61] Mississippi R. R. Com. v. Illinois Cent. R. Co., 113 Miss. 92, 73 So. 878, L. R. A. 1917D, 907.

[62] Patterson v. South &c. R. Co., 89 Ala. 318, 7 So. 473; Miller v. Chicago &c. R. Co., 66 Iowa 546, 24 N. W. 36; Stewart v. Cincinnati &c. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539; Madison v. Missouri &c. R. Co., 60 Mo. App. 599; Peckham v. Dutchess County &c. R. Co., 20 N. Y. S. 39; Cotton v. New York &c. R. Co., 20 N. Y. S. 347. Under a deed of right of way reserving crossings to the grantor it has been held that the railroad company is bound to keep them in repair. Carnegie Realty Co. v. Carolina &c. Ry. Co., 136 Tenn. 300, 189 S. W. 371.

[63] See Omaha &c. R. Co. v. Severin, 30 Nebr. 318, 46 N. W. 842, 45 Am. & Eng. R. Cas. 122; Chicago

repair may also become binding upon the company from long continued custom to repair. Thus, where the company had kept a crossing in repair for a period of forty-nine years, it was held that the duty to repair was one from which it could not escape.[64] The duty to repair is not owing to anyone besides persons lawfully using the crossing. A person using the crossing without right, and for his own convenience, cannot complain because the crossing may not be in proper repair.[65]

§ 1633 (1147). Passways and subways under the tracks.— Communication from one part of a landowner's property to another part, which has been cut off by a railroad right of way, is often provided for by passways and subways constructed under the tracks. As a rule, such passways and subways are more convenient for the landowner, and are at the same time much safer for the railway company, for collisions and injuries at such crossings are practically reduced to a minimum. There are but few adjudicated cases as to whether or not a company can be compelled to furnish a crossing by means of a passway or subway under the track. Most of the cases on the subject involve the rights of railway companies and landowners in reference to passways and subways after they have been constructed. It has, however, been held, and correctly, we think, that where a railroad company was required to construct farm

&c. R. Co. v. Harris, 54 Ill. 528; Illinois Central R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862, 26 Am. & Eng. R. Cas. 358; Baltimore &c. R. Co. v. Keck, 89 Ill. App. 72; Fremont &c. R. Co. v. Lamb, 11 Nebr. 592, 10 N. W. 493, 5 Am. & Eng. R. Cas. 367; Clouse v. Canada Southern R. Co., 4 Ont. R. 28, 14 Am. & Eng. R. Cas. 456.

[64] Prince v. New York &c. R. Co., 14 N. Y. S. 817. See Stewart v. Cincinnati &c. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539.

[65] Cornell v. Skaneateles R. Co., 15 N. Y. 581. See Mann v. Chicago &c. R. Co., 86 Mo. 347. And compare Southern R. Co. v. Murrell, 78 Miss. 446, 28 So. 824 (tenant). In Baltimore &c. Ry. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, it is held that where a railroad company maintains a crossing and permits its frequent use by a tenant of the farm for the benefit of which it is constructed the company may be held liable for negligently injuring the tenant at the crossing as to one who has acted upon invitation extended by it.

crossings, and it appeared that the track was on a high embankment, and there was a natural depression through which a subway could be more conveniently constructed than a grade crossing, such subway would be ordered constructed.[66] So, it seems that the right to a subway or crossing under the track may be acquired by prescription.[67] And where a railway company was under a statutory obligation to furnish a landowner a crossing, it was held that it might be either a grade crossing, an overhead crossing, or an undergrade crossing, depending on the lay of the land and the relative cost of constructing the different crossings.[68] Where a passway has been constructed, and the railway company attempts to fill it up, there is some conflict as to whether an injunction will lie to restrain the company from taking such action. If the company has entered into a valid agreement with the landowner to construct and maintain passways under its tracks, and it afterwards undertakes to fill up and destroy such passways, injunction is the proper remedy.[69] But where a passway has been used by mere sufferance, and under no claim of right, although it has been used for a sufficient length of time to give an easement by prescription, no such right has been acquired as will entitle a

[66] Beardsley v. Lehigh Valley Ry. Co., 142 N. Y. 173, 36 N. E. 877, 20 N. Y. S. 458; Van Wagner v. Central &c. R. Co., 80 Hun 278, 30 N. Y. S. 165; Jones v. Seligman, 81 N. Y. 190. See also Powell v. Atchison &c. Ry. Co., 215 Mo. 339, 114 S. W. 1067, 1070 (citing text.)

[67] Powell v. Atchison &c. Ry. Co., 215 Mo. 339, 114 S. W. 1067, 1070; Herndon v. Durham &c. R. Co., 161 N. Car. 650, 77 S. E. 683.

[68] Post v. Huntington &c. R. Co., 168 Pa. St. 19, 31 Atl. 950. See St. Paul &c. R. Co. v. Murphy, 19 Minn. 500. The text is cited in State v. Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16, 17, where it is said: "We have no hesitation in affirming this view (that undergrade crossings may be required in a proper case), for they may be vastly promotive of the owner's convenience, and, while they may involve more expense to the railroad company, it may well be doubted whether they are not always a real economy over the grade crossing with its continual peril of collision of trains with passing teams or cattle."

[69] Swan v. Burlington &c. R. Co., 72 Iowa 650; Rock Island &c. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105. See also Cleveland &c. R. Co. v. Munsell, 192 Ill. 430, 61 N. E. 374.

landowner to an injunction to prevent the filling up of the passway.[70] Yet if the landowner has acquired an easement, although he may not be entitled to an injunction to prevent the company from filling up the subway, he can recover damages for the destruction of his easement.[71]

§ 1634 (1148). Damages for destruction or impairment of crossing by railway company.—Where a railway company has once constructed a private crossing under a statutory duty to build such crossing, it is under an obligation to see that the crossing is properly maintained. It has no right, as a rule, to take out or destroy the crossing, and if it does so it will be liable in damages.[72] But where a company changed the grade of its track, thus necessitating a change in a private crossing, it was held that the company was not bound to construct new approaches to the crossing.[73]

§ 1635 (1149). When right to private crossing runs with the land.—Where there is a mere parol agreement to put in a private crossing, or for its use, the right to such crossing does not run with the land, and does not pass to a subsequent grantee of the adjoining land.[74] But where a deed conveying a right of way to the railway company provided for the con-

[70] Davis v. Cleveland &c. R. Co., 140 Ind. 468, 39 N. E. 495. See Canada Southern R. Co. v. Clouse, 13 Can. S. C. R. 139, 35 Am. & Eng. R. Cas. 296; Schrimper v. Chicago &c. R. Co., 115 Iowa 35, 87 N. W. 731; Whitham v. Chicago &c. Ry. Co., 178 Iowa 1296, 160 N. W. 913.

[71] Wells v. Northern &c. R. Co., 14 Ont. 594, 35 Am. & Eng. R. Cas. 314.

[72] Ohio &c. R. Co. v. McGehee, 47 Ill. App. 348; Wells v. Northern &c. R. Co., 14 Ont. R. 594, 35 Am. & Eng. R. Cas. 314. See also Pittsburgh &c. R. Co. v. Kearns, 58 Ind. App. 694, 108 N. E. 873.

[73] Williams v. Clark, 140 Mass. 238, 5 N. E. 802, 24 Am. & Eng. R. Cas. 460. See also Schrimper v. Chicago &c. R. Co., 115 Iowa 35, 87 N. W. 731. But see Chesapeake &c. R. Co. v. Richardson, 30 Ky. L. 426, 98 S. W. 1042.

[74] Mills v. Hopkins, 6 U. C. C. P. 138. A purchaser of a railway at a foreclosure rule is not bound by a parol agreement made by the president of the railroad company to make a farm crossing or maintain a fence of a certain description. Hunter v. Burlington &c. R. Co., 76 Iowa 490, 41 N. W. 305.

struction and maintenance of private crossings, the right is one that runs with the land, and the right to the crossing may be enforced in favor of a subsequent grantee of the land.[75] And where the railway company which has put in a crossing in compliance with an agreement between itself and an adjoining landowner continues to maintain the crossing after the landowner has conveyed to another, it may estop itself to claim that the subsequent grantee is not entitled to the crossing.[76] Where a railway company has constructed and maintained a private crossing, and the company afterwards sells its line, the grantee taking with notice that the crossing exists, it has been held that the grantee is bound to maintain the crossing and cannot destroy it.[77]

§ 1636 (1150.) Care required on part of railway company at private crossings.—We have already referred to the duty of a

[75] Pittsburgh &c. R. Co. v. Kearns, 58 Ind. App. 694, 108 N. E. 873; Post v. West Shore &c. R. Co., 50 Hun 301, 3 N. Y. S. 172; Hall v. Clearfield &c. R. Co., 168 Pa. St. 64, 31 Atl. 940. See also Rathbun v. New York &c. R. Co., 20 R. I. 60, 37 Atl. 300; Speer v. Erie R. Co., 70 N. J. Eq. 318, 62 Atl. 943.

[76] The question of whether the right to a private crossing runs with the land was before the supreme court of Michigan in the case of Stewart v. Cincinnati &c. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539. The court held that it was not necessary to decide that point to dispose of the case, but said in the course of its opinion: "In this case it is contended by the defendant that the agreement was personal, and was binding only between the railroad and the owner, and did not contain any covenants which ran with the land; and, moreover, it was an agreement to construct, and not to maintain. Conceding, without deciding, that this contention is correct, it follows that when Kent conveyed to Green on March 15, 1884, the obligation of the railroad company with respect to the crossing it had erected for Kent terminated, and they were at liberty to remove the structure at pleasure; but they did not remove it, but continued it as a crossing; and as long as they did so they were obligated to use ordinary care to see that it was not dangerous to those who should accept the invitation to use it for the purposes for which it was maintained."

[77] Swan v. Burlington &c. R. Co., 72 Iowa 650, 34 N. W. 457; Rock Island &c. R. Co. v. Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105, 55 Am & Eng. R. Cas. 65.

railway company in reference to repairing and maintaining private crossings, and in another chapter is discussed the duty of railway companies in reference to fences, gates and bars at private crossings. Here we propose to discuss the duty in respect to the operation of trains at private crossings. At public crossings railway companies are required to exercise a care reasonably proportionate to the danger to protect persons who may be using the crossings, but at private crossings, where only a limited number of persons cross, the precautions required to be taken in order to constitute reasonable care, under the circumstances, may be few and slight when compared with those required at public crossings. While there is some slight conflict in the authorities as to whether signals are required at private crossings the decided weight of authority is that they are not ordinarily required,[78] unless a statute

[78] Thomas v. Delaware &c. R. Co., 8 Fed. 729; Holmes v. Central &c. R. Co., 37 Ga. 593; McCoy v. Central of Ga. R. Co., 131 Ga. 378, 62 S. E. 297; Hucker v. Railroad Co., 7 Ky. L. 761; Johnson v. Louisville &c. R. Co. (Ky.), 13 Am. & Eng. R. Cas. 623; Northern Central R. Co. v. State, 54 Md. 113; Philadelphia &c. R. Co. v. Fronk, 67 Md. 339, 10 Atl. 204, 307, 1 Am. St. 390, 32 Am. & Eng. R. Cas. 31; Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82, 19 Atl. 8; Annapolis &c. R. Co. v. State, 104 Md. 659, 65 Atl. 434; Jones v. New York &c. R. Co., 211 Mass. 521, 98 N. E. 607; Sanborn v. Detroit &c. R. Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119; Locke v. First Division &c. R. Co., 15 Minn. 350; Gurley v. Missouri &c. R. Co., 104 Mo. 211, 16 S. W. 11; Maxey v. Missouri Pac. R. Co., 113 Mo. 1, 20 S. W. 654. But compare Cahill v. Cincinnati &c. R. Co., 92 Ky. 345, 18 S. W. 2, 13 Ky. L. 714, 6 Lewis' R. R. & Corp. Rep. 18; Louisville &c. R. Co. v. McNary, 32 Ky. L. 1266, 108 S. W. 898. See generally Ressler v. Wabash R. Co., 152 Iowa 449, 132 N. W. 827; Hartman v. Chicago &c. R. Co., 132 Iowa 582, 110 N. W. 10; Ransom v. Chicago &c. R. Co., 62 Wis. 178, 22 N. W. 147, 51 Am. R. 718; New York &c. R. Co. v. Kmetz, 193 Fed. 603. In Johnson v. Louisville &c. R. Co. (Ky.), 60 Am. & Eng. R. Cas. 648, it was said: "There not being any reason for requiring the giving of signals and slackening the speed of railroad trains when approaching a private way as exists in respect to a public road, and as to require it to be done at every private crossing, or opposite every dwelling house near the road, would unnecessarily and seriously interfere with and impede the running of trains, we think it would be unreasonable to require it."

so provides. Where, however, a private crossing is located so near a public crossing that signals given thereat can be distinctly heard at the private crossing, it has been held by some courts that the persons using the private crossing are entitled to the benefit of the signals required at the public crossing, and that if the company fails to give such signals it will be guilty of negligence.[79] If the company has recognized a private crossing as a public crossing, and the public use it as such, then, it seems, signals must be given.[80] At private crossings the persons who have a right to use the crossing do not do so as trespassers, and since they are not trespassers, and the company knows that such use of the crossing is likely to be made, it has been held that it is bound to use some degree of care to warn persons of the approach of trains.[81] Some author-

[79] Sanborn v. Detroit &c. R. Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119 and note; Cahill v. Cincinnati &c. R. Co., 92 Ky. 345, 18 S. W. 2, 6 Lewis' R. R. & Corp. Rep. 18; Chesapeake &c. Ry. Co. v. Wilson, 31 Ky. L. 500, 102 S. W. 810. This, however, seems to us to be questionable. In Thacker v. Norfolk &c. Ry. Co., 162 Ky. 337, 172 S. W. 658, it is said that the rule in Kentucky is as stated in the text but that the rule in West Virginia is otherwise. See Spicer v. Chesapeake &c. Ry. Co., 34 W. Va. 514, 12 S. E. 553.

[80] Missouri Pacific R. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; Chicago &c. R. Co. v. Dillon, 24 Ill. App. 203. See St. Louis &c. R. Co. v. Tomlinson, 78 Ark. 251, 94 S. W. 613; Louisville &c. R. Co. v. McNary, 32 Ky. L. 1266, 108 S. W. 898; Sutton v. New York &c. R. Co., 66 N. Y. 243. And where the company has been in the habit of giving signals at a private crossing it can not discontinue them without notice. If it does so and injury results therefrom it will be held guilty of negligence. Westaway v. Chicago &c. R. Co., 56 Minn. 28, 57 N. W. 222, 60 Am. & Eng. R. Cas. 653. See also Hartman v. Chicago &c. R. Co., 132 Iowa 582, 110 N. W. 10.

[81] Swift v. Staten Island &c. R. Co., 123 N. Y. 645, 25 N. E. 378; Thomas v. Delaware &c. R. Co., 8 Fed. 729. In Owens v. Pennsylvania Co., 41 Fed. 187, the court speaking of the duty of the company to give warnings at private crossings, said: "I think it was proper and reasonable to require that persons having charge of railroad trains, in coming to a place of that kind where, as I have said, a number of persons are engaged in business, and have occasion to pass backward and forward, should give some sign of warning." See also Frechett v. Illinois Cent. R. Co., 197 Ill. App. 213; Baltimore

ities hold that the question of whether or not it was negligence to omit signals, or some warning at a private crossing in any particular instance, should be left to a jury.[82]

§ 1637 (1151). Accidents and injuries at private crossings.— Where a railway company is under an obligation to maintain and repair a private crossing, it is generally liable for all proximate damages which may result to persons rightfully using the crossing by reason of such failure to repair,[83] unless the person who has suffered damages has been guilty of contributory negligence.[84] It is held, however, that one who uses a private crossing with full knowledge that it is defective and dangerous, does so at his own risk, and if he is injured when

&c. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597 and note. And see generally as to relative rights of parties, Central of Georgia R. Co. v. Parker, 8 Ga. App. 826, 70 S. E. 192 (railroad liable when it undertakes to keep in repair); Ressler v. Wabash R. Co., 152 Iowa 449, 132 N. W. 827 (rights at private crossings equal); Lorlucki v. West Jersey &c. R. Co., 82 N. J. L. 138, 81 Atl. 495 (duty to guard third rail). Railroad employes generally owe the duty to keep a lookout or moderate the speed when approaching a private crossing, at least unless the public use of it is such that they should anticipate the presence of persons thereon. Stulls' Admx. v. Kentucky Tract. Co., 172 Ky. 650, 189 S. W. 721.

[82] Thomas v. Delaware &c. R. Co., 8 Fed. 729. There is conflict, however, on this question for in the case of Philadelphia &c. R. Co. v. Fronk, 67 Md. 339, 10 Atl. 204, 307, 1 Am. St. 390, 32 Am. & Eng. R. Cas. 31, it is said: "Nor have we found or been referred to any case, either in this country or in England, in which it has been decided that the failure to whistle at a crossing like this, is evidence to go to the jury of culpable negligence on the part of a railway company." See post, § 1647.

[83] Smith v. New York &c. R. Co., 63 N. Y. 58; Stewart v. Cincinnati &c. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539; Central R. &c. Co. v. Robertson, 95 Ga. 430, 22 S. E. 551; Cowans v. Ft. Worth &c. R. Co., 40 Tex. Civ. App. 539, 89 S. W. 1116; Cotton v. New York &c. R. Co., 20 N. Y. 347. In the case last cited a horse's hoof became fastened in a defective private crossing, and a train struck him and killed him. See also Louisville &c. R. Co. v. Hubbard, 148 Ala. 45, 41 So. 814; Perdue v. St. Louis &c. R. Co., 82 Ark. 172, 100 S. W. 901.

[84] Madison v. Missouri &c. R. Co., 60 Mo. App. 599.

so using the crossing, he cannot recover,[85] but if he is ignorant of the condition of the crossing, the company may be liable.[86] Where the person who uses such a crossing is a mere licensee, it has been held he takes it as he finds it, and the company is not liable to him for injuries sustained because the crossing is not properly constructed.[87] And in a recent case it is held that even if it be assumed that, where a private road crosses a railroad track by means of a subway, a court is authorized to submit to a jury the question whether the railroad company owes to one about to use or actually using such crossing a duty to give warning of the approach of a train, the omission to give it cannot be made the basis of a recovery for injuries received in a runaway by one whose horse is frightened by a passing train, after he has driven through the subway and is traveling upon a road parallel with the track, although he is but fifty feet from the crossing; and that this is true although the place where the plaintiff's horse was frightened was one of peculiar dangers, because the road was there confined in a narrow lane by a barbed wire fence paralleling the railroad.[88] The court distinguished another case,[89] decided in the same jurisdiction, in which it was held that under certain circumstances it might be a question for the jury to determine whether the company was negligent in not giving a signal near a crossing, even though it was a private crossing. It has

[85] Madison v. Missouri &c. R. Co., 60 Mo. App. 599; Artman v. Kansas Cent. R. Co., 22 Kans. 296. That is, if a reasonably prudent man, in the exercise of ordinary care, would not use it, or, in other words, if he is guilty of contributory negligence. Compare also Nashville &c. R. Co. v. Ragan, 167 Ala. 277, 57 So. 522; McClellard v. Missouri Pac. R. Co., 82 Kans. 167, 107 Pac. 545.

[86] See Stewart v. Cincinnati &c. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539; Madison v. Missouri &c. R. Co., 60 Mo. App. 599; Cowans v. Ft. Worth &c. R. Co., 40 Tex. Civ. App. 539, 89 S. W. 1116.

[87] Truax v. Chicago &c. R. Co., 83 Wis. 547, 53 N. W. 842. See also post, § 1647.

[88] St. Louis &c. R. Co. v. Morrison, 73 Kans. 265, 85 Pac. 295. See also Barton v. Southern R. Co., 132 Ga. 841, 64 S. E. 1079, 22 L. R. A. (N. S.) 915.

[89] Roach v. St. Joseph &c. R. Co., 55 Kans. 654, 41 Pac. 964. See post, §§ 1647, 1652; Hartman v. Chicago &c. R. Co., 137 Iowa 582, 110 N. W. 10.

been held that a railroad company which builds and undertakes to keep in repair a bridge over an approach to a private crossing thereby extends such an invitation to the public to use the same as will render it liable for injuries from defects negligently permitted to exist or remain in the bridge or approach, even though it is not affirmatively shown that such crossing is one that the company is bound by statute to keep in safe order and condition.[90] It has also been said that there is no distinction between public and private crossings in the application of the principle of contributory negligence, and in a general sense, at least, this is true. It is the duty of a person traveling over a private crossing to use all his faculties to ascertain whether or not he can cross in safety.[91] And, where he ventures on such crossing without first looking and listening, he will be charged with negligence, defeating a recovery for injuries proximately caused by a failure to take these precautions.[92]

§ 1638 (1151a). Care at "traveled places," etc.—A South Carolina statute makes it the duty of railroad companies to sound signals on approach to "traveled places."[93] The courts of that state hold, that to constitute a place a "traveled place" under this statute, it must not only be a place where persons are accustomed to travel, but it must also be a place where persons have in some way acquired the right to travel.[94] An open

[90] Central R. &c. Co. v. Robertson, 95 Ga. 430, 22 S. E. 551; Southern R. Co. v. Hooper, 110 Ga. 779, 36 S. E. 232. But compare Atchison &c. R. Co. v. Fuller, 72 Kans. 527, 84 Pac. 140; Houston &c. R. Co. v. Evans (Tex. Civ. App.), 92 S. W. 1077 (question of contributory negligence).

[91] Thomas v. Delaware &c. R. Co., 8 Fed. 729.

[92] Lyman v. Philadelphia &c. R. Co., 4 Houst. (Del.) 583; Johnson v. Delano, 100 Nebr. 192, 158 N. W. 1034; Sprow v. Boston &c. R. Co., 163 Mass. 330, 39 N. E. 1024. See also Rich v. Chicago &c. R. Co., 149 Fed. 79; Stulls Admrx. v. Kentucky Tract. &c. Co., 172 Ky. 650, 189 S. W. 721; Annapolis &c. R. Co. v. State, 104 Md. 659, 65 Atl. 434.

[93] Gen. Stat. S. Car., § 1483.

[94] Hale v. Railroad Co., 34 S. Car. 299, 13 S. E. 537; Hankinson v. Railroad Co., 41 S. Car. 20, 19 S. E. 206; Risinger v. Southern R. Co., 59 S. Car. 429, 38 S. E. 1.

place, traveled for years by the public in going from the streets of the town to a depot, has been held a "traveled place" within this statute.[95] It has been held that the Minnesota statute, requiring signals to be sounded by locomotives before reaching places where the railroad crosses a "traveled" road or street, is without application to private farm crossings.[96] At a later place[97] the subject of the duty of the railroad company at crossings established by custom or license, will be discussed. It may not be amiss at this point, however, to say that it does not follow that because a railroad company is under no statutory obligation to sound these signals it may altogether omit to sound them at all private crossings. The question is usually to be determined on general legal principles, whether, under all the circumstances, reasonable care required the giving of such signals.[98] On this subject the New York court of appeals has said: "Where the public have, for a long time, notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury. Although in such cases the company is not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train approaching such a crossing, yet it is bound to give some notice and warning; and as to what is sufficient in this regard is a question for the jury. Where a train is approaching a crossing of this character, the fact that the bell was rung does not, as matter of law, establish the fact that the company used reasonable

[95] Risinger v. Southern R. Co., 59 S. Car. 429, 38 S. E. 1.

[96] Czech v. Great Northern R. Co., 68 Minn. 38, 70 N. W. 791, 38 L. R. A. 302. See also Byrne v. New York &c. R. Co., 94 N. Y. 12; Hodges v. St. Louis &c. R. Co., 71 Mo. 50. But compare Missouri &c. R. Co. v. Lee, 70 Tex. 496; Chicago &c. R. Co. v. Dillon, 24 Ill. App. 203; St. Louis, &c. R. Co. v. Tomlinson, 78 Ark. 251, 94 S. W. 613.

[97] Post, § 1647.

[98] Czech v. Great Northern R. Co., 68 Minn. 38, 70 N. W. 791, 38 L. R. A. 302. See also Sanborn v. Detroit &c. R. Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119 and note.

care; but it is for the jury to determine whether any other precaution should have been taken by those in charge of the train."[99] But, as elsewhere shown,[1] in many jurisdictions where there is nothing that can be construed as an invitation on the part of the company, or the like, the mere fact that people occasionally, or even frequently, cross the tracks at a place where there is no public right of passage does not necessarily require the company to treat it as a public crossing, and, as a general rule, the company is not required as a matter of law, under ordinary circumstances, to signal the approach of its train.[2]

[99] Swift v. Staten Island &c. R. Co., 123 N. Y. 645, 25 N. E. 378; Barry v. Railroad Co., 104 N. Y. 362, 10 N. E. 539. See also Houston &c. R. Co. v. Boozer, 70 Tex. 530, 8 S. W. 119; St. Louis &c. R. Co. v. Tomlinson, 78 Ark. 251, 94 S. W. 613; Sites v. Knott, 197 Mo. 684, 96 S. W. 206; New York &c. R. Co. v. Kmetz, 193 Fed. 603.

[1] Ante, §§ 1624, 1636, and post, § 1647.

[2] See also Annapolis &c. Ry. Co. v. State, 104 Md. 659, 65 Atl. 434; Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82; Sanborn v. Detroit &c. Ry. Co., 91 Mich. 538, 16 L. R. A. 119 and note; Hoback v. Louisville &c. R. Co., 30 Ky. L. 476, 99 S. W. 241; post, § 1647.

CHAPTER LI.

INJURIES AT CROSSINGS.

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§ 1645 (1152). **Introductory.**—It is the purpose in this chapter to treat of the duties respectively of railway companies and travelers at highway crossings and such other places as have by custom and use become recognized as crossings, so as to require a duty from the railroad company to those entitled to use them, and also to treat of the liability of the railway company to travelers suffering injuries at such crossings. At other places the right of way and track of the railroad company are in general its exclusive property upon which no stranger has a right to be,[1] and to those who trespass upon its track and right of way it owes no duty, as a general rule, except to refrain from willfully or wantonly injuring them.[2] But when a public crossing is once

[1] Finlayson v. Chicago &c. R. Co., 1 Dill. (U. S.) 579; Kansas &c. R. Co. v. Ward, 4 Colo. 30; Patterson v. Philadelphia &c. R. Co., 4 Houst. (Del.) 103, 7 Am. R. R. 207; Sweeney v. Boston &c. R. Co., 128 Mass. 5, 1 Am. & Eng. R. Cas. 138; Hazen v. Boston &c. R. Co., 2 Gray (Mass.) 574; Ellington v. Great Northern R. Co., 96 Minn. 176, 104 N. W. 827; Isabel v. Hannibal &c. R. Co., 60 Mo. 475, 9 Am. Rep. 261; Donnelly v. Brooklyn &c. R. Co., 109 N. Y. 16, 15 N. E. 733; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Pittsburgh &c. R. Co. v. Collins, 87 Pa. St. 405, 30 Am. Rep. 371; Cauley v. Pittsburgh &c. R. Co., 95 Pa. St. 398, 40 Am. Rep. 664 and note, 2 Am. & Eng. R. Cas. 4; Jackson v. Rutland &c. R. Co., 25 Vt. 150, 60 Am. Dec. 246.

[2] Finlayson v. Chicago &c. R. Co., 1 Dill. (U. S.) 579; Louisville &c. R. Co. v. Womack, 173 Fed. 752; Southern R. Co. v. Fisk, 159 Fed. 373; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Palmer v. Chicago &c. R. Co., 112 Ind. 250, 14 N. E. 70; Rossiter v. Lake Shore &c. R. Co., 52 Ind. App. 88, 96

established, the traveler, in the proper use of the crossing, is no longer a trespasser and certain mutual rights and duties arise upon the part of both the company and the traveler.[3] Any attempt to specifically define these rights and duties is embarrassed by much conflict of authority, but there are certain well defined general rules which are universally recognized as applying to the general class of cases, and these rules we shall attempt to lay down.

§ 1646 (1153). **Mutual rights and duties of company and traveler at crossings—Generally.**—The company possesses the right to the use of its tracks over highway crossings and the public retains the right to the use of the crossing as a highway. Neither has a right to interfere with a proper use of it by the other.[4] Their rights have been said to be "mutual, co-extensive,

N. E. 956; Gaynor v. Old Colony &c. R. Co., 100 Mass. 208; Pittsburgh &c. R. Co. v. Evans, 53 Pa. St. 250. See note to Houston &c. R. Co. v. Sympkins, 54 Tex. 615, 38 Am. Rep. 632 and note, 6 Am. & Eng. R. Cas. 17 (11); Lewis v. Baltimore &c. R. Co., 38 Md. 588, 17 Am. Rep. 521 and note, 13 Am. Law. Reg. N. S. 284; St. Louis &c. R. Co. v. Neely, 63 Ark. 636, 40 S. W. 130, 131, 37 L. R. A. 618 (citing text). Or to exercise reasonable care to prevent injury after discovery of their peril. See generally notes in 21 L. R. A. (N. S.) 432, 440, 36 L. R. A. (N. S.) 957, and 41 L. R. A. (N. S.) 266.

[3] Kay v. Pennsylvania &c. R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Continental Improvement Co. v. Stead, 95 U. S. 161; Willoughby v. Chicago &c. R. Co., 37 Iowa 432; Pennsylvania &c. R. Co. v. Krick, 47 Ind. 368; Elliott Roads and Streets (3rd ed.), §§ 1012, 1019, 1021.

[4] Morris v. Chicago &c. R. Co., 26 Fed. 22; Rockford &c. R. Co. v. Hillmer, 72 Ill. 235; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Indianapolis &c. R. Co. v. McLin, 82 Ind. 435; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 62, 13 N. E. 132, 2 Am. St. 155; Louisville &c. R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627; Lesan v. Maine Cent. R. Co., 77 Maine 85, 23 Am. & Eng. R. Cas. 245; Baltimore &c. R. Co. v. State, 29 Md. 252, 96 Am. Dec. 528; Baltimore &c. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329, 28 Am. & Eng. R. Cas. 639; Kelly v. Michigan &c. R. Co., 65 Mich. 186, 31 N. W. 186, 8 Am. St. 876; Beisiegel v. New York &c. R. Co., 40 N. Y. 9; North Pa. R. Co. v. Heileman, 49 Pa. St. 60, 88 Am. Dec. 482; Pennsylvania &c. R. Co. v. Goodman, 62 Pa. St. 329.

and, in all respects reciprocal,"[5] but this statement must be qualified in that, owing to the momentum of trains, confinement of their movement to a track, and the necessities and public nature of railway traffic, the railway company has the right of way and the traveler must wait until the train, the coming of which he knows, or ought to know, has passed.[6] The prior right of passage is in the railway company. The right of precedence of the company, however, does not impose upon the traveler the whole duty of avoiding collisions, but both parties must

[5] See Elliott Roads and Streets (3rd ed.), § 1021; Texas & P. R. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. ed. 1132; International &c. R. Co. v. Glover (Tex. Civ. App.), 88 S. W. 515.

[6] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Morris v. Chicago &c. R. Co., 26 Fed. 22; Galena &c. R. Co. v. Dill, 22 Ill. 265; Chicago &c. R. Co. v. Cauffman, 38 Ill. 424; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Chicago &c. R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155; Ohio &c. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234, 32 Am. & Eng. R. Cas. 121, 3 Am. St. 638; Chicago &c. R. Co. v. Spilker, 134 Ind. 380, 400, 33 N. E. 280 (citing Elliott Roads and Streets, § 786); Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308 (citing text); Black v. Burlington &c. R. Co., 38 Iowa 515; Brown v. Texas &c. R. Co., 42 La. Ann. 350, 7 So. 682, 21 Am. St. 374; Lesan v. Maine Cent. R. Co., 77 Maine 85, 23 Am. & Eng. R. Cas. 245; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; Pennsylvania &c. R. Co. v. Goodman, 62 Pa. St. 329; Lehigh &c. R. Co. v. Brandtmaier, 113 Pa. St. 610, 6 Atl. 238; Newhard v. Pennsylvania &c. R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563. See also Chicago &c. R. Co. v. Roberts, 3 Nebr. (unoff.) 425, 91 N. W. 707. It has also been held that a railway motor car has the right of way over an automobile on the highway. Kansas City &c. Ry. Co. v. Shoemaker, 249 Fed. 458. As to "absolute right of way" see Chicago &c. R. Co. v. Ingraham, 33 Ill. App. 351; Northern Pac. R. Co. v. Holmes, 3 Wash. Ter. 543, 18 Pac. 76. The assertion in Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403, followed in Indianapolis &c. R. Co. v. McLin, 82 Ind. 435, and many other cases, that the right of precedence of trains is conditioned upon due and timely warning of their approach, is subject to the qualification that the absence of warning does not absolve the traveler from reasonable diligence on his part and that the presence of the track is in itself generally sufficient to put him upon guard.

exercise care and diligence in regard to their respective duties and are charged with the mutual duty of exercising reasonable care to prevent injury.[7] Each must make reasonable and proper efforts, in view of the circumstances, to foresee and avoid collisions,[8] and each may, to a limited extent, rely upon the other to exercise such ordinary care.[9] It is generally the duty of the

[7] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403, per Bradley, J.; Dernberger v. Baltimore &c. R. Co., 234 Fed. 405; Robinson v. Western &c. R. Co., 48 Cal. 409; Chicago &c. R. Co. v. Cauffman, 38 Ill. 424; Chesapeake &c. R. Co. v. Riddle, 24 Ky. L. 1687, 72 S. W. 22, 24 Ky. L. 22; Purinton v. Maine &c. R. Co., 78 Maine 569, 7 Atl. 707; Cooper v. Lake Shore &c. R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. 482; Kelly v. Duluth &c. R. Co., 92 Mich. 19, 52 N. W. 81; Halferty v. Wabash &c. R. Co., 82 Mo. 90; Jackson v. Southwest Mo. R. Co. (Mo.), 189 S. W. 381; Bullock v. Wilmington &c. R. Co., 105 N. Car. 180, 10 S. E. R. 988, 42 Am. & Eng. R. Cas. 93; Cooper v. North Carolina R. Co., 140 N. Car. 209, 52 S. E. 932; North Pa. R. Co. v. Heileman, 49 Pa. St. 60, 88 Am. Dec. 482; Lehigh Valley R. Co. v. Brandtmaier, 113 Pa. St. 610, 6 Atl. 238; Bergeron v. Minneapolis &c. R. Co., 37 S. Dak. 458, 159 N. W. 51; Heddles v. Chicago &c. R. Co., 74 Wis. 239, 42 N. W. 237, 39 Am. & Eng. R. Cas. 645 (and for this reason each party may presume that the other will exercise ordinary and reasonable care).

[8] Morris v. Chicago &c. R. Co., 26 Fed. 22; Glass v. Memphis &c. R. Co., 94 Ala. 581, 10 So. 215; Beers v. Housatonic &c. R. Co., 19 Conn. 566; Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20; Pennsylvania R. Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Kansas Pac. R. Co. v. Pointer, 9 Kans. 620; Baltimore &c. R. Co. v. State, 29 Md. 252, 96 Am. Dec. 528; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Esler v. Wabash R. Co., 109 Mo. App. 580, 83 S. W. 73; Runyon v. Central R. Co., 25 N. J. L. 556; Brand v. Schenectady &c. R. Co., 8 Barb. (N. Y.) 368; North Pa. R. Co. v. Heileman, 49 Pa. St. 60, 88 Am. Dec. 482; Beyel v. Newport News &c. R. Co., 34 W. Va. 538, 45 Am. & Eng. R. Cas. 188.

[9] Thomas v. Delaware &c. R. Co., 8 Fed. 729, and authorities cited: Robinson v. Western &c. R. Co., 48 Cal. 409; Georgia &c. R. Co. v. Evans, 87 Ga. 673, 13 S. E. 580; Indiana &c. R. Co. v. Wheeler, 115 Ind. 253, 17 N. E. 563; Correll v. Burlington &c. R. Co., 38 Iowa 120, 18 Am. Rep. 22; Ramsey v. Louisville &c. R. Co., 89 Ky. 99, 20 S. W. 162; Lesan v. Maine Cent. R. Co., 77 Maine 85, 23 Am. & Eng. R. Cas. 245; Hendrickson v. Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044, 16 L. R. A. 261 and note, 32 Am. St. 540; Petty v. Hannibal &c. R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618; Boyd v. Wabash &c. R. Co., 105 Mo. 371, 16 S. W. 909;

railroad company to give due and timely warning of the approach of trains, and it is the duty of the traveler to seek to discover whether danger is imminent and to yield precedence. Failure to give such warning, whether statutory or required by ordinary care, will render the company liable for any injury of which it is the proximate cause, where the party injured is without fault, but the track itself is a warning of danger and the traveler must always exercise care proportionate to the known danger, and this care must be such as one who knows the danger and is aware of the prior right of passage would be expected to exercise.[10] The engineer may presume, until the situation would otherwise disclose itself to a man on guard, that an adult person on the track or approaching the track is in full possession of his senses, knows that he must yield precedence, and will exercise ordinary care and diligence to take

Jennings v. St. Louis &c. R. Co., 112 Mo. 268, 20 S. W. 490; Lyman v. Boston &c. R. Co., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364, 45 Am. & Eng. R. Cas. 163; Rodrian v. New York &c. R. Co., 55 Hun 606, 7 N. Y. S. 811; Beisiegel v. New York &c. R. Co., 34 N. Y. 622, 90 Am. Dec. 741; Blackwell v. Lynchburg &c. R. Co., 111 N. Car. 151, 16 S. E. 12, 17 L. R. A. 729 and note, 32 Am. St. 786; Pennsylvania Railroad Co. v. Ogler, 35 Pa. St. 60, 78 Am. Dec. 322; Duame v. Chicago &c. Railway Co., 72 Wis. 523, 40 N. W. 394, 7 Am. St. 879; Valin v. Milwaukee &c. R. Co., 82 Wis. 1, 51 N. W. 1084, 33 Am. St. 17, 55 Am. & Eng. R. Cas. 247. See also Pittsburgh &c. R. Co. v. Terrell, 177 Ind. 447, 95 N. E. 1109, 42 L. R. A. (N. S.) 367, 372 (citing text); Merchants &c. Co. v. Chicago &c. Ry. Co., 170 Iowa 378, 150 N. W. 720.

[10] Morris v. Chicago &c. R. Co., 26 Fed. 22; Indianapolis &c. R. Co. v. McLin, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237; Baltimore &c. R. Co. v. Walborn, 127 Ind. 142, 26 N. E. 207; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155; Indiana Un. Tract. Co. v. Myers, 47 Ind. App. 646, 93 N. E. 888; Clampit v. Chicago &c. R. Co., 84 Iowa 71, 50 S. W. 673; Eskridge v. Cincinnati &c. R. Co., 89 Ky. 367, 12 S. W. 580; State v. Union R. Co., 70 Md. 69, 18 Atl. 1032; Murray v. Missouri &c. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. 601; Laun v. St. Louis &c. R. Co., 216 Mo. 563, 116 S. W. 553; Bitner v. Utah &c. R. Co., 4 Utah 502, 11 Pac. 620; Burns v. North Chicago &c. Co., 65 Wis. 312, 27 N. W. 43; Gray v. North Eastern R. Co., 48 L. T. Rep. 904. See also Herbert v. Southern Pac. Co., 121 Cal. 227, 53 Pac. 651; Green v. Los Angeles &c. R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. 68;

care of himself.[11] The traveler may rely, to a limited extent, upon the railroad company to give the usual or required warning, and to otherwise observe the requirements of ordinary care, but to him the track is itself a warning of danger and he is in all cases under the duty to exercise proper precaution to inform himself as to the proximity of trains before attempting to cross.[12]

Quirm v. Chicago &c. R. Co., 162 Ind. 442, 70 N. E. 526; Reed v. Queen Anne's R. Co., 4 (Pen.) Del. 413, 57 Atl. 529; Evansville &c. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554.

[11] Dyson v. New York &c. R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. 82; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 62, 13 N. E. 132, 2 Am. St. 155; Ohio &c. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. 638, 112 Ind. 250, 14 N. E. 70; Mason v. Missouri &c. R. Co., 27 Kans. 83, 41 Am. Rep. 405; Johnson's Adm. v. Louisville &c. R. Co. (Ky.), 13 Am. & Eng. R. Cas. 623 and authorities cited in note; Lesan v. Maine &c. R. Co., 77 Maine 85, 23 Am. & Eng. R. Cas. 245; Gaynor v. Old Colony &c. R. Co., 100 Mass. 208, 97 Am. Dec. 96; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Boyd v. Wabash &c. R. Co., 105 Mo. 371, 16 S. W. 909; Harty v. Central R. Co., 42 N. Y. 468; Rothe v. Milwaukee &c. R. Co., 21 Wis. 256; Heddles v. Chicago &c. R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. 106 and note. See also Horan v. Boston &c. R. Co., 184 Fed. 453; Schmidt v. Missouri Pac. Ry. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196; Givens v. Louisville &c. R. Co. 24 Ky. L. 1796, 72 S. W. 320; Shetter v. Fort Worth &c. R. Co., 30 Tex. Civ. App. 530, 71 S. W. 31; Houston &c. R. Co. v. Ramsey, 43 Tex. Civ. App. 603, 97 S. W. 1067; Humphreys v. Valley R. Co., 100 Va. 169, 42 S. E. 882, 57 L. R. A. 384, 93 Am. St. 944. But see Georgia &c. R. Co. v. Evans, 87 Ga. 673, 13 S. E. 580; Card v. New York &c. R. Co., 50 Barb. (N. Y.) 39. And see also for cases where there is no right to indulge such presumption. Nichols v. Chicago &c. R. Co., 44 Colo. 501, 98 Pac. 808; Wasmer v. Missouri Pac. R. Co., 166 Mo. App. 215, 148 S. W. 155; Horton v. Houston &c. R. Co., 46 Tex. Civ. App. 639, 103 S. W. 467.

[12] Railroad Co. v. Huston, 95 U. S. 697, 24 L. ed. 542; Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; Elliott v. Chicago M. & St. P. R. Co., 150 U. S. 1245, 248, 14 Sup. Ct. 85, 37 L. ed. 1068; Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014; Miller v. Terre Haute &c. R. Co., 144 Ind. 323, 43 N. E. 257; Brown v. Milwaukee &c. R. Co., 22 Minn. 165; Loucks v. Chicago &c. R. Co., 31 Minn. 526, 18 N. W. 651, 19 Am. & Eng. R. Cas. 305; Hendrickson v. Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044,

§ 1647 (1154). **Duty of company at private crossings and at crossings by custom or license.**—The duties of the company and traveler respectively at a private crossing are somewhat different from those imposed upon each at a public crossing. As a rule the company is not required at such places to give the signals required by statute or otherwise at public crossings,[13] but it may, in peculiar instances, be a question for the jury, whether in the particular case it is negligence to omit the warning signals.[14] The fact that people repeatedly cross the tracks at a

16 L. R. A. 261 and note, 32 Am. St. 540; Carlson v. Chicago &c. R. Co., 96 Minn. 504, 105 N. W. 555; Jennings v. St. Louis &c. R. Co., 112 Mo. 268, 20 S. W. 490; Vandewater v. New York &c. R. Co., 74 Hun 32, 26 N. Y. S. 397; Beisiegel v. New York &c. R. Co., 34 N. Y. 622, 90 Am. Dec. 741; Ernst v. Hudson &c. R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Blackwell v. Lynchburg &c. R. Co., 111 N. Car. 151, 16 S. E. 12, 17 L. R. A. 729 and note, 32 Am. St. 786; Bowers v. Chicago &c. R. Co., 61 Wis. 457, 21 N. W. 536, 19 Am. & Eng. R. Cas. 301. See also Sherman v. Chicago &c. R. Co., 93 Ark. 24, 123 S. W. 1182; Automan v. Southern Pac. Co., 9 Cal. App. 718, 100 Pac. 877; Van Winkle v. New York &c. R. Co., 34 Ind. App. 476, 73 N. E. 157; Cleveland &c. R. Co. v. Lynn, 171 Ind. 589, 85 N. E. 999; Gora v. Southern Ry. Co., 67 S. Car. 347, 45 S. E. 810; Lewis v. Rio Grande &c. R. Co., 40 Utah 483, 123 Pac. 97; Brammer v. Norfolk &c. R. Co., 104 Va. 50, 51 S. E. 211.

[13] Thomas v. Delaware &c. R. Co., 8 Fed. 729; Defrieze v. Illinois Cent. R. Co. (Iowa), 94 N. W. 505; Early's Adm. v. Louisville &c. R. Co., 115 Ky. 13, 72 S. W. 348; Johnson's Admr. v. Louisville &c. R. Co. (Ky.), 13 Am. & Eng. R. Cas. 623; Philadelphia &c. R. Co. v. Fronk, 67 Md. 339, 10 Atl. 204, 307, 1 Am. St. 390, 32 Am. & Eng. R. Cas. 31; Sanborn v. Detroit &c. R. Co., 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119 and note; Maxey v. Missouri &c. R. Co., 113 Mo. 1, 20 S. W. 654; Bennett v. Grand Trunk &c. R. Co., 3 Ont. 446, 13 Am. & Eng. R. Cas. 627. See also ante, § 1636; Lake Erie &c. R. Co. v. Fleming, 183 Ind. 511, 109 N. E. 753; Christy v Chesapeake &c. Ry. Co., 35 W. Va. 117, 12 S. E. 1111. But see Cahill v. Cincinnati &c. Ry. Co., 92 Ky. 345, 18 S. W. 2; Walton v. St. Louis &c. R. Co., 67 Mo. 56.

[14] Thomas v. Delaware &c. R. Co., 8 Fed. 729; Chicago &c. R. Co. v. Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. 559; Cordell v. New York &c. R. Co., 70 N. Y. 119, 26 Am. Rep. 550. And in Defrieze v. Illinois Cent. R. Co. (Iowa), 94 N. W. 505, it is held that one at a private crossing "may take advantage of the failure to give statutory signals for a public crossing near by." See also Louisville &c.

place where there is no public right of passage does not necessarily entail upon the company any duty to treat the place as a public crossing and the fact that there are numerous trespassers and the act is committed often does not in itself relieve their presence upon the track of the character of a trespass,[15] but situations may arise from which the company ought reasonably to foresee danger, and in such cases it has been held that the company is not absolved from ordinary care and precautions to prevent injuries.[16] Yet, although the place is used

R. Co. v. Bodine, 109 Ky. 509, 59 S. W. 740, 56 L. R. A. 506; Louisville &c. R. Co. v. Englemann, 135 Ky. 515, 122 S. W. 833, 21 Ann. Cas. 565; post, § 1652; note to Midland Valley R. Co. v. Shores, 40 Okla. 75, 136 Pac. 157, 49 L. R. A. (N. S.) 814.

[15] Finlayson v. Chicago &c. R. Co., 1 Dill. (U. S.) 579, per Miller, J.; Illinois &c. R. Co. v. Hetherington, 83 Ill. 510; Blanchard v. Lake Shore &c. R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. 630; Illinois Cent. R. Co. v. O'Connor, 189 Ill. 559, 59 N. E. 1098; Atchison &c. R. Co. v. Parsons, 42 Ill. App. 93; Illinois &c. R. Co. v. Beard, 49 Ill. App. 232; Ivens v. Cincinnati &c. R. Co., 103 Ind. 27, 2 N. E. 134; Brown v. Louisville &c. R. Co., 97 Ky. 228, 30 S. W. 639; Gaynor v. Old Colony &c. R. Co., 100 Mass. 208, 97 Am. Dec. 96; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375. See also Alabama Great So. R. Co. v. Godfrey, 156 Ala. 202, 47 So. 185, 130 Am. St. 765; Curtis v. Southern R. Co., 130 Ga. 675, 61 S. E. 539; Ward v. Southern Pa. Co., 25 Ore. 433, 36 Pac. 166, 23 L. R. A. 715, and post, §§ 1785-1795. "By endurance or toleration of a trespass we do not understand that any of a party's privileges are waived or yielded, or that it ceases to be entitled to the protection afforded by the law. . . . It is not believed that any length of forbearance to take legal proceedings against trespassers, or to warn them from the bed on which a railroad is constructed, will amount to a dedication of the same to the use of the public as a way for pedestrians." Central &c. R. Co. v. Brinson, 70 Ga. 207, 241. But see Bullard v. Southern R. Co., 116 Ga. 644, 43 S. E. 39.

[16] Owens v. Pennsylvania R. Co., 41 Fed. 187; South &c. R. Co. v. Donovan, 84 Ala. 141, 4 So. 142; Western &c. R. Co. v. Meigs, 74 Ga. 857; Peyton v. Texas &c. R. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. 430; Sutton v. New York &c. R. Co., 66 N. Y. 243; Cassida v. Oregon R. &c. Co., 14 Ore. 551, 13 Pac. 438; Johnson v. Lake Superior &c. R. Co., 86 Wis. 64, 56 N. W. 161; Keith v. Intercolonial &c. R. Co., 18 Nova Sc. 226. See also Missouri &c. R. Co. v. Bratton, 85 Ark 326, 108 S. W. 518; Davis v. Louisville &c. R. Co., 30 Ky. L.

repeatedly and frequently as a crossing with the mere silent acquiescence of the company, or with the knowledge and simply passive permission of the company, it would seem ordinarily at least that the traveler who uses it is at most a bare licensee, who takes his license with all its concomitant risks and perils,[17] and as a general rule, the company owes him no duty greater than that which is due to a trespasser.[18] In order to impose

172, 97 S. W. 1122; Ahnefeld v. Wabash R. Co., 212 Mo. 280, 111 S. W. 95; Union Pac. R. Co. v. Connolly, 77 Nebr. 254, 109 N. W. 368; Lamphear v. New York &c. R. Co., 194 N. Y. 172, 86 N. E. 1115; Houston &c. R. Co. v. Adams, 44 Tex. Civ. App. 288, 98 S. W. 222. In most of these cases there was long continued acquiescence under such circumstances that it was held to amount to a license or even an invitation.

[17] Grethen v. Chicago &c. R. Co., 22 Fed. 609; Crane Elevator Co. v. Lippert, 63 Fed. 942; Cleveland &c. R. Co. v. Tartt, 64 Fed. 823; Garrett v. Illinois Cent. R. Co., 126 Fed. 406; Memphis &c. R. Co. v. Womack, 84 Ala. 149, 4 So. 618; Alabama &c. R. Co. v. Linn, 103 Ala. 134, 15 So. 508; McLaren v. Indianapolis &c. R. Co., 83 Ind. 319, 8 Am. & Eng. R. Cas. 217; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; Baltimore &c. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Sweeny v. Old Colony &c. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644 and note; Hickey v. Boston &c. R. Co., 14 Allen (Mass.) 429; Gaynor v. Old Colony R. Co., 100 Mass. 208, 97 Am. Dec. 96; Redigan v. Boston &c. R. Co., 155 Mass. 44, 28 N. E 1133, 14 L. R. A. 276, 31 Am. St. 520 and note; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Gillis v. Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317; Baltimore &c. R. Co. v. Sherman, 30 Grat. (Va.) 602; Hounsell v. Smyth, 7 C. B. (N. S.) 731. See also Thomas v. Chicago &c. R. Co., 103 Iowa 649, 39 L. R. A. 399, 72 N. W. 783, 786, citing text with approval, but following prior Iowa decisions as applicable to the particular facts.

[18] Illinois &c. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Illinois Cent. R. Co. v. O'Connor, 189 Ill. 559, 59 N. E. 1098; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Evansville &c. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Pennsylvania R. Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641, 37 N. E. 720. Compare Atchison &c. R. Co. v. Potter, 64 Kans. 13, 67 Pac. 534, 56 L. R. A. 575; Copp v. Maine Cent. R. Co., 100 Maine 568, 62 Atl. 735; Baltimore &c. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Chesapeake Beach R. Co. v. Donahue, 107 Md. 119, 68 Atl. 507; Hanks v. Boston &c. R. Co., 147 Mass. 495, 18 N. E. 218; June v. Boston &c. R. Co.,

upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company, and "neither sufferance, nor permission, nor passive acquiescence" is equivalent to an invitation.[19] If, however, the traveler uses a place as a crossing by invitation of the company, it must use ordinary care to prevent injury to him, as, where the company constructs a grade crossing and holds it out to the public as a suitable place to cross.[20] Where by

153 Mass. 79, 26 N. E. 238; Chenery v. Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; Diebold v. Pennsylvania R. Co., 50 N. J. L. 478, 14 Atl. 576; Matze v. New York &c. R. Co., 1 Hun (N. Y.) 417; Cornell v. Skaneateles R. Co., 15 N. Y. S. 581, 61 Hun 618; Collis v. New York Cent. R. Co., 71 Hun 504, 24 N. Y. S. 1090; Burk v. President &c. Canal Co., 86 Hun 519, 33 N. Y. S. 986; Nicholson v. Erie &c. R. Co., 41 N. Y. 525; Sutton v. New York &c. R. Co., 66 N. Y. 243; Baltimore &c. R. Co. v. Sherman, 30 Grat. (Va.) 602; Spicer v. Chesapeake &c. R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385 and note. See post, §§ 1785-1795; Alabama &c. R. Co. v. Linn, 103 Ala. 134, 15 So. 508; Clark v. Michigan Cent. R. Co., 113 Mich. 24, 71 N. W. 327, 67 Am. St. 442; Lynch v. Great Northern R. Co., 38 Mont. 511, 100 Pac. 616.

[19] Bennett v. Railroad Co., 102 U. S. 577, 26 L. ed. 235; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; Stewart v. Pennsylvania R. Co. (Ind. Super. Ct.), 14 Am. & Eng. R. Cas. 679; Sweeny v. Old Colony &c. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Murphy v. Boston &c. R. Co., 133 Mass. 121; Wright v. Boston &c. R. Co., 142 Mass. 296, 7 N. E. 866; Ross v. Kanawha &c. Ry. Co., 76 W. Va. 197, 85 S. E. 180, 182 (quoting text). See also Clark v. Northern Pac. R. Co., 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508. This seems to us to be the correct general rule but, as elsewhere shown in this section, there is considerable conflict among the authorities and the rule is not the same in all jurisdictions.

[20] Walker v. Ala. T. & N. R. Co., 194 Ala. 360, 70 So. 125 (citing text); Western Ry. Co. of Ala. v. Madison (Ala. App.), 80 So. 162, 163 (also citing text); Sweeny v. Old Colony &c. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644 and note; Murphy v. Boston &c. R. Co., 133 Mass. 121, 14 Am. & Eng. R. Cas. 675; Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. 441 and note; Yazoo &c. R. Co. v. Watson, 82 Miss. 89, 33 So. 942. See also Central R. &c. Co. v. Robertson, 95 Ga. 430, 22 S.

fencing off a foot way over its tracks it induces the public to so use it,[21] by building to the track plank bridges for foot passengers,[22] or by constructing gates in the railroad fence for the use of pedestrians who habitually cross the track,[23] it thereby holds out the place as proper for them to use. Such invitation as imposes on the company the duty of ordinary care is implied, where by some act or designation of the company persons are led to believe that a way was intended to be used by travelers or others having lawful occasion to go that way, and the company is under obligation to use ordinary care to keep it free from danger.[24] There is much conflict of authority as

E. 551; Missouri &c. R. Co. v. Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. 856; Webb v. Portland &c. R. Co., 57 Maine 117; Boothby v. Boston &c. R. Co., 90 Maine 313, 38 Atl. 155; Black v. Central R. Co., 85 N. J. L. 197, 89 Atl. 24, 51 L. R. A. (N. S.) 1215; Midland Valley R. Co. v. Shores, 40 Okla. 75, 136 Pac. 157, 49 L. R. A. (N. S.) 814.

[21] Pennsylvania R. Co. v. Hammill, 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531.

[22] Norfolk &c. R. Co. v. Carper, 88 Va. 556, 14 S. E. 328. See also De Larr v. Ferd. Heim Brew Co., 62 Kans. 188, 61 Pac. 689; Gurley v. Missouri &c. R. Co., 122 Mo. 141, 26 S. W. 953.

[23] Lynch v. St. Joseph &c. R. Co., 111 Mo. 601, 19 S. W. 1114. See also St. Louis &c. R. Co. v. Dooley, 77 Ark. 561, 92 S. W. 789; Baltimore &c. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186; Houston &c. R. Co. v. Beard, 42 Tex. Civ. App. 427, 93 S. W. 532. Mere acquiescence may not even amount to a license, and in order to impliedly authorize travelers to use a railroad track there must usually be some allurement or enticement on the part of the company.

[24] Evansville &c. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Carleton v. Franconia Iron and Steel Co., 99 Mass. 216; Kelly v. Southern Minn. &c. R. Co., 28 Minn. 98, 9 N. W. 588; Lillstrom v. Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587; Coulter v. Great Northern R. Co., 5 N. Dak. 568, 67 N. W. 1046; Ray v. Chesapeake &c. Ry. Co., 57 W. Va. 333, 50 S. E. 413, 415 (quoting text); Schoonover v. Baltimore &c. R. Co., 69 W. Va. 560, 73 S. E. 266, Ann. Cas. 1913B, 964 (citing text). In Cowans v. Ft. Worth &c. R. Co., 40 Tex. Civ. App. 539, 89 S. W. 1116, it was held in an action by a drayman injured, while unloading a car, by reason of a defective crossing, where "the evidence showed that the crossing had been used for many years by draymen as a crossing when unloading cars, that the custom was known to the company, that the public crossing on a near-by street was out of repair, that cars of

to what constitutes such a general use of a place as a crossing or such recognition of the right to use such a place as will impose upon the company the duty of observing the precaution required at public crossings, but we think the doctrine we have expressed is the true one supported by the best reasoned cases and by the recognized principles of law. The opposite view has been taken in a line of cases in which it is held that if the place has been used as a passageway for a long period of time and this use is with the knowledge and permission of the railroad company, it is its duty to treat it as a highway,[25] and that where the railroad company licenses the public to make a general use of a crossing over its track, it can not treat a person who walks upon it as a trespasser,[26] but some of these de-

goods were placed within a few feet of the defective crossing, and that no barrier forbidding the use thereof by the public was erected, the jury were authorized to find that the drayman was impliedly invited by the company to use the tracks at that point, imposing on the company the duty of exercising ordinary care in keeping the crossing in repair," and that "the drayman was under no obligation to exercise ordinary care in selecting a crossing; he having a right in the absence of knowledge to the contrary, to assume that the company had made the crossing reasonably safe."

[25] Hansen v. Southern Pac. R. Co., 105 Cal. 379, 38 Pac. 957; Chicago &c. R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801; Barry v. New York &c. R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Byrne v. New York &c. R. Co., 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; Swift v. Staten Island &c. R. Co., 123 N. Y. 645, 25 N. E. 378; Bellefontaine &c. R. Co. v. Snyder, 18 Ohio St. 399; Harriman v. Pittsburg &c. R. Co., 45 Ohio St. 11, 9 Western R. 438, 4 Am. St. 507; Taylor v. Delaware &c. R. Co., 113 Pa. St. 162, 8 Atl. 43, 57 Am. Rep. 446; Texas &c. R. Co. v. Watkins (Tex. Civ. App.), 26 S. W. 760; Davis v. Chicago &c. R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667. See also Cahill v. Chicago &c. R. Co., 74 Fed. 285; Clampit v. Chicago &c. R. Co., 84 Iowa 71, 50 N. W. 673; Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88, 79 S. W. 505; Union Pac. Ry. Co. v. Connolly, 77 Nebr. 254, 109 N. W. 368; Hinkle v. Richmond &c. R. Co., 109 N. Car. 472, 13 S. E. 884, 26 Am. St. 581; Texas &c. R. Co. v. Watkins (Tex. Civ. App.), 26 S. W. 760; Roth v. Union Depot Co., 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855; Ray v. Chesapeake &c. R. Co., 57 W. Va. 333, 50 S. E. 413, 414 (citing text).

[26] Bennett v. Railroad Co., 102 U. S. 577, 26 L. ed. 235; Murphy v. Chicago &c. R. Co., 38 Iowa 539; Well v. Portland &c. R. Co., 57

cisions seem to impose upon the company a greater duty than is due to a bare licensee, and the traveler is no more than a bare licensee, unless he has a legal right to be on the track, or is there by invitation of the company. It has also been held, and seems to be good law, that where the company has established a practice of giving signals or keeping a flagman at a place frequently used as a crossing and such practice is notorious, the traveler has the right to expect that the usual warning will be given, and the failure of the company to do so, is a proper fact for the jury to consider in determining the question of the defendant's negligence.[27]

§ 1648 (1155). **Statutory duties of company at crossing—Violation as negligence.**—The precautions to be observed by the railroad company at crossings are ordinarily prescribed by statutes which generally designate the signals required to be given by approaching trains and the maximum speed allowed at dangerous or populous places, and provide for the use of signboards, bells, lights, gates or flagmen at crossings of certain descriptions. These statutes may generally be regarded as defining the ordinary care due to travelers at such places, but

Maine 117; Campbell v. Boyd, 88 N. Car. 129, 43 Am. Rep. 740; Kay v. Pennsylvania &c. R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Philadelphia &c. R. Co. v. Troutman (Pa.), 6 Am. & Eng. R. Cas. 117, 11 W. N. C. 453; Davis v. Chicago &c. R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667. See also Southern R. Co. v. Chatman, 124 Ga. 1062, 53 S. E. 692, 6 L. R. A. (N. S.) 283; Calwell v. Minneapolis &c. R. Co., 138 Iowa 32, 115 N. W. 605; Cincinnati &c. R. Co. v. Harrigan, 149 Ky. 53, 147 S. W. 942; Ahnefield v. Wabash R. Co., 212 Mo. 280, 111 S. W. 95; Frye v. St. Louis &c. Ry. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069; Lamb v. Southern R. Co., 86 S. Car. 106, 67 S. E. 958, 138 Am. St. 1030; Gulf &c. R. Co. v. Cohen (Tex. Civ. App.), 126 S. W. 916.

[27] Nash v. New York &c. R. Co., 48 Hun 618, 1 N. Y. S. 269; Midland Valley R. Co. v. Shores, 40 Okla. 75, 136 Pac. 157, 49 L. R. A. (N. S.) 814, 819 (citing text). And the company should not discontinue the signals without notice. Westaway v. Chicago &c. R. Co., 56 Minn. 28, 57 N. W. 222; Pittsburgh &c. R. Co. v. Yundt, 78 Ind. 373, 41 Am. Rep. 580. See also Wolcott v. New York &c. R. Co., 68 N. J. L. 421, 53 Atl. 297. Compare McGlauflin v. Boston &c. R. Co., 230 Mass. 431, 119 N. E. 955.

circumstances may arise in which the observance of all the statutory requirements will not be sufficient to amount to the ordinary care required. It is held in most of the authorities that the statutes are merely cumulative, and do not release the company from the observance of such additional precautions as peculiar circumstances may demand, or, in other words, that they represent the minimum of care exacted,[28] and there are undoubtedly cases in which the mere giving of the statutory signal may not exonerate the company,[29] but ordinarily, although not always, when that which the statute prescribes is done, the company cannot well be held guilty of negligence. In some states the statutes provide that an omission of the statutory duty shall, prima facie, constitute actionable negligence,[30]

[28] Chicago &c. R. Co. v. Netolicky, 67 Fed. 665; Clark v. Canadian Pac. R. Co., 69 Fed. 543; Chicago &c. R. Co. v. Boggs, 101 Ind. 522; Chicago &c. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280; Atchison &c. R. Co. v. Hague, 54 Kans. 284, 38 Pac. 257, 45 Am. St. 278; Bradley v. Boston &c. R. Co., 2 Cush. (Mass.) 539; Favor v. Boston &c. R. Co., 114 Mass. 350, 19 Am. Rep. 364; Eaton v. Fitchburg R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183; Alabama &c. R. Co. v. Phillips, 70 Miss. 14, 11 So. 602; Barry v. N. Y. &c. R. Co., 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615; Richardson v. N. Y. &c. R. Co., 133 N. Y. 563, 30 N. E. 1148, 61 Hun 624, 15 N. Y. S. 868. See also Hayes v. Mich. Cent. R. Co., 111 U. S. 228, 235, 4 Sup. Ct. 369, 28 L. ed. 410; O'Neil v. Dry Dock &c. R. Co., 129 N. Y. 125, 29 N. E. 84, 26 Am. St. 512; Chicago City R. Co. v. Fennimore, 199 Ill. 9, 64 N. E. 985; Louisville &c. R. Co. v. Treanor's Adm'r., 179 Ky. 337, 200 S. W. 634. But see contra, Chicago &c. R. Co. v. Dougherty, 110 Ill. 521, 19 Am. & Eng. R. Cas. 292; Chicago &c. R. Co. v. Robinson, 106 Ill. 142, 19 Am. & Eng. R. Cas. 396; Beisiegel v. N. Y. &c. R. Co., 40 N. Y. 9, 34 N. Y. 622, 90 Am. Dec. 741; Grippen v. N. Y. &c. R. Co., 40 N. Y. 34; Dyson v. N. Y. &c. R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. 82.

[29] In additional cases cited in last proceeding note, see also Pittsburgh &c. Ry. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486; Lake Shore &c. Ry. Co. v. Myers, 52 Ind. App. 59, 100 N. E. 313; Bickel v. Penna. R. Co., 217 Pa. St. 456, 66 Atl. 756, 118 Am. St. 926; Weaver v. Southern R. Co., 76 S. Car. 49, 56 S. E. 657, 121 Am. St. 934; Erie R. Co. v. Weinstein, 166 Fed. 271.

[30] In Mississippi, Georgia, Missouri and Tennessee. In Tennessee such a statute has been construed to mean that when a violation of the statute is followed by

although the company may show by way of defense that the negligence was not the proximate cause of the injury.[31] It has been held in many cases, in the absence of an express statutory provision to that effect, that the omission of statutory duty is prima facie evidence of negligence,[32] and in other courts the rule has prevailed that the fact of failure to observe the statutory requirements is simply evidence of negligence, and is to be considered by the jury in connection with all the circumstances of the case.[33] The rule supported, we think, by the weight of

an injury, it will be conclusively presumed that the violation was the proximate cause of the injury. Railroad v. Walker, 11 Heisk. (Tenn.) 383; Nashville &c. R. Co. v. Thomas, 5 Heisk. (Tenn.) 262; Collins v. East Tenn. &c. R. Co., 9 Heisk. (Tenn.) 841; Louisville &c. R. Co. v. Connor, 9 Heisk. (Tenn.) 19; Ry. Co. v. Burke, 6 Cold. (Tenn.) 45, 50, 51; Southern Ry. Co. v. Koger, 219 Fed. 702. But see Southern R. Co. v. Simpson, 131 Fed. 705. And that proof of the observance of the statute entirely relieves from liability for injuries inflicted at the time of its observance. Railroad v. Walker, 11 Heisk. (Tenn.) 383; Hill v. Louisville &c. R. Co., 9 Heisk. (Tenn.) 823; Nashville &c. R. Co. v. Thomas, 5 Heisk. (Tenn.) 262.

[31] Huckshold v. St. Louis &c. R. Co., 90 Mo. 548, 2 S. W. 794, 28 Am. & Eng. R. Cas. 659. See also Illinois Cent. R. Co. v. Watson (Miss.), 39 So. 69; Louisville &c. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418. See Davis v. Atlanta &c. R. Co., 63 S. Car. 370, 41 S. E. 468, 892, under South Carolina statutes. But compare cases cited in last preceding note under Tennessee statute.

[32] Orcutt v. Pacific Coast R. Co., 85 Cal. 291, 24 Pac. 661; St. Louis &c. R. Co. v. Terhune, 50 Ill. 151, 99 Am. Dec. 504; Terre Haute &c. R. Co. v. Barr, 31 Ill. App. 57; Atchison &c. R. Co. v. Feelan, 47 Ill. App. 66; Kelsall v. New York &c. R. Co., 196 Mass. 554, 82 N. E. 674; Corbs v. Michigan Cent. R. Co., 144 Mich. 73, 107 N. W. 892; Stotler v. Chicago &c. R. Co., 200 Mo. 107, 98 S. W. 509; Norris v. Atlantic Coast Line R. Co., 152 N. Car. 505, 67 S. W. 1017, 27 L. R. A. (N. S.) 1069; Winstanley v. Chicago &c. R. Co., 72 Wis. 375, 39 N. W. 856. See also Tucker v. Boston &c. R. Co., 73 N. H. 132, 59 Atl. 943; Chicago &c. R. Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. 318; Mobile &c. R. Co. v. Dugan, 103 Ill. App. 371.

[33] Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; Blanchard v. Lake Shore &c. R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. 630; Omaha &c. R. Co. v. O'Donnell, 22 Nebr. 475, 35 N. W. 235, 35 Am. & Eng. R. Cas. 346; Union Pac. R. Co. v. Rasmussen, 25 Nebr. 810, 41 N. W. 778; Clark v. Boston &c. R. Co., 64 N. H. 323, 10 Atl. 676; McGrath v. New York &c. R. Co., 63 N. Y.

authority is that one who violates the law is a wrong-doer,[34] that ordinarily the omission of the statutory duty is negligence per se,[35] and that where the omission is established, such neg-

522; Massoth v. Delaware &c. R., 64 N. Y. 524; Vandewater v. New York &c. R. Co., 135 N. Y. 583, 32 N. E. 636, 18 L. R. A. 771; Meek v. Pennsylvania R. Co., 38 Ohio St. 632, 13 Am. & Eng. R. Cas. 643; Beck v. Portland &c. R. Co., 25 Ore. 32, 34 Pac. 753; Phila. &c. R. Co. v. Ervin, 89 Pa. St. 71, 33 Am. Rep. 726; Phila. &c. R. Co. v. Boyer, 97 Pa. St. 91; Garteiser v. Galveston &c. R. Co., 2 Tex. Civ. App. 230, 21 S. W. 631; Riley v. Salt Lake &c. R. Co., 10 Utah 428, 37 Pac. 681. See also Baltimore &c. R. Co. v. Golway, 6 App. Cas. (D. C.) 143. See ante, §§ 842, 1445.

[34] Chicago &c. R. Co. v. Kennedy, 2 Kans. App. 693, 43 Pac. 802; Atchison &c. R. Co. v. Morgan, 31 Kans. 77, 1 Pac. 298; Karle v. Kansas City &c. R. Co., 55 Mo. 476; Baker v. Flint &c. R. Co., 68 Mich. 90, 35 N. W. 836. It is an axiomatic truth that every person while violating an express statute is a wrong-doer, and as such is ex necessitate negligent in the eye of the law. Jetter v. N. Y. &c. R. Co., 2 Keyes (N. Y.) 154. See also Penn. R. Co. v. Stegemeier, 118 Ind. 305, 10 Am. St. 136, citing Wanless v. Northeastern R. Co., L. R. 6 Q. B. 481; Railway Co. v. Schneider, 45 Ohio St. 678, 30 Am. Rep. 620; Baker v. Pendergast, 32 Ohio St. 494.

[35] Illinois Cent. R. Co. v. O'Neill, 177 Fed. 328; Atlanta &c. R. Co. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Central &c. R. Co. v. Smith, 78 Ga. 694, 3 S. E. 397, 34 Am. & Eng. R. Cas. 1; Penn. R. Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188; Cincinnati &c. R. Co. v. Butler, 103 Ind. 31, 2 N. E. 138; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Penn. R. Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Pittsburgh &c. R. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486; Lake Erie &c. R. Co. v. Myers, 52 Ind. App. 59, 100 N. E. 313; Pittsburgh &c. R. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486; Chicago &c. R. Co. v. Biddinger, 61 Ind. App. 419, 109 N. E. 953; Philadelphia &c. R. Co. v. Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; Dugan v. St. Paul &c. R. Co., 40 Minn. 544, 42 N. W. 538; Keim v. Union Ry. Co., 90 Mo. 314, 2 S. W. 427; Murray v. Missouri Pac. Ry. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. 601; Dahlstrom v. St. Louis &c. R. Co., 108 Mo. 525, 18 S. W. 919; Schlereth v. Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110; Jetter v. New York &c. R. Co., 2 Keyes (N. Y.) 154; Virginia &c. Ry. Co. v. White, 84 Va. 498, 5 S. E. 573, 10 Am. St. 874; Piper v. Chicago &c. R. Co., 77 Wis. 247, 46 N. W. 165. See also South &c. Ala. R. Co. v. Donovan, 84 Ala. 141, 4 So. 142; Western R. Co. v. Moore, 169 Ala. 284, 53 So. 744; Kansas City &c. R. Co. v. Drew, 103 Ark. 374, 147 S. W. 50; Central of Ga. R. Co. v. Bond, 111

ligence arises as a matter of law,[36] but such omission by no

Ga. 13, 36 S. E. 299; Louisville &c. R. Co. v. Hames, 135 Ga. 67, 68 S. E. 805; Wheeler v. Oregon &c. Nav. Co., 16 Idaho 375, 102 Pac. 347; Kansas City &c. R. Co. v. Herman (Kans.), 62 Pac. 543; Skipwith v. Mobile &c. R. Co., 95 Miss. 50, 48 So. 964; De Atley v. Northern Pac. R. Co., 42 Mont. 224, 112 Pac. 76; Rowe v. Southern R. Co., 85 S. Car. 23, 66 S. E. 1056; Garber v. St. Louis &c. R. Co. (Tex. Civ. App.), 118 S. W. 857; Hooker v. Chicago &c. R. Co., 76 Wis. 542, 44 N. W. 1085. A statute creates an absolute duty, and the duty of performance does not depend upon, and is not controlled by, surrounding circumstances. Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20. "But the weight of authority is overwhelmingly to the effect that the failure to perform any duty imposed either by statute or an ordinance, is negligence per se." Penn. R. Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188. "It is negligence per se to run a train of cars in violation of a city ordinance, and if any one is injured in consequence of such negligence without being himself guilty of contributory negligence, he may recover damages for such injury." Pennsylvania R. Co. v. Horton, 132 Ind. 189, 31 N. E. 45. See also Hays v. Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. 624; Fath v. Tower Grove &c. R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74.

[36] "But as was said in McCully v. Clarke, 40 Pa. St. 399, 80 Am. Dec. 584, there are some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court." Schum v. Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468. The duty to give signals at a crossing in the manner prescribed by the statute is a determinate one, and the court has a right to instruct as a matter of law that an omission of such duty constitutes negligence. Chicago &c. R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761. The duty to give prescribed signals upon approaching a public highway was a duty defined by a positive law of the state, and a failure to observe it was in and of itself negligence, and an instruction to that effect as a matter of law was proper. Cincinnati &c. R. Co. v. Butler, 103 Ind. 31, 2 N. E. 138. See also Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20; Central &c. Co. v. Smith, 78 Ga. 694, 34 Am. & Eng. R. Cas. 1; Cordell v. N. Y. &c. R. Co., 64 N. Y. 535; Renwick v. New York &c. R. Co., 36 N. Y. 132; Gorton v. Erie R. Co., 45 N. Y. 660; Western &c. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320. See also McKerley v. Red River &c. R. Co. (Tex.), 85 S. W. 499, 86 S. W. 921;

means conclusively establishes the company's liability, for the injured party must have been free from fault, and the negligence of the company must have been the proximate cause of his injury in order to enable him to recover.[37] And further, it has been held that an omission of statutory duty is not conclusively negligence per se, for the company may explain the omission, and show that under peculiar circumstances, it may not have constituted negligence, and it has been so held where the locomotive started at less distance from the crossing than that at which the statute required signals to be given.[38] But other courts have held with much reason, that this does not

Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250.

[37] Horn v. Baltimore &c. R. Co., 54 Fed. 301; Southern R. Co. v. Crawford, 164 Ala. 178, 51 So. 340; Chicago &c. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286; Buchanan v. Philadelphia &c. R. Co., 1 Boyce (Del.) 83, 75 Atl. 872; Quincy &c. R. Co. v. Willhoener, 72 Ill. 60; Pennsylvania R. Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188; Baltimore &c. R. Co. v. Young, 146 Ind. 374, 45 N. E. 479, 480 (quoting text); Wabash R. Co. v. McNown, 53 Ind. App. 116, 99 N. E. 126; Atchison &c. R. Co. v. Morgan, 31 Kans. 77, 1 Pac. 298; Chicago &c. R. Co. v. Kennedy, 2 Kans. App. 693, 43 Pac. 802; Phila. &c. R. Co. v. Stebbing, 62 Md. 504; Stoneman v. Atlantic &c. R. Co., 58 Mo. 503; Pennsylvania R. Co. v. Rathgeb, 32 Ohio St. 66; Cent. Tex. &c. R. Co. v. Nycum (Tex.), 34 S. W. 460. See also Enoch v. Pittsburg &c. R. Co., 145 Ind. 635, 44 N. E. 658; Chicago &c. R. Co. v. Thomas, 147 Ind. 35, 46 N. E. 73; Dodge v. Burlington &c. R. Co., 34 Iowa 276; Carpenter v. Chicago &c. R. Co., 126 Iowa 94, 101 N. W. 758; Rutherford v. Iowa Cent. R. Co., 142 Iowa 744, 121 N. W. 703; Louisville &c. R. Co. v. Penrod, 108 Ky. 172, 56 S. W. 1; Spizale v. Louisiana R. &c. Co., 128 La. 187, 54 So. 714; McManamee v. Missouri Pac. R. Co., 135 Mo. 440, 37 S. W. 119; McDonald v. International &c. R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. 803; San Antonio &c. R. Co. v. Gray, 95 Tex. 424, 67 S. W. 763; Rogers v. Rio Grande &c. R. Co., 32 Utah 967, 90 Pac. 1075, 125 Am. St. 876; Atlantic &c. R. Co. v. Rieger, 95 Va. 418, 28 S. E. 591; Schug v. Chicago &c. R. Co., 102 Wis. 515, 78 N. W. 1090; Kujawa v. Chicago &c. R. Co., 135 Wis. 562, 116 N. W. 249.

[38] Cent. Tex. &c. R. Co. v. Nycum (Tex.), 34 S. W. 460. See also Central of Georgia R. Co. v. Harper, 124 Ga. 836, 53 S. E. 391; Southern R. Co. v. Jay, 137 Ga. 60, 72 S. E. 503; White v. New York &c. R. Co., 200 Mass. 441, 86 N. E. 923. But see Ft. Worth &c. R. Co. v. Greer, 32 Tex. Civ. App. 606, 75 S. W. 552.

excuse the company from giving the statutory signals altogether, even if they cannot be given for the full distance.[39] In no event is the omission to give the statutory signals sufficient of itself to make out a case, for there must be evidence showing that it was the proximate cause of the injury. Some courts and some authors, in discussing the elements which go to constitute negligence per se have produced confusion by a failure to distinguish the act or omission as separate from its consequences,[40] and have in their discussion erroneously assumed that absolute liability is an inseparable concomitant of negligence per se. The consequences of an act or omission do not of themselves show that an act is or is not negligent, and it is not necessary, in order to render an act or omission negligent, that it produce some disastrous result. Negligence per se may work no serious injury to any person, not because it is not wrongful in itself, but because no one is in position at a particular time to be injured. The liability of the wrong-doer to the person injured is, however, generally dependent upon the element of proximate cause.[41]

§ 1649 (1156). Common-law duty of company at crossings—Degree of care.—At common law the railway company is under

[39] Lake Shore &c. R. Co. v. Johnsen, 135 Ill. 641, 653, 26 N. E. 510; Pittsburgh &c. R. Co. v. Terrel, 177 Ind. 447, 95 N. E. 1109, 42 L. R. A. (N. S.) 367; Spiller v. St. Louis &c. R. Co., 112 Mo. App. 491, 87 S. W. 43 (holding that signals may nevertheless be required although not for the full statutory distance). See also Golinvaux v. Burlington &c. R. Co., 125 Iowa 652, 101 N. W. 465; Mitchell v. Union Terminal R. Co., 122 Iowa 237, 97 N. W. 1112; Stotler v. Chicago &c. R. Co., 200 Mo. 107, 98 S. W. 509; Gulf &c. R. Co. v. Hall, 34 Tex. Civ. App. 535, 80 S. W. 133; Canada Atlantic R. Co. v. Henderson, 29 Can. S. C. 632. Most of these cases hold that the bell must be rung in any event.

[40] See Beck v. Portland &c. R. Co., 25 Ore. 32, 34 Pac. 753, 755, 4 Am. & Eng. Encyc. of Law, 922, 923, 16 Am. & Encyc. of Law, 420 et seq.

[41] "It should be remarked that a liability does not attach to every act of negligence per se, such liability only attaches when the injury results from the negligence." Houston &c. R. Co. v. Wilson, 60 Tex. 142. As to whether violation of statute prohibiting obstruction of crossing is actionable negligence, see note to Denton v. Missouri &c. R. Co., 90 Kans. 51, in 47 L. R. A. (N. S.) 820.

obligation to exercise ordinary care to prevent collisions with travelers on the highway, and by ordinary care is meant such care as a reasonably prudent man would ordinarily exercise under the circumstances.[42] The company is not bound to exercise extraordinary care by using every possible means to prevent injury, but it is bound to use reasonable precautions.[43] It is said that the care and skill, to be reasonable, must be proportioned to the danger and multiplied chances of injury,[44] and where the surroundings are such as to render a crossing peculiarly dangerous it is the duty of the company to exercise care commensurate with the danger,[45] and especially if the company

[42] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Lapsley v. Union Pac. R. Co., 50 Fed. 172; Chicago &c. R. Co. v. Fisher, 49 Kans. 460, 30 Pac. 462; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; Weber v. N. Y. &c. R. Co., 58 N. Y. 451; Austin &c. R. Co. v. McElmurray (Tex. Civ. App.), 25 S. W. 324. An instruction is erroneous which requires "ordinary" care of a traveler and a "high degree of care" of the company. Atchison &c. R. Co. v. McClurg, 59 Fed. 860.

[43] Chicago &c. R. Co. v. Stumps, 55 Ill. 367; Willoughby v. Chicago &c. R. Co., 37 Iowa 432; Shaw v. Boston &c. R. Co., 8 Gray (Mass.) 45; Weber v. New York &c. R. Co., 58 N. Y. 451; Gulf &c. R. Co. v. Smith, 87 Tex. 348, 28 S. W. 520; Gulf &c. R. Co. v. Younger, 10 Tex. Civ. App. 141, 29 S. W. 948. "In some cases, and under some circumstances, ordinary care may require a very high degree of vigilance and precaution, but this does not necessarily include all that is physically possible." Weber v. New York &c. R. Co., 58 N. Y. 451, citing authorities. See also Gulf &c. R. Co. v. Smith, 87 Tex. 348, 28 S. W. 520.

[44] Grand Trunk &c. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; Lapsley v. Union Pac. R. Co., 50 Fed. 172; Inabnett v. St. Louis &c. R. Co., 69 Ark. 130, 61 S. W. 570, 572 (quoting text); Beers v. Housatonic &c. R. Co., 19 Conn. 566; Pittsburgh &c. R. Co. v. Yundt, 78 Ind. 373, 41 Am. Rep. 580; Norton v. Eastern R. Co., 113 Mass. 366; Kennedy v. North Mo. R. Co., 36 Mo. 351; Craig v. Chicago &c. R. Co., 97 Nebr. 426, 150 N. W. 374; Runyon v. Cent. R. Co., 25 N. J. L. 556; Dyer v. Erie &c. R. Co., 71 N. Y. 228; Bellefontaine &c. R. Co. v. Snyder, 24 Ohio St. 670; Penn. R. Co. v. Barnett, 59 Pa. St. 259, 98 Am. Dec. 346.

[45] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Nehrbas v. Cent. Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670; Peoria &c. R. Co. v. Siltman, 88 Ill. 529; Elgin &c. R. Co. v. Lawlor, 229 Ill. 621, 82 N. E. 407; Pittsburgh &c. R. Co. v. Warrum, 42

has created unusual danger at or near a crossing, it must meet such peril with additional precautions.[46] At the crossing of a street in a city or town the duties are usually greater than would be required in less populous districts where the chances of danger are less.[47] The company must exercise reasonable care to provide sufficient men and proper appliances for the

Ind. App. 179, 82 N. E. 934; Funston v. Chicago &c. R. Co., 61 Iowa 452, 16 N. W. 518, 14 Am. & Eng. R. Cas. 640; Gray v. Chicago &c. R. Co., 143 Iowa 268, 121 N. W. 1097; Louisville &c. R. Co. v. Goetz, 79 Ky. 442, 14 Am. & Eng. R. Cas. 627; Louisville &c. R. Co. v. Comley, 173 Ky. 469, 191 S. W. 96; Eichorn v. New Orleans &c. R. Co., 112 La. Ann. 236, 36 So. 335, 104 Am. St. 437, citing Elliott Roads and Streets (3rd ed.), 1028, 1140; Penn. R. Co. v. Matthews, 36 N. J. L. 531; Mackay v. N. Y. &c. R. Co., 35 N. Y. 75; Richardson v. N. Y. &c. R. Co., 45 N. Y. 846; Weber v. N. Y. &c. R. Co., 58 N. Y. 451; Lake Shore &c. R. Co. v. Orvis, 1 Ohio Dec. 492; Central &c. R. Co. v. Feller, 84 Pa. St. 226; Duffy v. Chicago &c. R. Co., 32 Wis. 269; Eilert v. Green Bay &c. R. Co., 48 Wis. 606, 4 N. W. 769. Evidence of expert that crossing is dangerous and evidence that many others have been hurt there has been held inadmissible. Tiffin v. St. Louis &c. R. Co., 78 Ark. 55, 93 S. W. 564.

[46] Nehrbas v. Cent. Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670; Virgin v. Lake Erie &c. R. Co., 55 Ind. App. 216, 101 N. E. 500; Funston v. Chicago &c. R. Co., 61 Iowa, 452, 14 Am. & Eng. R. Cas. 640; Louisville &c. R. Co. v. Ueltschi, 29 Ky. L. 1136, 97 S. W. 14; Cherry v. Louisiana &c. R. Co., 121 La. Ann. 471, 46 So. 596, 17 L. R. A. (N. S.) 505, 126 Am. St. 323; Klein v. Jewett, 26 N. J. Eq. 474; New York &c. R. Co. v. Randel, 47 N. J. L. 144, 23 Am. & Eng. R. Cas. 508; Delaware &c. R. Co. v. Shelton, 54 N. J. L. 342, 26 Atl. 937; Weaver v. Columbus &c. R. Co., 76 Ohio St. 164, 81 N. E. 180; Atlantic Coast Line R. Co. v. Grubbs, 113 Va. 214, 74 S. E. 144.

[47] Andrews v. N. Y. &c. R. Co., 60 Conn. 293, 22 Atl. 566; Chicago &c. R. Co. v. O'Sullivan, 143 Ill. 48, 32 N. E. 398; Pittsburgh &c. R. Co. v. Yundt, 78 Ind. 373, 41 Am. Rep. 580; Illinois &c. R. Co. v. Dick, 91 Ky. 434, 15 S. W. 665; Louisville &c. R. Co. v. Schuster (Ky.), 35 Am. & Eng. R. Cas. 407; Baltimore &c. R. Co. v. State, 29 Md. 252, 96 Am. Dec. 528; Harlan v. St. Louis &c. R. Co., 65 Mo. 22; Hilz v. Missouri &c. R. Co., 101 Mo. 36, 13 S. W. 946; Fero v. Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33. See also Craig v. Chicago &c. R. Co., 97 Nebr. 426, 150 N. W. 374; Gerg v. Pennsylvania R. Co., 254 Pa. St. 316, 98 Atl. 960; Merrill v. Minneapolis &c. R. Co., 27 S. Dak. 1, 129 N. W. 468; Christensen v. Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746.

control of the train;[48] must, where necessary, provide suitable warnings of danger at highway crossings,[49] and on the approach of trains to crossings, warnings must generally be given which would apprise a traveler in the use of ordinary care of the danger of the situation.[50] The signals should be given at such a time and the speed of the train so regulated that the warning may be effectual to the traveler to whom the duty is due.[51] The traveler has a right to rely, to a limited extent, upon the company to exercise ordinary care, but never to such an extent as to dispense with ordinary care on his part. The traveler is not himself excused under any circumstances

[48] O'Mara v. Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61 and note; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65; Frick v. St. Louis &c. R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Toledo &c. R. Co. v. McGinnis, 71 Ill. 346; Kansas &c. R. Co. v. Pointer, 14 Kans. 37; Kay v. Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628.

[49] Chicago &c. R. Co. v. Still, 19 Ill. 499, 71 Am. Dec. 236; Field v. Chicago &c. R. Co., 14 Fed. 332, 8 Am. & Eng. R. Cas. 425; Shaber v. St. Paul &c. R. Co., 28 Minn. 103, 5 N. W. 575, 2 Am. & Eng. R. Cas. 185. See also Conger v. Baltimore &c. R. Co., 31 App. D. C. 139; Southern R. Co. v. Winchester, 32 Ky. L. 19, 105 S. W. 167; Eichorn v. New Orleans &c. R. Co., 112 La. Ann. 236, 36 So. 335, 104 Am. St. 437.

[50] Missouri Pac. R. Co. v. Moffatt, 56 Kans. 667, 44 Pac. 607; Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Lake Shore &c. R. Co. v. Myers, 52 Ind. App. 59, 98 N. E. 654; Loucks v. Chicago &c. R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305, 4 Am. & Eng. Encyc. Law, 917. See also Louisville &c. R. Co. v. Davenes, 162 Ala. 660, 50 So. 276; Weatherby v. Nashville &c. R. Co., 166 Ala. 575, 51 So. 959; Ft. Smith &c. R. Co. v. Messek, 96 Ark. 243, 131 S. W. 686; Lake Erie &c. R. Co. v. Moore, 51 Ind. App. 110, 97 N. E. 203; Bamberg v. Atlantic Coast Line R. Co., 72 S. Car. 389, 51 S. E. 988.

[51] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; South &c. R. Co. v. Thompson, 62 Ala. 494; Lake Erie &c. R. Co. v. Moore, 51 Ind. App. 110, 97 N. E. 203; Pittsburgh &c. R. Co. v. Macy, 59 Ind. App. 125, 167 N. E. 486 (must give reasonable and timely warning); Baltimore &c. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329; Hermans v. New York &c. R. Co., 63 Hun 625, 17 N. Y. S. 319; Hinkle v. Richmond &c. R. Co., 109 N. Car. 472, 13 S. E. 884, 26 Am. St. 581; Reeves v. Delaware &c. R. Co., 30 Pa. St. 454, 72 Am. Dec. 713, and note; Ellis v. Lake Shore &c. R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. 914; Childs v. Penn. R. Co., 150 Pa. St. 73, 24 Atl. 341.

from the observance of like care in guarding himself from injury;[52] but what is ordinary care usually depends upon the circumstances of the particular case. If the company so operates its trains as to render the statutory warnings ineffectual, its having given them may not in all cases relieve it from liability.[53] Ordinarily it is for the jury to determine what constitutes ordinary care under the circumstances of each case,[54] but where the facts are undisputed it may sometimes present

[52] Railroad Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; Robinson v. Western Pac. R. Co., 48 Cal. 409; Toledo &c. R. Co. v. Lander, 48 Ind. App. 56, 95 N. E. 319; Loucks v. Chicago &c. R. Co., 31 Minn. 526, 18 N. W. 651, 19 Am. & Eng. R. Cas. 305; Ernst v. Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Bower v. Chicago &c. R. Co., 61 Wis. 457, 21 N. W. 536, 19 Am. & Eng. R. Cas. 301. See also Penn. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136, same as to statutory requirement. And see Van Winkle v. New York &c. R. Co., 34 Ind. App. 476, 73 N. E. 157; Wabash Ry. Co. v. Tippecanoe &c. Co., 178 Ind. 113, 98 N. E. 64; Chicago &c. R. Co. v. Daun, 53 Ind. App. 699, 101 N. E. 734; Van Riper v. New York &c. R. Co., 71 N. J. L. 345, 59 Atl. 26.

[53] Chicago &c. R. Co. v. Boggs, 101 Ind. 522, 51 Am. R. 761, 23 Am. & Eng. R. Cas. 282; South &c. R. Co. v. Thompson, 62 Ala. 494; Ellis v. Lake Shore &c. R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. 914; Baltimore &c. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329; Childs v. Penn. R. Co., 150 Pa. St. 73, 24 Atl. 341.

[54] Lapsley v. Union Pac. R. Co., 50 Fed. 172; Macon &c. R. Co., v. Davis, 18 Ga. 679; Louisville &c. R. Co. v. Goetz, 79 Ky. 442, 14 Am. & Eng. R. Cas. 627, 42 Am. Rep. 227; Shaber v. St. Paul &c. R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; Loucks v. Chicago &c. R. Co., 31 Minn. 526, 18 N. W. 651, 19 Am. & Eng. R. Cas. 305, 309; Frick v. St. Louis &c. R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Omaha &c. R. Co. v. Brady, 37 Nebr. 27, 57 N. W. 767. See also Northern Cent. R. Co. v. State, 100 Md. 404, 60 Atl. 19; Central Texas &c. R. Co. v. Gibson, 35 Tex. Civ. App. 66, 83 S. W. 862. "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and can not be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court." Lamar, J., in Grand Trunk R. Co. v. Ives, 144 U. S. 406, 12 Sup. Ct. 679, 36 L. ed. 485.

a question of law for the court.[55] Even in cases where the statutory duties have been performed, it is, in some peculiar instances, for the jury to determine whether in the particular case the performance of such duties was sufficient to comply with the common law requirement.[56]

§ 1650 (1157). **Signboards and gates at crossings.**—Where signs or gates are not required by statute it is usually a question for the jury, as to whether, under the circumstances, it is negligence for the company to omit them.[57] The track in itself is a warning of danger, but its presence may not always be apparent to the traveler, and where it is observed by the surroundings, reasonable care may require the company to erect such signs as will apprise him of its presence, or to take

[55] Randall v. Baltimore & O. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. ed. 1003; Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. ed. 213; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434; Rogers v. Boston &c. R. Co., 187 Mass. 217, 72 N. E. 55; Loucks v. Chicago &c. R. Co., 31 Minn. 526, 18 N. W. 651, 19 Am. & Eng. R. Cas. 305. The general rule is that it is only where the facts are such that reasonable men must draw the same conclusion from them that the question of negligence is considered as one of law for the court. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485.

[56] Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; Finklestein v. N. Y. &c. R. Co., 41 Hun (N. Y.) 34; Weber v. N. Y. &c. R. Co., 58 N. Y. 451; Dyer v. Erie Ry. Co., 71 N. Y. 228; Byrne v. New York &c. R. Co., 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; Piper v. Chicago &c. R. Co., 77 Wis. 247, 46 N. W. 165. See also Fife v. Chicago &c. R. Co., 174 Mo. App. 655, 161 S. W. 350; Bickel v. Penna R. Co., 217 Pa. St. 456, 66 Atl. 756, 118 Am. St. 926; Weaver v. Southern Ry. Co., 76 S. Car. 49, 56 S. E. 657, 121 Am. St. 934.

[57] Eaton v. Fitchburg &c. R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183; Shaber v. St. Paul &c. R. Co., 28 Minn. 103, 9 N. W. 575, 2 Am. & Eng. R. Cas. 185; Baltimore &c. R. Co. v. Whitacre, 35 Ohio St. 627; Elkins v. Boston &c. R. Co., 115 Mass. 190; Heddles v. Chicago &c. R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. 106 and note; Central Texas &c. R. Co. v. Gibson (Tex. Civ. App.), 33 S. W. 862. See also Chicago &c. R. Co. v. Kowalski, 92 Fed. 310; Latham v. Staten Island R. Co., 150 Fed. 235; Illinois Cent. R. Co. v. O'Neill, 177 Fed. 328.

other proper precautions. The omission of a signboard will not render the company liable to one who knows of the location of the track and is familiar with the surroundings, as the omission of the company can in no way be the cause of his injury,[58] but where signboards are required by statute their omission may constitute negligence, or, at least, evidence of negligence.[59] In order to render the company liable, however, the omission must have been the proximate cause of injury to the traveler who was himself in the exercise of ordinary care,[60] and it has been held that the erection of a signboard, whether required by statute or not, can only be regarded as a duty to one who approaches a crossing for the purpose of using it.[61] Outside of statutory and municipal regulations there is no absolute rule of law requiring the company to maintain gates at crossings, but the necessity for a gate at a particular crossing in order to comply with the requirement of ordinary care is in some cases to be determined by the jury.[62] Where maintained, whether required by statute or not, the fact that the gate is

[58] Field v. Chicago &c. R. Co., 14 Fed. 332, 8 Am. & Eng. R. Cas. 425; Haas v. Grand Rapids &c. R. Co., 47 Mich. 401, 11 N. W. 216; Gulf &c. R. Co. v. Greenlee, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322. See also Laborde v. Louisiana R. &c. Co., 121 La. Ann. 47, 46 So. 97.

[59] Field v. Chicago &c. R. Co., 14 Fed. 332, 8 Am. & Eng. R. Cas. 425; Haas v. Grand Rapids &c. R. Co., 47 Mich. 401, 11 N. W. 216; Shager v. St. Paul &c. R. Co., 28 Minn. 103, 9 N. W. 575; Payne v. Chicago &c. R. Co., 44 Iowa 236. A statute requiring signboards near crossings has been held not to apply to crossing of a street in a city. Seaboard Air Line R. Co. v. Smith, 53 Fla. 375, 43 So. 235.

[60] Lang v. Holiday &c. R. Co., 49 Iowa 469; Field v. Chicago &c. R. Co., 14 Fed. 332, 8 Am. & Eng. R. Cas. 425. See also where absence of gate was apparent to traveler as he approached the crossing, Southern Ry. Co. v. Whitlock, 136 Tenn. 266, 188 S. W. 1151.

[61] East Tenn. &c. R. Co. v. Feathers, 10 Lea (Tenn.) 103, 15 Am. & Eng. R. Cas. 446.

[62] Stubley v. London &c. R. Co., L. R. 1 Ex. 13; Boucher v. New York &c. R. Co., 196 Mass. 355, 82 N. E. 15, 13 L. R. A. (N. S.) 1177; Eaton v. Fitchburg &c. R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183. See as to power of municipalities to require gates, Fleener v. Oregon Short Line R. Co., 16 Idaho 781, 102 Pac. 897; Chicago &c. R. Co. v. Averill, 127 Ill. App. 275. But compare In re Pennsylvania R. Co., 213 Pa. St. 373, 62 Atl. 98, 63 L. R. A. (N. S.) 140.

open is held to be an invitation to cross and an assurance that the track can be crossed in safety,[63] but such an invitation will not excuse the traveler from himself exercising care to avoid a collision.[64] It is the duty of the company to close the gates on the approach of a train, but the traveler must not rely entirely upon its servant to do so.[65] In cases where the failure to close the gates is followed by a collision, the questions of negligence and contributory negligence are usually for the jury.[66] It is held that a traveler who attempts to cross while

[63] Central Trust Co. v. Wabash &c. R. Co., 27 Fed. 159; Beal &c. Co. v. Carr, 85 Ark. 479, 108 S. W. 1053, 1054 (citing text); Penn. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136; State v. Boston &c. R. Co., 80 Maine 430, 15 Atl. 36; Evans v. Lake Shore &c. R. Co., 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; Lindeman v. New York &c. R. Co., 46 Hun 679, 11 N. Y. St. 837; Sharp v. Glushing, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372; Fitzgerald v. Long Island R. Co., 117 N. Y. 653, 22 N. E. 1133; Oldenburg v. N. Y. &c. R. Co., 124 N. Y. 414, 26 N. E. 1021; Cleveland &c. Railway Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321; Wilson v. New York &c. R. Co., 18 R. I. 491, 29 Atl. 258; Northeastern &c. R. Co. v. Wanless, L. R. 7 E. & I. App. Cas. 12, 43 L. J. Q. B. 185; Stubley v. London &c. R. Co. L. R. 1 Ex. 13. See also Delaware &c. R. Co. v. Larnard, 161 Fed. 520; Perkins v. Wabash R. Co., 233 Ill. 458, 84 N. E. 677; Evansville &c. R. Co. v. Berndt, 172 Ind. 697, 88 N. E. 612; Louisville &c. R. Co. v. Wilson, 30 Ky. L. 1048, 100 S. W. 302; Record v. Penna. R. Co., 75 N. J. L. 311, 67 Atl. 1040.

[64] Penn. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136, and authorities cited, 31 Cent. L. J. 473. He is not required to do all that might otherwise be required, but "he should use such care as a reasonably prudent man would under the circumstances." Missouri &c. R. Co. v. Ray, 25 Tex. Civ. App. 567, 63 S. W. 912, 913 (citing text). See also Briggs v. Boston &c. R. Co., 188 Mass. 463, 74 N. E. 667; Roland v. Philadelphia &c. R. Co., 224 Pa. St. 630, 73 Atl. 958. The facts of the absence of the flagman and the gates being open, are to be considered by the jury as affecting the traveler's conduct. Palmer v. N. Y. &c. R. Co., 112 N. Y. 234, 19 N. E. 678.

[65] Lunt v. London &c. R. Co., L. R. 1 Q. B. 277; Phila. &c. R. Co. v. Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

[66] Palmer v. N. Y. &c. R. Co., 112 N. Y. 234, 19 N. E. 678; Lunt v. London &c. R. Co., L. R. 1 Q. B. 277; Bilbee v. London &c. R. Co., 18 Com. B. (N. S.) 584; Sharp v. Gulshing, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372. See also O'Keefe v. St. Louis &c. R. Co., 108 Mo. App. 177, 83 S. W. 308. And it is of

the gate is in motion is guilty of such contributory negligence as to defeat his action against the company.[67]

§ 1651. Flagmen at crossings.—In the absence of a statute, the company is not required to keep a flagman at every highway crossing,[68] but if the place be one of extraordinary peril, the fact that there was no flagman, while not conclusive evidence of negligence on the part of the company, is usually for the jury to consider in determining whether in the particular case, the company exercised ordinary care.[69] When a flagman

course, essential to recovery that the absence or mismanagement of the gate should be a proximate cause of the injury. Chicago Terminal &c. R. Co. v. Korando, 129 Ill. App. 620; Mehalek v. Minneapolis &c. R. Co., 105 Minn. 128, 117 N. W. 250.

[67] Peck v. New York &c. R. Co., 50 Conn. 379, 14 Am. & Eng. R. Cas. 633. See also Weaver v. Southern R. Co., 76 S. Car. 49, 56 S. E. 657, 121 Am. St. 934. See where gate is closed. Baltimore &c. P. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. ed. 262.

[68] Commonwealth v. Boston &c. R. Co., 101 Mass. 201; Haas v. Grand Rapids &c. R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; Penn. R. Co. v. Matthews, 36 N. J. L. 531; Weber v. New York &c. R. Co., 58 N. Y. 451; McGrath v. New York &c. R. Co., 59 N. Y. 468, 17 Am. Rep. 359; Seifried v. Penna. R. Co., 206 Pa. St. 399, 55 Atl. 1061; Callison v. Charleston &c. R. Co., 106 S. Car. 123, 90 S. E. 260. See also Chicago &c. R. Co. v. Clarkson, 147 Fed. 397; Latham v. Staten Island R. Co., 150 Fed. 235; Merchants' &c. Co. v. Chicago &c. Ry. Co., 170 Iowa 378, 150 N. W. 720. In such case running a train over the crossing without a flagman or watchman at the crossing is not negligence per se. Chicago &c. R. Co. v. Biddinger, 63 Ind. App. 30, 113 N. E. 1027. In the case of Houghkirk v. President &c. of Canal Co., 92 N. Y. 219, 44 Am. R. 370, it was said. "A railroad company is not bound and owes no duty so to station a flagman, and negligence can not be predicated on the omission. The fact may be proven as one of the circumstances under which the train was moved, and by which the degree of care requisite in its handling and running may be affected; so that the question never is whether there should have been a flagman, or one ought to have been stationed at the crossing, but whether in view of his presence or absence, the train was moved with prudence or negligence." See article in 31 Cent. L. J. 473.

[69] Pittsburgh &c. R. Co. v. Yundt, 78 Ind. 373, 41 Am. Rep. 580; Kansas Pac. R. Co. v. Richardson, 25 Kans. 391, 6 Am. & Eng. R. Cas. 96; Penn. R. Co. v. Matthews, 36

is required by statute or ordinance, the violation of the law does not conclusively establish liability on the part of the company, but the injured party must show that the omission was the proximate cause of the injury.[70] It has been held, where the statute empowers railroad commissioners to designate the crossings at which flagmen shall be required and compels the company to maintain flagmen at such places, that in the absence of an order from the commissioners the company is under no duty to keep a flagman at a particular crossing and that the fact of its failure to do so could not be introduced as evidence,[71] but this is in conflict with what we think is the

N. J. L. 531; Cent. Pass. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. 309; Bailey v. New Haven &c. R. Co., 107 Mass. 496; Eaton v. Fitchburg R. Co., 129 Mass 364, 2 Am. & Eng. R. Cas. 183; Bolinger v. St. Paul &c. R. Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. 680; Welsch v. Hannibal &c. R. Co., 72 Mo. 451, 6 Am. & Eng. R. Cas. 75, 37 Am. Rep. 440 and note; Schmitz v. St. Louis &c. R. Co., 119 Mo. 256, 23 S. W. 250, 23 L. R. A. 250; Omaha &c. R. Co. v. Brady, 39 Nebr. 27, 57 N. W. 767; McGrath v. New York &c. R. Co., 63 N. Y. 522; Phila. R. Co. v. Killips, 88 Pa. St. 405; Missouri &c. R. Co. v. Bratcher, 54 Tex. Civ. App. 10, 118 S. W. 1091; Central Tex. &c. R. Co. v. Gibson (Tex. Civ. App.), 83 S. W. 862; Kinney v. Crocker, 18 Wis. 74; Hoye v. Chicago &c. R. Co., 67 Wis. 1, 29 N. W. 646; Atlanta Boat Line R. Co. v. Jones (Ala. App.), 78 So. 645. See also Annaker v. Chicago R. Co., 81 Iowa 267, 47 N. W. 68; Illinois Cent. R. Co. v. Coley, 28 Ky. L. 336, 89 S. W. 234; Roby v. Kansas City &c. R. Co., 130 La. 880, 58 So. 696; Huntington v. Bangor &c. R. Co., 105 Maine 363, 74 Atl. 802; Barnum v. Grand Trunk &c. R. Co., 148 Mich. 370, 111 N. W. 1036; Russell v. Oregon &c. N. Co., 54 Ore. 128, 102 Pac. 619. And failure to station a flagman at a particular crossing may be introduced as evidence of negligence without being specifically alleged in the complaint. Lesan v. Main &c. R. Co., 77 Maine 85, 23 Am. & Eng. R. Cas. 245. See also Heddles v. Chicago &c. R. Co., 74 Wis. 239, 42 N. W. 237.

[70] Chicago &c. R. Co. v. Notzki, 66 Ill. 455; Pennsylvania Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188, 6 Am. & Eng. R. Cas. 79; Cordell v. New York &c. R. Co., 70 N. Y. 119, 26 Am. Rep. 550; Briggs v. New York &c. R. Co., 72 N. Y. 26; Pakalinski v. New York &c. R. Co., 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; Johnson v. St. Paul &c. R. Co., 31 Minn. 283, 17 N. W. 622, 15 Am. & Eng. R. Cas. 467; Fletcher v. Atlantic &c. R. Co., 64 Mo. 484. See also Brooks v. Boston &c. R. Co., 188 Mass. 416, 74 N. E. 670.

[71] Battiskill v. Humphrey, 64 Mich. 494, 31 N. W. 894, 28 Am. & Eng. R. Cas. 597, 29 Am. & Eng. R Cas. 411.

better rule—that the statutes only prescribe the minimum of care required.[72] Although not originally under obligation to do so, if the company has maintained a flagman at a particular crossing for a long time and his presence is notorious, travelers have, within limits, a right to assume, when he is absent, that no train is approaching, and his absence or permanent removal, without notice to the public is negligence or at least is evidence of negligence;[73] but where, not knowing that a flagman had usually been stationed at the crossing, the traveler's conduct was in no way influenced by his absence, such absence creates no liability, nor does the absence of a flagman in any event absolve the traveler from the exercise of care.[74] The

[72] See Ante, § 1648; Evans v. Erie R. Co., 213 Fed. 129. Also Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; Dolph v. New York &c. R. Co., 74 Conn. 538, 51 Atl. 525; Alabama &c. R. Co. v. Phillips, 70 Miss. 14, 11 So. 602; English v. Southern Pac. Co., 13 Utah 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. 772.

[73] Indianapolis, St. Louis &c. R. Co. v. Dunn, 78 Ill. 197; Pittsburgh &c. R. Co. v. Yundt, 78 Ind. 373, 41 Am. Rep. 580; Sweeny v. Old Colony R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644 and note; Richmond v. Chicago &c. R. Co., 87 Mich. 374, 49 N. W. 621; Delaware &c. R. Co. v. Toffey, 38 N. J. L. 525; Dolan v. Delaware &c. R. Co., 71 N. Y. 285; Ernst v. Hudson River R. Co., 39 N. Y. 61, 100 Am. Dec. 405 and note; McNamara v. New York &c. R. Co., 136 N. Y. 650, 32 N. E. 765; Phila. &c. R. Co. v. Killips, 88 Pa. St. 405; Burns v. North Chicago Rolling Mill Co., 65 Wis. 312, 27 N. W. 43; Heddles v. Chicago &c. R. Co., 74 Wis. 239, 42 N. W. 237; 2 Thomp. Neg. (2nd ed.), § 1539. See also Dolph v. New York &c. R. Co., 74 Conn. 538, 51 Atl. 525; Indianapolis Un. R. Co. v. Newbaucher, 16 Ind. App. 21, 43 N. E. 576; Sights v. Louisville &c. R. Co., 117 Ky. 436, 78 S. W. 172; Mitchell v. Illinois Cent. R. Co., 110 La. Ann. 630, 34 So. 714, 98 Am. St. 472; Richmond v. Chicago &c. R. Co., 87 Mich. 374, 49 N. W. 621; Montgomery v. Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930, 936, (quoting text). This is also the rule where a city ordinance requires the presence of a flagman. Lockridge v. Minneapolis &c. R. Co., 161 Iowa 74, 140 N. W. 834; Roby v. Kansas City &c. R. Co., 130 La. Ann. 880, 58 So. 696, 41 L. R. A. (N. S.) 355.

[74] Pakalinsky v. New York &c. R. Co., 82 N. Y. 251, 2 Am. & Eng. R. Cas. 251; Lake Shore &c. R. Co. v. Sunderland, 2 Bradw. (Ill.) 307. See also Hodgin v. Southern R. Co., 143 N. Car. 93, 55 S. E. 413, in which it is held that when the traveler discovers the absence of the flagman he is put on his guard and it is all the more incumbent

invitation or direction of the flagman to the traveler is held to be an assurance of safety upon which he has a right to rely,[75] but while relying upon such assurance he has no right to omit to use the senses of sight and hearing, as a prudent man would do under the circumstances,[76] although the same vigilance may not be required of him as if there were no such invitation.[77] The question of contributory negligence in such

on him to look and listen for his own protection. And compare Tiffin v. St. Louis &c. R. Co., 78 Ark. 55, 93 S. W. 564; Smith v. Wabash R. Co., 141 Ind. 92, 40 N. E. 270; Peck v. Grand Trunk &c. R. Co., 155 Mich. 430, 119 N. W. 578. And see generally Martin v. Baltimore &c. R. Co., 2 Marv. (Del.) 123, 42 Atl. 442; Huntington v. Bangor &c. R. Co., 105 Maine 363, 74 Atl. 802; Waterson v. Chicago &c. Ry. Co., 164 Wis. 375, 160 N. W. 261; Chicago &c. R. Co. v. Clarkson, 147 Fed. 397.

[75] Central Trust Co. v. Wabash &c. R. Co., 27 Fed. 159; Whelan v. New York &c. R. Co., 38 Fed. 15; Cleveland &c. R. Co. v. Harrison, 178 Ind. 324, 98 N. E. 729; Pittsburgh &c. R. Co. v. Cottman, 52 Ind. App. 661, 101 N. E. 22; State v. Boston &c. R. Co., 80 Maine 430, 15 Atl. 36, 35 Am. & Eng. R. Cas. 356; Bayley v. Eastern R. Co., 125 Mass. 62; Sweeny v. Old Colony R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Sharp v. Glushing, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172. See also Alabama &c. R. Co. v. Anderson, 109 Ala. 299, 19 So. 516; Louisville &c. R. Co. v. Schmidt, 147 Ind. 638, 46 N. E. 344, 347 (citing text); Lake Erie &c. R. Co. v. Fike, 35 Ind. App. 554, 74 N. E. 636. Edwards v. Chicago &c. R. Co., 94 Mo. App. 36, 67 S. W. 950. It seems to us that some of these cases go too far toward absolving the traveler from all care for himself. No reliance upon a servant of the company can excuse him for stepping recklessly into certain and apparent danger. See Hayes v. New York &c. R. Co., 91 Conn. 301, 99 Atl. 694, and authorities cited in next following note.

[76] Penn. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136; Berry v. Pennsylvania R. Co., 48 N. J. L. 141, 4 Atl. 303, 26 Am. & Eng. R. Cas. 396; Casey v. New York &c. R. Co., 78 N. Y. 518; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172; Lake Shore &c. R. Co. v. Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389; Greenwood v. Phila. &c. R. Co., 124 Pa. St. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. 614. See also Cross v. Illinois Cent. R. Co., 33 Ky. L. 432, 110 S. W. 290; Union Pac. R. Co. v. Rosewater, 157 Fed. 168, 84 C. C. A. 616, 15 L. R. A. (N. S.) 803, and other cases there cited in note.

[77] Chicago &c. R. Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Pittsburgh &c. R. Co. v. Cottman, 52 Ind. App. 661, 101 N. E. 22;

cases depends largely upon the circumstances of the particular case and is usually for the jury.[78] If the traveler refuses to heed the signals of the flagman and attempts to cross when warned not to do so, he cannot ordinarily recover for any injury sustained[79] except it be wilful. The negligence of the flagman or gatekeeper is the negligence of the company and one customarily permitted to act as flagman, although not employed for the purpose, may render the company liable for his negligence.[80] Evidence of the intoxication of the flagman at the time of the accident is admissible.[81] And the flagman should be physically and mentally capable of performing his duties.[82] The question as to whether he has used due care in performing them or is guilty of negligence in the particular case is usually for the jury.[83] It has also been held that when gates are con-

Dolan v. Delaware &c. Co., 71 N. Y. 285; Callaghan v. Delaware &c. R. Co., 52 Hun 276, 5 N. Y. S. 285; Bond v. New York &c. R. Co., 69 Hun 476, 52 N. Y. S. R. 637, 23 N. Y. S. 450; Lunt v. London &c. R. Co., L. R. 1 Q. B. 277. See also Beal &c. Co. v. Carr, 85 Ark. 479, 108 S. W. 1053, 1054 (citing text); Palmer v. New York &c. R. Co., 112 N. Y. 234, 19 N. E. 678. Missouri &c. R. Co. v. Ray, 25 Tex. Civ. App. 567, 63 S. W. 912, 913 (citing text).

[78] Denver &c. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505; Chicago &c. R. Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Richmond v. Chicago &c. R. Co., 87 Mich. 374, 49 N. W. 621; Woehrle v. Minnesota &c. R. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348.

[79] Houston &c. R. Co. v. Carson, 66 Tex. 345, 1 S. W. 107.

[80] Louisville &c. R. Co. v. Webb, 90 Ala. 185, 8 So. 518, 11 L. R. A. 674; Peck v. Mich. Cent. R. Co., 57 Mich. 3, 23 N. W. 466, 19 Am. & Eng. R. Cas. 257; Dickson v. Missouri Pac. R. Co., 104 Mo. 491, 16 S. W. 381; Ernst v. Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Kissenger v. New York &c. R. Co., 56 N. Y. 538; Dolan v. Delaware &c. R. Co., 71 N. Y. 285.

[81] Warner v. New York &c. R. Co., 44 N. Y. 465.

[82] McNamara v. Chicago &c. R. Co., 126 Mo. App. 152, 103 S. W. 1093.

[83] Delaware &c. R. Co. v. Toffey, 38 N. J. L. 525; Wolcott v. New York &c. R. Co., 68 N. J. L. 421, 53 Atl. 297. His mere presence is not sufficient and he should give warning in due time. Chicago &c. R. Co. v. Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Norton v. Eastern R. Co., 113 Mass. 366; Montgomery v. Union Pac. R. Co., 181 Mo. 477, 79 S. W. 930 (mere presence not sufficient). But fact that he was not in his usual place will not render company liable if

structed at a dangerous crossing and the watchman is absent and the gates open the company should slacken speed.[84]

§ 1652 (1158). Signals on approach to crossings.[84a] The duty to give warning signals on the approach of trains to crossings has become so well established that in most, if not all of the states they are required by statute, which are generally held to be cumulative only and to define the minimum of ordinary care, although there are some cases holding that compliance with the statute is always sufficient.[85] It has been held that whether required by statute or not, suitable warnings must be given to apprise the traveler of the presence of the train.[86] How far the omission to give the warnings in compliance with the statute or to meet the requirements of ordinary care constitutes negligence on the part of the company has been discussed in previous sections. The company must exercise care to so operate its trains that the warning signals may be heard and that the trav-

traveler was guilty of contributory negligence. Hancock v. Lake Erie &c. R. Co., 21 Ind. App. 10, 51 N. E. 369. And it has been held that a flagman is not guilty of negligence in leaving his post after he has given warning and while the train is passing. Huntington v. Bangor &c. R. Co., 105 Maine 363, 74 Atl. 802.

[84] Schwarz v. Delaware &c. R. Co., 211 Pa. St. 625, 61 Atl. 255.

[84a] This section is cited in Headley v. Denver &c. R. Co., 60 Colo. 500, 154 Pac. 731, and in Kerr v. Rush (Mo. App.), 215 S. W. 393, 398.

[85] Ante, §§ 1648, 1649; Atchison &c. R. Co. v. Hague, 54 Kans. 284, 45 Am. St. 278, 60 Am. & Eng. R. Cas. 617, 38 Pac. 257; Missouri Pac. R. Co. v. Moffatt, 56 Kans. 67, 44 Pac. 607. See New York &c. R. Co. v. Hackett, 58 N. J. L. 4, 32 Atl. 265.

[86] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Chicago &c. R. Co. v. Sharp, 63 Fed. 532, 60 Am. & Eng. R. Cas. 595; Atlanta &c. R. Co. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Cleveland &c. R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985; Pittsburgh &c. R. Co. v. Terrell, 177 Ind. 447, 95 N. E. 1109, 42 L. R. A. (N. S.) 367; Vandalia R. Co. v. Baker, 50 Ind. App. 184, 97 N. E. 16; Faber v. St. Paul &c. R. Co., 29 Minn. 465, 13 N. W. 902, 8 Am. & Eng. R. Cas. 277; Vandewater v. New York &c. R. Co., 74 Hun 32, 26 N. Y. S. 397; Gulf &c. R. Co. v. Hamilton (Tex.), 28 S. W. 906. See as to inadmissibility of rule of company requiring bell to be rung. Minot v. Boston &c. R. Co., 73 N. H. 317, 61 Atl. 509.

eler may take advantage of them.[87] Otherwise it will be guilty of negligence. In order that one injured may recover he must be able to show that the omission of the signals was the proximate cause of his injury,[88] and in no case can one recover on account of such omission, who by any other means has timely notice of the approach of the train, for after he has seen the danger the purpose of the signals is subserved, whether they have been given or not;[89] but such statutes are mandatory; they define a positive duty, and it has been held that the court should not leave the question of their necessity to the jury,[90]

[87] Chicago &c. R. Co. v. Netolicky, 67 Fed. 665; Chicago &c. R. Co. v. Boggs, 101 Ind. 522, 51 Am. R. 761, 23 Am. & Eng. R. Cas. 282. See also Smith v. Mich. Cent. R. Co., 35 Ind. App. 188, 73 N. E. 928; Cleveland &c. R. Co. v. Carey, 33 Ind. App. 275, 71 N. E. 244; Cleveland &c. R. Co. v. Miles, 162 Ind. 646, 652, et seq. 70 N. E. 985.

[88] Horn v. Baltimore &c. R. Co., 54 Fed. 301; East Tennessee &c. R. Co. v. King, 81 Ala. 177, 2 So. 152; Chicago &c. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286; Central R. Co. v. Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42; Toledo &c. R. Co. v. Jones, 76 Ill. 311; Chicago &c. R. Co. v. Harwood, 90 Ill. 425; Wabash &c. R. Co. v. McNown, 53 Ind. App. 116, 99 N. E. 126; Parker v. Wilmington &c. R. Co., 86 N. Car. 221, 8 Am. & Eng. R. Cas. 420. See also Bryant v. Illinois Cent. R. Co. (La. Ann.), 22 So. 799; Stahl v. Lake Shore &c. R. Co., 117 Mich. 273, 75 N. W. 629, 630 (citing text). For a peculiar case in which the negligence of the company was held a proximate cause, see Morey v. Lake Superior &c. R. Co., 125 Wis. 148, 103 N. W. 271. A different rule seems to prevail under the Tennessee statute. See ante § 1648.

[89] Saldana v. Galveston &c. R. Co., 43 Fed. 862; Southern R. Co. v. King, 160 Fed. 332; Chicago &c. R. Co. v. Bell, 70 Ill. 102; Wabash &c. R. Co. v. McNown, 53 Ind. App. 116, 99 N. E. 126; Baltimore &c. R. Co. v. Abegglen, 41 Ind. App. 603, 84 N. E. 566; Cleveland &c. R. Co. v. Houghland, 44 Ind. App. 73, 88 N. E. 623; Atchison &c. R. Co. v. Walz, 40 Kans. 433, 19 Pac. 787; Atchison &c. R. Co. v. Judah, 65 Kans. 474, 70 Pac. 346; Illinois Cent. R. Co. v. Dupree, 138 Ky. 459, 128 S. W. 334, 34 L. R. A. (N. S.) 645; State v. Baltimore &c. R. Co., 69 Md. 339, 14 Atl. 685, 35 Am. & Eng. R. Cas. 412; Stahl v. Lake Shore &c. R. Co., 117 Mich. 273, 75 N. W. 629, 630, (citing text); Telfer v. Northern R. Co., 30 N. J. L. 188; Pakalinsky v. Railroad Co., 82 N. Y. 424; Chicago &c. Ry. Co. v. Barton, 59 Okla. 109, 159 Pac. 250; Houston &c. R. Co. v. Nixon, 52 Tex. 19.

[90] Cincinnati &c. R. Co. v. Butter, 103 Ind. 31, 2 N. E. 138, 23 Am. & Eng. R. Cas. 262; Pittsburgh &c.

although it is said that they are excused when the city ordinances forbid them in the limits of the municipality.[91] One who approaches the crossing has a right to assume that the company will give the usual signals of approach, and when he can neither hear nor see any signs of a moving train, that the crossing may be made safely,[92] but he is not thereby relieved from the duty to use his senses vigilantly to avoid danger.[93]

R. Co. v. Martin, 82 Ind. 476; Atlanta &c. R. Co. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Havens v. Erie R. Co., 53 Barb. (N. Y.) 328; Semel v. N. Y. &c. R. Co., 9 Daly (N. Y.) 321. See also Pittsburgh &c. R. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486.

[91] Penn. R. Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188. Compare Cleveland &c. R. Co. v. Carey, 33 Ind. App. 275, 71 N. E. 244; Gendreau v. Minneapolis &c. R. Co., 99 Minn. 38, 108 N. W. 814. But under such circumstances the company must exercise greater precaution in other respects. Baltimore &c. R. Co. v. Golway, 23 Wash. L. Rep. 308. It has been held, however, that the engineer must blow his whistle if prudence demands it, notwithstanding an order to the contrary from the railroad commissioners. Rowen v. New York &c. R. Co., 59 Conn. 364, 21 Atl. 1073. See also Katzenberger v. Lawo, 90 Tenn. 235, 16 S. W. 611, 13 L. A. R. 185, and note, 25 Am. St. 681. And such a statute applicable to highways applies to city highway crossings, unless the city under statutory authority has an ordinance governing the subject. Pittsburgh &c. R. Co. v. Terrell, 177 Ind. 477, 95 N. E. 1109, 42 L. R. A. (N. S.) 367; Pittsburgh &c. R. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486. See also Elgin &c. R. Co. v. Hoadley, 122 Ill. App. 165; Stotler v. Chicago &c. R. Co., 200 Mo. 107, 98 S. W. 509.

[92] Wabash &c. R. Co. v. Central Trust Co., 23 Fed. 738; Baltimore &c. R. Co. v. Conoyer, 149 Ind. 524, 529, 48 N. E. 352, 354; Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308, 311, (both citing text); Virgin v. Lake &c. R. Co., 55 Ind. App. 216 101 N. E. 500; Chicago &c. R. Co. v. Daun, 53 Ind. App. 382, 101 N. E. 731; Kennayde v. Pac. R. Co., 45 Mo. 255; Donohue v. St. Louis &c. R. Co., 91 Mo. 357, 2 S. W. 424, 28 Am. & Eng. R. Cas. 673; Ernst v. Hudson &c. R. Co., 35 N. Y. 9, 90 Am. Dec. 761, and note.

[93] Meeks v. Southern Pac. R. Co., 52 Cal. 602, 56 Cal. 513, 8 Am. & Eng. R. Cas. 314; Matteson v. Southern Pac. R. Co., 6 Cal. App. 318, 92 Pac. 101; Cottle v. New York &c. R. Co., 82 Conn. 142, 72 Atl. 727; Miller v. Terre Haute &c. R. Co., 144 Ind. 323, 43 N. E. 257; New York &c. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Baltimore &c. R. Co. v. State, 29 Md. 252, 96 Am. Dec. 528; Byrnes v. New York &c. R. Co., 195 Mass. 437, 81 N. E. 187; Carlson v. Chi-

Where there is no statutory requirement it is generally for the jury to determine what notice is reasonable under the circumstances of the particular case.[94]

§ 1653. Signals—Statutes and ordinances.—There is conflict of authority as to who may claim the benefit of the statutory signals, and it may depend somewhat upon the language of the particular statute. Where the statute does not specifically designate the class to whom the duty is owing, the courts have usually construed it to be due only to those who are about to use, are using, or have lately used the crossing, and have held that no others could recover for injuries resulting from a failure to give the signals,[95] but other courts have gone further and hold that

cago &c. R. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. 655, 4 L. R. A. (N. S.) 349; Stoneman v. Atlantic &c. R. Co., 58 Mo. 503; Porter v. Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880; Gorton v. Erie &c. R. Co., 45 N. Y. 460; Shaw v. Jewett, 86 N. Y. 616, 6 Am. & Eng. R. Cas. 111.

[94] Tolman v. Syracuse &c. R. Co., 98 N. Y. 198, 50 Am. Rep. 649 and note; Loucks v. Chicago &c. R. Co., 31 Minn. 526, 18 N. W. 651, 19 Am. & Eng. R. Cas. 305; Guggenheim v. Lake Shore &c. R. Co., 57 Mich. 488, 24 N. W. 827, 22 Am. & Eng. R. Cas. 546; Penn. R. Co. v. Ogier, 35 Pa. St. 60, 78 Am. Dec. 322; Longenecker v. Pennsylvania R. Co., 105 Pa. St. 328.

[95] Pike v. Chicago &c. R. Co., 39 Fed. 754; Reynolds v. Great Northern R. Co., 69 Fed. 808, 29 L. R. A. 695; Central &c. R. Co. v. Golden, 93 Ga. 510, 21 S. E. 68; Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 S. E. 374; New York &c. R. Co. v. Martin, 35 Ind. App. 669, 72 N. E. 654; Clark v. Missouri Pac. Railway Co., 35 Kans. 350, 11 Pac. 134; Evans v. Atlantic &c. R. Co., 62 Mo. 49; Bell v. Hannibal &c. Railroad Co., 72 Mo. 50; Elwood v. New York &c. R. Co., 4 Hun (N. Y.), 808; Harty v. Central R. Co., 42 N. Y. 468; O'Donnell v. Providence &c. R. Co., 6 R. I. 211, 216; East Tenn. &c. R. Co. v. Feathers, 10 Lea. (Tenn.) 103; Gorris v. Scott, L. R., 9 Exch. 125. See also Ellis v. Southern R. Co., 163 Fed. 686; Louisville &c. R. Co. v. Markel, 103 Ala. 160, 15 So. 511, 49 Am. St. 21; Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. 84, 4 L. R. A. 710; St. Louis &c. R. Co. v. Morrison, 73 Kans. 265, 85 Pac. 295; Everett v. Great Northern R. Co., 100 Minn. 309, 111 N. W. 281, 283 (quoting text); Lynch v. Great Northern R. Co., 38 Mont. 511, 100 Pac. 616; Missouri &c. R. Co. v. Saunders, 101 Tex. 255, 106 S. W. 321, 14 L. R. A. (N. S.) 998 and note.

the duty is for the protection of all persons lawfully at or near the crossing from any danger to be apprehended from the sudden approach of a train without warning.[96] There are other decisions which hold that the warning is intended only for travelers on the highway, whether intending to cross or not, and that no duty is due to a farmer working in the field.[97] There is also conflict among the authorities as to whether such statutes apply only to grade crossings. In some instances this conflict is more apparent than real, and is caused by a difference in the language of the statutes, but in others the conflict is substantial.[98] Positive evidence that signals were given is held

[96] Central Railroad Co. v. Raiford, 82 Ga. 400, 9 S. E. 169; Lonergan v. Illinois Cent. R. Co., 87 Iowa 755, 49 N. W. 852, affirmed 53 N. W. 236, 17 L. R. A. 254; Defrieze v. Illinois Cent. R. Co. (Iowa), 94 N. W. 505; Sanborn v. Railway Co., 91 Mich. 538, 52 N. W. 153; Chicago &c. R. Co. v. Metcalf, 44 Nebr. 848, 63 N. W. 51, 28 L. R. A. 824. In People v. New York &c. R. Co., 25 Barb. (N. Y.) 199, it is held that the hazards to be provided against by such a statute are two-fold: First, the danger of collision at crossings; second, that of damage by frightening of teams traveling upon a public highway near the crossing. See also Cahill v. Railroad Co., 13 Ky. 714, 18 S. W. 2; Wakefield v. Railroad Co., 37 Vt. 330, 86 Am. Dec. 711; Ward v. Chicago &c. R. Co., 97 Iowa 50, 65 N. W. 999; Mitchell v. Union Term. R. Co., 122 Iowa 237, 97 N. W. 112; St. Louis &c. Ry. Co. v. Kilman, 39 Tex. Civ. App. 107, 86 S. W. 1050.

[97] Williams v. Chicago &c. R. Co., 135 Ill. 491, 26 N. E. 661, 11 L. R. A. 352, 25 Am. St. 397; Ranson v. Chicago &c. R. Co., 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718. See also St. Louis &c. R. Co. v. Morrison, 73 Kans. 265, 85 Pac. 295.

[98] Holding statute applicable only to grade crossings are: Jenson v. Chicago &c. R. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680; Bowen v. Gainesville &c. R. Co., 95 Ga. 688, 22 S. E. 695; McElroy v. Georgia &c. R. Co., 98 Ga. 257, 25 S. E. 439; Barton v. Southern R. Co., 132 Ga. 841, 64 S. E. 1079, 22 L. R. A. (N. S.) 915. Cleveland &c. R. Co. v. Halbert, 179 Ill. 196, 53 N. E. 623; Favor v. Boston &c. R. Co., 114 Mass. 351, 19 Am. Rep. 364; Missouri &c. R. Co. v. Thomas, 87 Tex. 282, 28 S. W. 343; Houston &c. R. Co. v. Sagalinski, 19 Tex. Civ. App. 107, 46 S. W. 113; Barron v. Chicago &c. R. Co., 89 Wis. 79, 61 N. W. 303. Holding contra are: Johnson v. Southern Pac. R. Co., 107 Cal. 624, 82 Pac. 306, 1 L. R. A. (N. S.) 307; Toledo &c. R. Co. v. Jump, 50 Ohio St. 651, 35 N. E. 1054; People v. New York &c. R. Co., 13 N. Y. 78. See also Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259, 98 Am. Dec. 346; Rup-

to overcome evidence that they were not heard by other witnesses;[99] but if one who was intently listening for, and expecting the signals, and could have heard them, testifies that he did not hear them, his evidence may be of equal weight with the evidence that they were given, and it is for the jury to determine from the evidence.[1] The construction of the various

ard v. Chesapeake &c. R. Co., 88 Ky. 280, 11 S. W. 70, 7 L. R. A. 316. We are inclined to think that, ordinarily, the statute should be held to apply only to grade crossings, but there is much to be said on both sides of the question, and perhaps all that can be safely said is that the matter depends upon the language and purpose of the statute. In this connection, however, it may be noted that municipal regulations as to speed, signals, and the like have often been held authorized and applicable even in the switch yards of the company. Gulf &c. R. Co. v. Melville (Tex. Civ. App.), 87 S. W. 863; Missouri &c. R. Co. v. McGlamory (Tex. Civ. App.), 34 S. W. 359; Baltimore &c. R. Co. v. Peterson, 156 Ind. 364, 371, 59 N. E. 1044, and additional authorities there cited. See Miller v. Engle, 185 Mo. App. 558, 172 S. W. 631, reviewing cases on both sides as to whether statute applies to overhead crossings and holding that there may be a liability where a signal is not given and a horse is frightened no matter whether the statute applies or not. See also Rupard v. Chesapeake &c. R. Co., 88 Ky. 280, 11 S. W. 70, 7 L. R. A. 316; Louisville &c. R. Co. v. Sawyer, 114 Tenn. 84, 86 S. W. 386, 108 Am. St. 881.

[99] Savannah &c. R. Co. v. Shearer, 58 Ala. 672; Chicago &c. R. Co. v. Still, 19 Ill. 499, 71 Am. Dec. 236 and note; Chicago &c. R. Co. v. Robinson, 106 Ill. 142, 13 Am. & Eng. R. Cas. 620; Cleveland &c. R. Co. v. Wuest, 40 Ind. App. 693, 82 N. E. 986; Missouri &c. R. Co. v. Pierce, 39 Kans. 391, 18 Pac. 305; Missouri Pac. R. Co. v. Moffatt, 56 Kans. 667, 44 Pac. 607; Telfer v. Northern R. Co., 30 N. J. L. 188; Eissing v. Erie R. Co., 73 N. J. L. 343, 63 Atl. 856; Chapman v. New York &c. R. Co., 14 Hun (N. Y.), 484; McGrath v. New York &c. R. Co., 63 N. Y. 522; Bohan v. Milwaukee &c. R. Co., 61 Wis. 391, 21 N. W. 241, 19 Am. & Eng. R. Cas. 276; Ellis v. Great Western R. Co., L. R. 9 C. P. 551. But it would not be safe in all jurisdictions to so instruct the jury. See 2 Elliott Ev. § 969.

[1] Chicago &c. R. Co. v. Dickson, 88 Ill. 431; Bunting v. Cent. Pac. R. Co., 16 Nev. 277, 6 Am. & Eng. R. Cas. 282; Renwick v. New York &c. R. Co 36 N. Y. 132; Voak v. Northern Cent. R. Co., 75 N. Y. 320; Urbanek v. Chicago &c. R. Co., 47 Wis. 59, 1 N. W. 464; Berg v. Chicago &c. R. Co., 50 Wis. 419, 7 N. W. 347, 2 Am. & Eng. R. Cas. 70; Dublin &c. R. Co. v. Slattery, L. R. 3 App. Cas. 1155.

statutes involves many difficult questions which the scope of this chapter will not allow us to discuss. Statutory signals are generally only required at legally established highways,[2] and it has been held that where the statute requires the ringing of the bell, or the blowing of the whistle, both are not necessary.[3] Also, the company is considered as having discharged its duty under some statutes where the signal is given at the required distance and continued until the crossing is passed,[4] but what constitutes a compliance must depend upon the phraseology of the particular statute, and its strict construction depends upon whether it is penal or remedial.[5] Statutes or ordinances requiring signals are police regulations, and the liability for their violation is sometimes in the nature of a penalty, and generally the company or the engineer is liable to indictment for failure to give them.[6]

§ 1654 (1159). Duty of company to keep a lookout—Lights. —It is frequently provided by statute or ordinance that railroad companies shall keep a lookout as their trains approach crossings, and this may be required, in order to constitute reasonable care, even in the absence of any statute or ordinance upon the subject,[7] particularly where the crossing is unusually dan-

[2] Ante, § 1647; Cordell v. N. Y. &c. R. Co., 64 N. Y. 535. But see Arkansas &c. R. Co. v. Graves, 96 Ark. 638, 132 S. W. 992; Calwell v. Minneapolis &c. R. Co., 138 Iowa 32, 115 N. W. 605.

[3] Terry v. St. Louis &c. R. Co., 89 Mo. 586, 1 S. W. 746; Chicago &c. R. Co. v. Damerell, 81 Ill. 450.

[4] Zimmerman v. Hannibal &c. R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191.

[5] Ante, § 847.

[6] Ante, § 855; Chicago &c. R. Co. v. McDaniels, 63 Ill. 122; Commonwealth v. Boston &c. R. Co., 133 Mass. 383, 8 Am. & Eng. R. Cas. 297 and note. And see as to city ordinances and when and where they are applicable, Freitag v. Chicago Junc. R. Co., 46 Ind. App. 491, 503, 89 N. E. 501, 92 N. E. 1039 (disapproving Illinois Cent. R. Co. v. Schmidt, 100 Ill. App. 490 and other Illinois cases); Cleveland &c. R. Co. v. Lynn, 177 Ind. 311, 95 N. E. 577; Texas &c. R. Co. v. Bean, 55 Tex. Civ. App. 341, 119 S. W. 328.

[7] Duncan v. St. Louis &c. R. Co., 152 Ala. 118, 44 So. 418; Louisiana &c. R. Co. v. Ratcliffe, 88 Ark. 524, 115 S. W. 396; Chicago &c. R. Co. v. Ryan, 70 Ill. 211; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65; Leavitt v. Terre Haute &c. R. Co., 5 Ind. App. 513, 31 N. E. 860, 32 N.

gerous,[8] or the train is backed over the crossing, or the like,[9] but under ordinary circumstances the engineer or other employe on the lookout may assume that an adult on the track or approaching the track, and who is apparently able to do so, will yield the right of way, and exercise due care to avoid a collision.[10] So, there are cases in which it is the duty of the company at night to have a headlight on the locomotive or a light on the car nearest the crossing, where the train is backed

E. 866; Marcott v. Marquette &c. R. Co., 47 Mich. 1, 4 Am. & Eng. R. Cas. 548; Hinkle v. Richmond &c. R. Co., 109 N. Car. 472, 13 S. E. 884, 26 Am. St. 581; Frick v. St. Louis &c. R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Chesapeake &c. R. Co. v. Crews, 118 Tenn. 52, 99 S. W. 368; Missouri &c. R. Co. v. Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589; Johnson v. Chicago &c. R. Co., 49 Wis. 529, 5 N. W. 886. In New York &c. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130, 132, it is said that it is the duty of the engineer to keep a lookout along the track ahead, but he is not expected to see anything at the side that does not come within the range of his vision while so doing (citing text). In some jurisdictions it is held that the engineer or fireman must keep a continuous lookout wherever persons may reasonably be expected upon the track even if they are not a public crossing. Post, § 1795; Smith v. Norfolk &c. R. Co., 114 N. Car. 728, 19 S. E. 863, 923, 25 L. R. A. 287, and note. See also Grace v. Minneapolis &c. R. Co., 153 Iowa 418, 133 N. W. 672; Bays v. Louisville &c. R. Co., 142 Ky. 400, 134 S. W. 450, 34 L. R. A. (N. S.) 678 and note.

[8] East Tenn. &c. R. Co. v. White, 5 Lea (Tenn.) 540, 8 Am. & Eng. R. Cas. 65; Marcott v. Marquette &c. R. Co., 47 Mich. 1, 10 N. W. 52.

[9] Barley v. Chicago &c. R. Co., 4 Biss. (U. S. C. C.) 430; Chicago &c. R. Co. v. Sharp, 63 Fed. 532; Cincinnati &c. R. Co. v. Davis, 161 Fed. 334; St. Louis &c. R. Co. v. Johnson, 74 Ark. 372, 86 S. W. 282; Robinson v. Western Pac. R. Co., 48 Cal. 409; Chicago &c. R. Co. v. Triplett, 38 Ill. 482; Bourrett v. Chicago &c. R. Co., 152 Iowa 579, 132 N. W. 973, 36 L. R. A. (N. S.) 957; Kansas Pac. R. Co. v. Pointer, 14 Kans. 37; Smith v. Pere Marquette R. Co., 136 Mich. 224, 98 N. W. 1022; Wiley v. Long Island &c. R. Co., 76 Hun (N. Y.) 29; Schlimgen v. Chicago &c. R. Co., 90 Wis. 186, 62 N. W. 1045. But compare Richmond &c. R. Co. v. Yeamans, 86 Va. 860, 12 S. E. 946.

[10] Ante, § 1646. See also Horan v. Boston &c. R. Co., 184 Fed. 453; Garrison v. St. Louis &c. R. Co., 92 Ark. 437, 123 S. W. 657; Zetsche v. Chicago &c. R. Co., 238 Ill. 240, 87 N. E. 412; Snow v. Indianapolis &c. R. Co., 47 Ind. App. 189, 93 N. E. 1089; Schmidt v. Missouri Pac. R. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196.

over it, unless reasonable care is exercised to provide some other efficient precaution to take its place.[11] And in a recent case where three flat cars with no light on them, were backed over a crossing where there was a curve and an embankment, the fact that there was a red light on the caboose back of the flat cars and that the engine bell was ringing and its whistle sounded when about six hundred feet away did not prevent the jury from being justified in finding that the company was negligent and should have had a light on the front end of the forward car.[12] But when a headlight is provided the company is not liable, where it exercises due care, merely because the light is temporarily obscured by causes beyond its control.[13] Nor is it liable merely because there was no headlight where the train was plainly visible and the absence of the headlight was not a proximate cause of the injury.[14]

§ 1655 (1160). Rate of speed—When negligence.—In the absence of any statute or ordinance upon the subject, no rate of speed is negligence per se.[15] But, when considered in connection

[11] Chicago &c. R. Co. v. Sharp, 63 Fed. 532; Chicago &c. R. Co. v. Garvy, 58 Ill. 83; Cheney v. New York Cent. R. Co., 16 Hun (N. Y.) 415; Smedis v. Brooklyn &c. R. Co., 88 N. Y. 13; Nashville &c. R. Co. v. Smith, 6 Heisk. (Tenn.) 174; Missouri &c. R. Co. v. Finch (Tex. Civ. App.), 31 S. W. 84. See also St. Louis &c. R. Co. v. Johnson, 75 Ark. 372, 86 S. W. 282; Becke v. Missouri &c. R. Co., 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157 and note.

[12] Deister v. Atchison &c. Ry. Co., 99 Kans. 525, 162 Pac. 282, L. R. A. 1917C. 784 (and warranted in finding freedom from contributory negligence).

[13] Louisville &c. R. Co. v. Melton, 2 Lea (Tenn.) 262. (Light obscured by mist).

[14] Daniels v. Staten Island &c. Co., 125 N. Y. 407, 26 N. E. 466. Failure to keep a lookout or light must be a proximate cause of injury. Adkisson v. Louisville &c. R. Co., 33 Ky. L. 204, 110 S. W. 284; Texas &c. R. Co. v. Shivers, 48 Tex. Civ. App. 112, 106 S. W. 894.

[15] Dyson v. New York &c. R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. 82; Elliot v. New York &c. R. Co., 83 Conn. 320, 76 Atl. 298; Seaboard Air Line R. Co. v. Smith, 53 Fla. 375, 43 So. 235; Chicago &c. R. Co. v. Harwood, 80 Ill. 88; Terre Haute &c. R. Co. v. Clark, 73 Ind. 168; Lake Shore &c. R. Co. v. Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778; Artz v. Chicago &c. R. Co., 44 Iowa 284; Atchison &c. R. Co. v. Schriver, 80 Kans. 540, 103 Pac. 994, 24 L. R. A.

with other circumstances, as it must be in some cases, the court may sometimes be justified in declaring that the company was guilty of negligence in running its train at an excessive and dangerous rate of speed under the circumstances of the particular case. Ordinarily, however, the question is one of fact for the jury.[16] In the absence of any statutory requirement there is no obligation upon the company to slacken the speed of its trains, under ordinary circumstances, at country crossings,[17]

(N. S.) 492; Schackleford v. Louisville &c. R. Co., 84 Ky. 43, 4 Am. St. 189; Grows v. Maine &c. R. Co., 67 Maine 100; Tobias v. Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514; Mollica v. Michigan Cent. R. Co., 170 Mich. 96, 135 N. W. 927; Powell v. Missouri Pac. R. Co., 76 Mo. 80, 8 Am. & Eng. R. Cas. 467; Young v. Hannibal &c. R. Co., 79 Mo. 336; Burlington &c. R. Co. v. Wendt, 12 Nebr. 76, 10 N. W. 456; Cohen v. Eureka &c. R. Co., 14 Nev. 376; Warner v. New York &c. R. Co., 44 N. Y. (5 Hand.) 465; Norwich Ins. Co. v. Oregon R. Co., 46 Ore. 123, 78 Pac. 1025; Reading &c. R. Co. v. Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267, and note; Bemis v. Connecticut &c. R. Co., 42 Vt. 375, 1 Am. Rep. 339. See also Golinvaux v. Burlington &c. R. Co., 125 Iowa 625, 101 N. W. 465; Southern Ind. R. Co. v. Messack, 35 Ind. App. 616, 74 N. E. 1097, 1098 (citing text); New York &c. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130, 132 (citing text).

[16] Bilton v. Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440, 442 (citing text); Western &c. R. Co. v. King, 70 Ga. 261, 19 Am. & Eng. R. Cas. 255; Chicago &c. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218, and authorities cited in last preceding note, supra; Marcott v. Marquette &c. R. Co., 47 Mich. 1, 10 N. W. 53, 4 Am. & Eng. R. Cas. 548; Folkmire v. Michigan &c. Ry. Co., 157 Mich. 159, 121 N. W. 811; Miller v. New York &c. R. Co., 65 Hun 623, 20 N. Y. S. 163; Serano v. New York Cent. &c. R. Co., 188 N. Y. 156, 80 N. E. 1025, 117 Am. St. 833; Reeves v. Delaware &c. R. Co., 30 Pa. St. 454, 72 Am. Dec. 713; Mosten v. Lake Shore &c. R. Co., 218 Pa. St. 392, 67 Atl. 740; McGill v. Pittsburgh &c. R. Co., 152 Pa. St. 331, 25 Atl. 540. The text is also cited to this effect in St. Louis &c. R. Co. v. Woods, 96 Ark. 311, 131 S. W. 870.

[17] Toledo &c. R. Co. v. Miller, 76 Ill. 278; Chicago &c. R. Co. v. Harwood, 80 Ill. 88; Chicago &c. R. Co. v. Robinson, 9 Bradw. (Ill. App.) 89; DuBoise v. New York &c. R. Co., 88 Hun 10, 34 N. Y. S. 279; Zeigler v. Northeastern R. Co., 5 S. Car. 221, 7 S. Car. 402. See also Atchison &c. R. Co. v. Judah, 65 Kans. 474, 70 Pac. 346; Warner v. New York &c. R. Co., 44 N. Y. 465; New York &c. R. Co. v. Kistler, 66 Ohio 326, 64 N. E. 130; Childs v. Pennsylvania R. Co., 150 Pa. St. 75, 24 Atl. 341; Newhard v. Pennsyl-

and a high rate of speed may be perfectly proper at country crossings, although it might be considered negligence at a crossing in a populous city.[18] Whether it is negligence or not usually depends upon the circumstances of the particular case, and the rate of speed, when alleged as one of the grounds for recovery, may generally be shown in connection with the other circumstances as evidence of negligence.[19] The rate of speed, however, should not be so great as to render the statutory signals unavailing,[20] and the company will be liable to one

vania R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563; Custer v. Railroad Co., 206 Pa. 529, 55 Atl. 1130; Sutton v. Chicago &c. R. Co., 98 Wis. 157, 73 N. W. 993.

[18] Telfer v. Northern R. Co., 30 N. J. L. 188; Chicago &c. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218. See also Parkerson v. Louisville &c. R. Co., 25 Ky. L. 2260, 80 S. W. 468; Fife v. Chicago &c. R. Co., 174 Mo. App. 655, 161 S. W. 300. In Lake Shore &c. R. Co. v. Barnes, 166 Ind. 7, 76 N. E. 629, 630, reasons are given for the distinction, and the text is cited, with numerous decisions in its support. The text is also quoted in Oberstock v. United Rys. Co., 68 Ore. 197, 137 Pac. 195, 198, where it is said that greater care may be required when tracks run along a street than where the company has exclusive use of its tracks. Circumstance may require a diminished speed, adjusted to the danger. Russell v. Oregon R. Co., 54 Ore. 128, 102 Pac. 619; Chicago &c. R. Co. v. Stepp, 164 Fed. 785, 22 L. R. A. (N. S.) 350. And in cities this is often so. Great Northern R. Co. v. Hooker, 170 Fed. 154; Smith v. Cincinnati &c. R. Co., 146 Ky. 568, 142 S. W. 1047; Holey v. Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120, 114 Am. St. 743. See also Snow v. Indianapolis &c. R. Co., 47 Ind. App. 189, 93 N. E. 1089.

[19] Rockford &c. R. Co. v. Hillmer, 72 Ill. 235; Terre Haute &c. R. Co. v. Clark, 73 Ind. 168; Louisville &c. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 86; Artz v. Chicago &c. R. Co., 44 Iowa 284; Annacker v. Chicago &c. R. Co., 81 Iowa 267, 47 N. W. 68; Massoth v. Delaware &c. Canal Co., 64 N. Y. 524; Salter v. Utica &c. R. Co., 88 N. Y. 42, 8 Am. & Eng. R. Cas. 437; Galveston &c. R. Co. v. Duelm (Tex.), 23 S. W. 596. Speed should be regulated according to the danger. Reed v. Queen Anne's R. Co., 57 Del. 529, 57 Atl. 529. See also Evansville &c. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554. But compare Missouri Pac. Ry. Co. v. Hansen, 48 Nebr. 232, 66 N. W. 1105. As to the admissibility of evidence of the rate of speed elsewhere or on other occasions, see 3 Elliott Ev. § 2522; Union Trac. Co. v. Vandercook, 32 Ind. App. 621, 69 N. E. 486; Lyman v. Boston &c. R. Co., 66 N. H. 200, 200 Atl. 976, 11 L. R. A. 364.

[20] Continental Imp. Co. v. Stead, 95 U. S. 161, 164, 24 L. ed. 403. See

who is injured by reason of the violation of a valid statute or ordinance limiting the rate of speed, where such violation is the proximate cause of the injury and the person injured is rightfully using the crossing in the exercise of due care.[21] So, indeed, it will be liable in such a case where it runs its trains over a dangerous crossing at a rate of speed not so great as that limited by the statute or ordinance, if it is negligent for it to do so under the circumstances.[22]

also Pennsylvania R. Co. v. Ackermann, 74 Pa. St. 265; Philadelphia &c. R. Co. v. Hagan, 47 Pa. St. 244, 86 Am. Dec. 541; Quimby v. Vermont Cent. R. Co., 23 Vt. 387; Louisville &c. R. Co. v. Commonwealth, 80 Ky. 143, 44 Am. R. 468 and note, 14 Am. & Eng. R. Cas. 613; Chicago &c. R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282.

[21] Chicago &c. R. Co. v. Becker, 84 Ill. 483; Wabash R. Co. v. Kamradt, 109 Ill. App. 203; Schneewaisz v. Illinois Cent. R. Co., 196 Ill. App. 248; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65; Corroll v. Burlington &c. R. Co., 38 Iowa 120, 18 Am. Rep. 22; New Orleans &c. R. Co. v. Toulme, 59 Miss. 284; Crosby v. New York &c. R. Co., 88 Hun 196, 34 N. Y. S. 714; Haas v. Chicago &c. R. Co., 41 Wis. 44. See also Weatherly v. Nashville &c. R. Co., 166 Ala. 595, 51 So. 959; Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Pittsburgh &c. R. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486; Stolter v. Chicago &c. Ry. Co., 200 Mo. 107, 98 S. W. 509; Merrill v. Minneapolis &c. R. Co., 27 S. Dak. 1, 129 N. W. 468. That it must be the proximate cause to render the company liable, see Chicago &c. R. Co. v. Kennedy, 3 Kans. App. 693, 43 Pac. 802; St. Louis &c. R. Co. v. Ferrell, 84 Ark. 270, 105 S. W. 263; Georgia &c. R. Co. v. Williams, 93 Ga. 253, 18 S. E. 825; Pennsylvania Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188; Broussard v. Louisville &c. R. Co., 140 La. Ann. 517, 73 So. 606; Philadelphia &c. R. Co. v. Stebbing, 62 Md. 504; Kelley v. Hannibal &c. R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; Evans &c. Co. v. St. Louis &c. R. Co., 17 Mo. App. 624; Galveston &c. R. Co. v. Murray (Tex. Civ. App.), 99 S. W. 144; Southern R. Co. v. Housbrough, 107 Va. 733, 60 S. E. 58; ante, § 1648. That it does not excuse the plaintiff from exercising due care and that contributory negligence is a good defense, see Illinois &c. R. Co. v. Hetherington, 83 Ill. 510; Illinois Cent. R. Co. v. Willis, 29 Ky. L. 1187, 97 S. W. 21; Neary v. Northern Pac. R. Co., 41 Mont. 480, 110 Pac. 226; Kunz v. Oregon R. &c. Co., 51 Ore. 191, 93 Pac. 141; Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; post, § 1658.

[22] Louisville &c. R. Co. v. Milam, 9 Lea (Tenn.) 233; Shaber v. St. Paul &c. R. Co., 28 Minn. 103, 9

§ 1656 (1161). Duty of company where view is obstructed.—Where a crossing is unusually dangerous because the track is curved or the view obstructed, or because of its peculiar construction or situation, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires.[23] Its duty to travelers upon the highway is to exercise reasonable care under the circumstances, and reasonable care in such cases may require it to exercise precautions not demanded in ordinary cases. This rule is especially applicable when the company itself causes the obstruction, as, for instance, where it has allowed weeds and trees to grow up on its right of way, or has piled up wood, or left cars in such a place that they obstruct the view.[24] It also requires the

N. W. 575, 2 Am. & Eng. R. Cas. 185; Frick v. St. Louis &c. R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Louisville &c. R. Co. v. French, 69 Miss. 121, 12 So. 338; Wabash R. Co. v. Henks, 91 Ill. 406.

[23] Continental Imp. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Dimick v. Chicago &c. R. Co., 80 Ill. 338; Chicago &c. R. Co. v. Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. 559; Artz v. Chicago &c. R. Co., 34 Iowa 153; Funston v. Chicago &c. R. Co., 61 Iowa 452, 16 N. W. 518; Cincinnati &c. R. Co. v. Commonwealth, 31 Ky. L. 1113, 104 S. W. 771; Davidson v. Illinois Cent. R. Co., 124 La. Ann. 165, 49 So. 1015; Harlan v. St. Louis &c. R. Co., 65 Mo. 22; Vandewater v. New York &c. R. Co., 74 Hun 32, 26 N. Y. S. 397; Richardson v. New York &c. R. Co., 45 N. Y. 846; Cordell v. New York &c. R. Co., 75 N. Y. 330; Central R. Co. v. Feller, 84 Pa. St. 226; Missouri &c. R. Co. v. Muske (Tex. Civ. App.), 141 S. W. 565; Gesas v. Oregon &c. R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. (N. S.) 1074; Eilert v. Green Bay &c. R. Co., 48 Wis. 606, 4 N. W. 769; Ritchie v. Caledonian R. Co., 7 Scotch Sess. Cas. (4th series) 148; Stapley v. London &c. R. Co., L. R. 1 Ex. 21; James v. Great Western R. Co., L. R. 2 C. P. 634, note; Bilbee v. London &c. R. Co., 18 C. B. N. S. 584. See also Cherry v. Louisiana &c. R. Co., 121 La. Ann. 471, 46 So. 596, 17 L. R. A. (N. S.) 505, 126 Am. St. 323; Weaver v. Columbus &c. R. Co., 76 Ohio St. 164, 81 N. E. 180; Atlantic Coast Line R. Co. v. Grubbs, 113 Va. 214, 74 S. E. 144; Southern R. Co. v. Jones, 106 Va. 412, 56 S. E. 155; and note in 22 L. R. A. (N. S.) 233, et seq.

[24] Thomas v. Delaware &c. R. Co., 8 Fed. 729; Nehrbas v. Central Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670; Indianapolis &c. R. Co. v. Smith, 78 Ill. 112; Chicago &c. R. Co. v. Lee, 87 Ill. 454; Brown v. Hannibal &c. R. Co., 50 Mo. 461, 11 Am. Rep. 420; Dela-

company, as a general thing, to take greater precautions at a dangerous crossing in a city than at an ordinary crossing in the open country.[25] And it may even require flagmen or gates to be placed at the crossing,[26] although these are unnecessary in ordinary cases, in the absence of a statute or an ordinance requiring them. But it is not negligence in itself for a railroad company to properly maintain on its right of way buildings reasonably necessary for the prosecution of its business,[27] and

ware &c. R. Co. v. Shelton, 55 N. J. L. 342, 26 Atl. 937; Mackey v. New York &c. R. Co., 35 N. Y. 75; Kissenger v. New York &c. R. Co., 56 N. Y. 538; Houston &c. R. Co. v. Poras (Tex. Civ. App.), 29 S. W. 945. See also Klein v. Jewett, 26 N. J. Eq. 474; Pennsylvania Co. v. Stegemeier, 118 Ind. 305, 10 Am. St. 136. And it is said in general terms in several recent cases that liability of the company may be founded on its negligence in allowing weeds, grass and brush to grow on its right of way so as to obstruct the vision of travelers approaching the crossing. Burzio v. Joplin &c. R. Co., 102 Kans. 287, 562, 171 Pac. 351, L. R. A. 1918C, 996. Corley v. Atchison &c. R. Co., 90 Kans. 70, 133 Pac. 555, Ann. Cas. 1915B, 764 (in allowing unnecessary obstructions to exist upon the right of way); Barber v. Louisiana R. &c. Co., 141 La. Ann. 1059, 76 So. 199, L. R. A. 1917F, 802. See also notes in 12 L. R. A. (N. S.) 1067, 17 L. R. A. (N. S.) 505, 22 L. R. A. (N. S.) 232. L. R. A. 1916F, 127, 130.

[25] Fero v. Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178 and note; Longabaugh v. Virginia City &c. R. Co., 9 Nev. 271; Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322; Paducah &c. R. Co. v. Hoehl, 12 Bush (Ky.) 41; Telfer v. Northern R. Co., 1 Vroom (N. J.) 188. See also Andrews v. New York &c. R. Co., 60 Conn. 293, 22 Atl. 566; Illinois Cent. R. Co. v. Dick, 91 Ky. 434, 15 S. W. 665.

[26] Louisville &c. R. Co. v. Hackman, 17 Ky. L. 81, 30 S. W. 407; Bailey v. New Haven &c. Co., 107 Mass. 496; Pollock v. Eastern R. Co., 124 Mass. 158; Hubbard v. Boston &c. R. Co., 162 Mass. 132, 38 N. E. 366; Freeman v. Duluth &c. R. Co., 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594 and note; Barnum v. Grand Trunk &c. R. Co., 148 Mich. 370, 111 N. W. 1036; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; Railway Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321; Russell v. Oregon &c. N. Co., 54 Ore. 128, 102 Pac. 619; Missouri &c. R. Co. v. Bratcher, 54 Tex. Civ. App. 10, 118 S. W. 1091.

[27] Evansville &c. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554; Louisville &c. R. Co. v. Lucas, 30 Ky. L. 359, 98 S. W. 308; Missouri &c. R. Co. v. Bratcher, 54 Tex. Civ. App. 10, 118 S. W. 1091.

it has even been held that, as the company has no control over weeds, brush and the like, not on its right of way, it is not required to take the same into consideration when approaching the crossing.[28] It is usually a question of fact, or a mixed question of law and fact, for the jury to determine, under proper instructions, whether the company has exercised reasonable care in the particular case,[29] and it should not be forgotten that the traveler must also exercise such reasonable care and take such precautions as the dangerous nature of the crossing may require.[30]

§ 1657 (1162). Backing and "kicking" cars.—It is frequently said that it is negligence per se to make a "flying switch" or "kick" a car over a crossing, or to push a train backward over a crossing, without warning and in the absence of a lookout.[31]

[28] New York &c. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130. The soundness of this decision, however, seems questionable. Such condition should be considered upon the question of the care to be exercised in the operation of trains although even maintaining trees on the right of way may not be negligence in itself. Cowles v. New York &c. R. Co., 80 Conn. 48, 66 Atl. 1020, 12 L. R. A. (N. S.) 1067, and other cases cited in note. Compare Childress v. Lake Erie &c. R. Co. (Ind. App.), 101 N. E. 332; Chicago &c. R. Co. v. Stepp, 44 Ind. App. 353, 88 N. E. 343; Danskin v. Pennsylvania R. Co., 76 N. J. L. 660, 72 Atl. 32, 22 L. R. A. (N. S.) 232.

[29] Text cited in Bilton v. Southern Pac. Co., 148 Cal. 443, 83 Pac. 441, 442. See also Chicago &c. R. Co. v. Williams, 56 Kans. 333, 43 Pac. 246; Austin v. Long Island R. Co., 69 Hun 67, 23 N. Y. S. 193, affirmed in 140 N. Y. 639, 35 N. E. 892; San Antonio &c. R. Co. v. Stollens (Tex. Civ. App.), 49 S. W. 79; Missouri &c. R. Co. v. King (Tex. Civ. App.), 123 S. W. 151.

[30] Evansville &c. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554; Robinson v. Rockland &c. R., 99 Maine 47, 58 Atl. 57. See post, § 1658, et seq.

[31] Note to Kentucky Cent. R. Co. v. Smith, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63; 2 Thomp. Neg. (2nd ed.), §§ 1695-1697; Chicago Term. &c. R. Co. v. Walton, 165 Ind. 642, 74 N. E. 988. See also Southern Pac. R. Co. v. Pender, 14 Ariz. 573, 134 Pac. 289; Cooper v. Lake Shore &c. R. Co., 66 Mich. 261, 33 N. W. 306; Wilson v. Dallas, 84 Nebr. 605, 121 N. W. 1128; Wilson v. Atlantic &c. R. Co., 142 N. Car. 333, 55 S. E. 257; Lacey v. Louisville &c. R. Co., 152 Fed. 134.

It is doubtless true that there are many cases in which but one reasonable inference can be drawn, and the court can say, as a matter of law, that it is negligence to make a "flying switch" or "kick" a car over a crossing where people are likely to be, as, for instance, in a populous city, without giving any notice or taking other precautions to protect them,[32] or to back a train, over such a crossing without warning or other precautions.[33] It may, therefore, not be incorrect to say that such conduct, without taking any precautions, is ordinarily negligence per se. But we think that much must depend upon the peculiar circumstances of each particular case, and that it is going too far to say that making a "flying switch" or "kicking" or backing cars, is negligence per se, or as matter of law, under any and all circumstances.[34] It is certainly not negligence, if proper precautions are taken, and whether the company has

[32] Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. ed. 213; Chicago &c. R. Co. v. Donovan, 160 Fed. 826; East Tennessee &c. R. Co. v. King, 81 Ala. 177, 2 So. 152; Robinson v. Western &c. R. Co., 48 Cal. 409; Chicago &c. R. Co. v. Garvy, 58 Ill. 83 (detached car sent over a much used crossing at night without brakeman or light); Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Peltier v. Louisville &c. R. Co. (Ky.), 39 S. W. 30; Pennsylvania R. Co. v. State, 61 Md. 108; French v. Taunton Branch Railroad, 116 Mass. 537; Brown v. New York &c. R. Co., 32 N. Y. 597, 88 Am. Dec. 353 and note; Kay v. Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628. See also O'Connor v. Missouri &c. R. Co., 94 Mo. 150, 7 S. W. 106, 4 Am. St. 364; Hinckley v. Cape Cod R. Co., 120 Mass. 257; Schindler v. Milwaukee &c. R. Co., 87 Mich. 400, 49 N. W. 670; Louisville &c. R. Co. v. Coleman, 86 Ky. 556. See also Mitchell v. Illinois Cent. R. Co., 110 La. Ann. 630, 34 So. 714, 98 Am. St. 472, 477 and note, and note in Ann. Cas. 1913D, 4, citing many other cases by states.

[33] Chicago &c. R. Co. v. Sharp, 63 Fed. 532; Kansas Pac. R. Co. v. Ward, 4 Colo. 30; Chicago &c. R. Co. v. Triplett, 38 Ill. 482; Pittsburg &c. R. Co. v. Terrell, 177 Ind. 477, 95 N. E. 1109; Bailey v. New Haven &c. Co., 107 Mass. 496; Cooper v. Lake Shore &c. R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. 482; Eaton v. Erie R. Co., 51 N. Y. 544.

[34] See Sullivan v. Pennsylvania Co. (Pa. St.), 7 Atl. 177; Carroll v. Minnesota Valley R. Co., 13 Minn. 30, 36, 97 Am. Dec. 221; Ohio &c. R. Co. v. McDaneld, 5 Ind. App. 108, 31 N. E. 836; Pakalinsky v. New York &c. R. Co., 82 N. Y. 424.

taken such precautions and used reasonable care under the circumstances is generally a question of fact for the jury.[35] So, as in other cases, it is not actionable negligence unless it was a proximate cause of the injury complained of, and the plaintiff cannot recover if he was guilty of contributory negligence.[36]

§ 1658 (1163). Contributory negligence of travelers at railroad crossings—Generally.—At many places we have treated of contributory negligence, and at this place our purpose is to treat very generally of the doctrine as applied to accidents at railroad crossings. The general rules as to the presence or

[35] Illinois Cent. R. Co. v. Larson, 152 Ill. 326, 38 N. E. 784; York v. Maine Cent. R. Co., 84 Maine 117, 24 Atl. 790, 18 L. R. A. 60; Smith v. Maine Cent. R. Co., 87 Maine 339, 32 Atl. 967; Barnum v. Grand Trunk &c. R. Co., 137 Mich. 580, 100 N. W. 1022; Howard v. St. Paul &c. R. Co., 32 Minn. 214, 20 N. W. 93, 19 Am. & Eng. R. Cas. 283; Alabama &c. R. Co. v. Summers, 68 Miss. 566, 10 So. 63; Barry v. New York &c. R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Woodard v. New York &c. R. Co., 106 N. Y. 369, 13 N. E. 424; Southern R. Co. v. Daves, 108 Va. 378, 61 S. E. 748; Bohan v. Milwaukee &c. R. Co., 58 Wis. 30, 15 N. W. 801, 15 Am. & Eng. R. Cas. 374, 61 Wis. 391, 21 N. W. 241, 19 Am. & Eng. R. Cas. 276; Ferguson v. Wisconsin &c. R. Co., 63 Wis. 145, 23 N. W. 123, 19 Am. & Eng. R. Cas. 285. Negligence unless they are taken. Bowles v. Chesapeake &c. R. Co., 61 W. Va. 272, 57 S. E. 131, 132 (citing text). In Klotz v. Winona &c. R. Co., 68 Minn. 341, 71 N. W. 257, the text is cited, but it is held that under any view the defendant was negligent in that case.

[36] Pennsylvania R. Co. v. State, 61 Md. 108; Lehigh &c. Coal Co. v. Lear (Pa.), 9 Atl. 267 (question for jury); Grippen v. New York &c. R. Co., 40 N. Y. (1 Hand.) 34; Hinckley v. Cape Cod R. Co., 120 Mass. 257 (nonsuit because of contributory negligence); Woodard v. New York &c. R. Co., 106 N. Y. 369 (same); Murphy v. Chicago &c. R. Co., 45 Iowa 661; Drain v. St. Louis &c. R. Co., 86 Mo. 574 (question for jury); Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. ed. 213 (same); Patton v. Railway Co., 89 Tenn. 370, 14 S. W. 485, 12 L. R. A. 184 (same); Chicago &c. R. Co. v. Hedges, 105 Ind. 398 (same); Howard v. St. Paul &c. R. Co., 32 Minn. 214, 20 N. W. 93; Phillips v. Milwaukee &c. R. Co., 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521. See also Pittsburg &c. R. Co. v. Puszdrakiewicz, 129 Ill. App. 295; Chicago &c. R. Co. v. Clarkson, 147 Fed. 397; Southern R. Co. v. Simpson, 131 Fed. 705.

absence of contributory negligence in crossing cases are, in the main, much the same as in other cases of actions for personal injuries where there is no contract relation, such as that of carrier and passenger, or employer and employe, between the parties, but there is this important qualification in most jurisdictions, namely, that as the quantum of care to be exercised at railroad crossings is defined by the law, the question whether there was contributory negligence is more frequently a question of law than in other cases where damages are sought for personal injuries caused by negligence. The rule which seems to us to have the best foundation in principle, is, that in cases of collision between travelers and railroad trains the presumption, in the absence of anything to the contrary, is, that the traveler was guilty of negligence, and hence that, prima facie, his fault was a proximate cause of the injury,[37] or at least that there is no presumption in his favor. It is established law that the track itself is a warning of danger, and it is a fact of which, because of its being a matter of general knowledge, courts take judicial notice, that multitudes of persons pass over railroad tracks in safety. It is also a matter of common knowledge, and, therefore, a matter judicially known, that reasonable care on the part of the traveler will in all ordinary cases enable him to cross the track in safety. These considerations require the conclusion, as we believe, that prima facie there was either a pure accident, or, if there was negligence, that the negligence of the plaintiff was nevertheless the proximate cause of the injury. It seems to us that evidence that a plaintiff received an injury at a railroad crossing of itself neither proves negligence on the part of the company nor the absence of contributory fault on the part of the injured person. But on this question there is conflict of authority, for

[37] Tucker v. Duncan, 9 Fed. 867; Cincinnati &c. R. Co. v. Butler, 103 Ind. 31, 2 N. E. 138; Miller v. Louisville &c. R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416; Cleaves v. Pigeon &c. Co., 145 Mass. 541, 14 N. E. 646; Rainey v. New York &c. R. Co., 68 Hun 495, 23 N. Y. S. 80; Bates v. New York &c. R. Co., 84 Hun 287, 32 N. Y. S. 337. See also O'Connor v. New York &c. R. Co., 189 Mass. 361, 75 N. E. 614.

many courts of high standing hold that the presumption is that there was no contributory negligence on the part of the plaintiff.[38] The rule supported by the weight of authority is, as we have already said, that the burden of proving contributory negligence is on the defendant,[39] but upon this question there

[38] Glasscock v. Central &c. R. Co., 73 Cal. 137, 14 Pac. 518; Welch v. Baltimore &c. R. Co., 7 Del. 140, 76 Atl. 50; Fleener v. Oregon &c. R. Co., 16 Idaho 781, 102 Pac. 897; Dukeman v. Cleveland &c. R. Co., 237 Ill. 104, 86 N. E. 712; Rietveld v. Wabash R. Co., 129 Iowa 249, 105 N. W. 515; Atchison &c. R. Co. v. Hayes, 79 Kans. 542, 99 Pac. 1131; Mynning v. Detroit &c. R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. 804, 28 Am. & Eng. R. Cas. 665; Crumpley v. Hannibal &c. R. Co., 111 Mo. 152, 19 S. W. 820; Lyman v. Boston &c. R. Co., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364, 45 Am. & Eng. R. Cas. 163, 20 Atl. 976; McBride v. Northern &c. R. Co., 19 Ore. 64, 23 Pac. 814; Hanna v. Philadelphia &c. R. Co., 213 Pa. St. 157, 62 Atl. 643, 4 L. R. A. (N. S.) 344; Smith v. Chicago &c. R. Co., 4 S. Dak. 71, 55 N. W. 717, 56 Am. & Eng. R. Cas. 123. See also Texas &c. Ry. Co. v. Gentry, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. ed. 186; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 474, 24 Sup. Ct. 137, 48 L. ed. 262; Weller v. Chicago &c. R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. 592; Pittsburg &c. R. Co. v. Reed, 36 Ind. App. 67, 75 N. E. 50; Nichols v. Baltimore &c. R. Co., 33 Ind. App. 229, 240, 241, 71 N. E. 170, and numerous authorities there cited; notes in 4 L. R. A. (N. S.) 344 and 125 Am. St. 876. But this presumption cannot be indulged as against facts to the contrary. Rollins v. Chicago &c. R. Co., 139 Fed. 639; St. Louis &c. R. Co. v. Chapman, 140 Fed. 129; Bressler v. Chicago &c. R. Co., 74 Kans. 256, 86 Pac. 472; Carlson v. Chicago &c. R. Co., 96 Minn. 504, 105 N. E. 655, 4 L. R. A. (N. S.) 349, 113 Am. St. 655; Woolf v. Washington R. &c. Co., 37 Wash. 491, 79 Pac. 997; Clemons v. Chicago &c. R. Co., 137 Wis 387, 119 N. W. 102.

[39] Of the many cases affirming that the burden is on the defendant, we cite: Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401, 21 L. ed. 114; Indianapolis & St. L. R. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Montgomery &c. Co. v. Montgomery &c. R. Co., 86 Ala. 372, 5 So. 735; Choctaw &c. R. Co. v. Baskins, 78 Ark. 355, 93 S. W. 757; Sanderson v. Frazier, 8 Colo. 79, 54 Am. Rep. 544; Louisville &c. R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 227; Northern &c. R. Co. v. State, 31 Md. 357; Hicks v. Pacific &c. R. Co., 65 Mo. 34; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 690; Danner v. South Carolina R. Co., 4 Rich. L. (S. Car.) 329, 55 Am. Dec. 678; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32; Milwaukee &c. R. Co. v. Hunter,

is great conflict of authority.[40] Granting, however, that the rule is that in cases other than actions to recover for injuries at crossings the burden is on the defendant there seems, nevertheless, much reason for holding that it should not apply in crossing cases. Where there is a controversy as to the facts, or where the facts are such that men of fair intelligence may draw different conclusions, the question of contributory negligence on the part of a traveler is a question of fact for the jury,[41] but the jury as to the law must act upon the instructions

11 Wis. 160, 78 Am. Dec. 699. See also under late Indiana statute, Pittsburg &c. R. Co. v. Reed, 36 Ind. App. 67, 75 N. E. 50, 51; Grand Trunk &c. Ry. Co. v. Reynolds (Ind. App.), 90 N. E. 94. And to the same effect are nearly all the cases cited in the last preceding note. In Indiana there seems to be no presumption either way but the statute now in force casts the burden on the defendant although contributory negligence may be shown by the evidence of either party. Cleveland &c. R. Co. v. Champe, 55 Ind. App. 243, 102 N. E. 868; Grand Trunk &c. Ry. Co. v. Reynolds, 175 Ind. 161, 92 N. E. 733; Cleveland &c. R. Co. v. Lynn, 177 Ind. 311, 98 N. E. 67.

[40] Of the many cases affirming that the burden is on the plaintiff, we cite: Park v. O'Brien, 23 Conn. 339; Popke v. New York &c. R. Co., 81 Conn. 724, 71 Atl. 1098; Prather v. Richmond &c. R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. 263; Galena &c. R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Winn v. Cleveland &c. R. Co., 239 Ill. 132, 87 N. E. 954; Kauffman v. Cleveland &c. R. Co., 144 Ind. 456, 43 N. E. 446; Greenleaf v. Illinois &c. R. Co., 29 Iowa 14, 4 Am. Rep. 181; Willoughby v. Chicago &c. R. Co., 37 Iowa 432; Kansas &c. R. Co. v. Pointer, 14 Kans. 37; Moore v. Shreveport, 3 La. Ann. 645; Perkins v. Eastern &c. R. Co., 29 Maine 307, 50 Am. Dec. 589; Lesan v. Maine &c. R. Co., 77 Maine 85, 23 Am. & Eng. R. Cas. 245; Wheelright v. Boston &c. R. Co., 135 Mass. 225, 16 Am. & Eng. R. Cas. 315; White v. New York &c. R. Co., 200 Mass. 441, 86 N. E. 923; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Mississippi &c. R. Co. v. Mason, 51 Miss. 234; Wright v. Boston &c. R. Co., 74 N. H. 128, 65 Atl. 687, 8 L. R. A. (N. S.) 832, 124 Am. St. 949, and notes; Reynolds v. New York &c. R. Co., 58 N. Y. 248; Owens v. Richmond &c. R. Co., 88 N. Car. 502; Walsh v. Oregon &c. R. Co., 10 Ore. 250; Boss v. Providence &c. R. Co., 15 R. I. 149, 1 Atl. 9; Shum v. Rutland R. Co., 81 Vt. 186, 69 Atl. 945, 19 L. R. A. (N. S.) 973 and note.

[41] Chicago &c. R. Co. v. Sharp, 63 Fed. 532; McGhee v. White, 66 Fed. 502; St. Louis &c. R. Co. v. Box, 52 Ark. 368, 12 S. W. 757; Fernandes v. Sacramento &c. R. Co., 52 Cal. 45, 50; McKeever v. Market

of the court. A railway company[42] and a traveler are bound to exercise ordinary care,[43] but, as we have elsewhere shown, what is ordinary care generally, depends upon the facts of the particular case, and, in most instances, is a question of fact for the jury under instructions from the court.[44] The care of a traveler must be such, in cases where he is not misled, without fault on his part, by the negligence of the company, as would be exercised by a man of ordinary prudence who knows that he is about to go into a place where there is constant danger,[45] who knows that the trains of the company have a prior right of passage,[46] and who knows, also, that he cannot omit

St. &c. R. Co., 59 Cal. 294, 300; Cincinnati &c. R. Co. v. Grames, 136 Ind. 39, 49, 34 N. E. 714; Schmidt v. Burlington &c. R. Co., 75 Iowa 606, 39 N. W. 916; Tyler v. New York &c. R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas. 296; Palmer v. Detroit &c. R. Co., 56 Mich. 1, 22 N. W. 88; Young v. Detroit &c. R. Co., 56 Mich. 430, 23 N. W. 67, 19 Am. & Eng. R. Cas. 417; Geist v. Detroit &c. R. Co., 91 Mich. 446, 51 N. W. 1112; Conway v. Troy &c. R. Co., 41 Hun (N. Y.) 639; Friedman v. Dry Dock &c. R. Co., 110 N. Y. 676, 18 N. E. 482; Kane v. New York &c. R. Co., 132 N. Y. 160, 30 N. E. 256; Philadelphia &c. R. Co. v. Carr, 99 Pa. St. 505; Longenecker v. Pennsylvania &c. R. Co., 105 Pa. St. 328; Johnson v. Gulf &c. R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274; Heath v. Stewart, 90 Wis. 418, 63 N. W. 1051. It is a mixed question of law and fact in such cases as those referred to in the text, inasmuch as it is the duty of the court to declare the law, and of the jury to accept the law as declared by the court.

[42] Garraher v. San Francisco &c. R. Co., 81 Cal. 98, 22 Pac. 480; Houston &c. R. Co. v. Brin, 77 Tex. 174, 13 S. W. 886. See Becke v. Missouri &c. R. Co., 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157.

[43] Chicago &c. R. Co. v. Fisher, 49 Kans. 460, 30 Pac. 462. See generally Olson v. Chicago &c. R. Co., 81 Wis. 41, 50 N. W. 1096; Hicks v. Missouri &c. R. Co., 46 Mo. App. 304.

[44] Winstanley v. Chicago &c. R. Co., 72 Wis. 375, 39 N. W. 856; Duame v. Chicago &c. R. Co., 72 Wis. 523, 40 N. W. 394, 7 Am. St. 879.

[45] Daniel v. Metropolitan &c. R. Co., L. R. 5 H. L. 45, L. R. 3 C. P. 391; State v. Maine Central R. Co., 76 Maine 357, 49 Am. Rep. 622. See also MacFeat v. Philadelphia &c. R. Co., 6 Pen. (Del.) 513, 69 Atl. 744; Atlantic Coast Line R. Co. v. Weir, 63 Fla. 74, 58 So. 641; Chicago &c. R. Co. v. Sack, 129 Ill. App. 58; Lake Shore &c. R. Co. v. Brown, 41 Ind. App. 435, 84 N. E. 25; Chesapeake &c. R. Co. v. Wilson, 31 Ky. L. 500, 102 S. W. 810.

[46] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed.

reasonable precautions on his part upon the assumption that there will not be negligence on the part of the employes of the company.[47] Where the measure of duty is prescribed by law, and there is no controversy as to the facts, and but one reasonable inference to be fairly and justly drawn from such facts, the question whether due care was exercised is one of law for the court.[48] Where the case goes to the jury, it is the duty of the court to instruct the jury as to the law, and, as we have said, the question of negligence is usually, but not always, one of mixed law and fact.[49]

403; Indiana &c. R. Co. v. Hammock, 113 Ind. 1, 14 N. E. 737; Indiana Un. Tract. Co. v. Myers, 47 Ind. App. 646, 93 N. E. 888; Brown v. Texas &c. R. Co., 42 La. Ann. 350, 7 So. 682, 21 Am. St. 374; Laun v. St. Louis &c. R. Co., 216 Mo. 563, 116 S. W. 555; Johnson v. Seaboard Air Line R. Co., 163 N. Car. 431, 79 S. E. 690; Davey v. London &c. R. Co., L. R. 12 Q. B. D. 70.

[47] Howard v. Kansas City &c. R. Co., 41 Kans. 403, 21 Pac. 267; Murray v. Pontchartrain Railway Co., 31 La. Ann. 490; Childs v. New Orleans &c. Railway Co., 33 La. Ann. 154; Houston v. Vicksburgh R. Co., 39 La. Ann. 796, 2 So. 562; Weeks v. New Orleans &c. R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. 560; Runyon v. Central R. Co., 25 N. J. L. 556; New York &c. R. Co. v. Kellam, 83 Va. 851, 3 S. E. 703; post, § 1660.

[48] Parks v. Ross, 11 How. (U. S.) 362, 13 L. ed. 730; Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014; Pike v. Grand Trunk &c. R. Co., 39 Fed. 255; Colorado &c. R. Co. v. Holmes, 5 Colo. 197; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; Conkling v. Erie R. Co., 63 N. J. L. 338, 43 Atl. 666, 667 (citing text); West Chester &c. R. Co. v. McElwee, 67 Pa. St. 311; Hoye v. Chicago &c. R. Co., 62 Wis. 666, 23 N. W. 14; post, § 1676. But in order to authorize the court to direct a verdict the case must be a clear one. Detroit &c. R. Co. v. Van Steinburg, 17 Mich. 99, 120; Walsh v. Oregon &c. R. Co., 10 Ore. 250. There must, according to what we regard as the better opinion, be more than a scintilla of evidence in order to carry the case to the jury. Hathaway v. East Tenn. &c. R. Co., 29 Fed. 489; Goodlett v. Louisville &c. R. Co., 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. ed. 1230; Beaulien v. Portland &c. R. Co., 48 Maine 291; 6 Thompson Negligence (2nd ed.), 7393.

[49] Kansas &c. R. Co. v. Ward, 4 Colo. 30; Wabash &c. R. Co. v. Shacket, 105 Ill. 364, 44 Am. Rep. 791; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Central &c. R. Co. v. Henigh, 23 Kans. 347, 33 Am. Rep. 167; Knight v. Ponchartrain &c. R. Co., 23 La. Ann. 462; Wallace v. Western &c. R. Co., 98 N.

§ 1659 (1164). Contributory negligence at crossings—Illustrative cases.—It is held to be contributory negligence, in a case where the view is obstructed, for a traveler to drive so rapidly in approaching a crossing as to drown the noise of moving trains,[50] and so it is held of one who occupies such a position in the vehicle as prevents him from seeing an approaching engine.[51] Where one approaches a railroad crossing with his eyes or ears so covered as to prevent him from seeing or hearing approaching trains, and does not resort to other means to ascertain whether a train is approaching, he is guilty of contributory

Car. 494, 4 S. E. 503, 2 Am. St. 346; Metropolitan &c. R. Co. v. Jackson, 3 L. R. App. Cas. 193; Manzoni v. Douglas, L. R. 6 Q. B. D. 145; 6 Thomp. Neg. (2nd ed.), § 7408.

[50] Pepper v. Southern &c. R. Co., 105 Cal. 389, 38 Pac. 974; Wilson v. New York &c. R. Co., 18 R. I. 598, 29 Atl. 300; Crandall v. Lehigh &c. R. Co., 72 Hun 431, 25 N. Y. S. 151. And see Ward v. Richmond &c. R. Co., 43 Fed. 422; Littaur v. Narragansett &c. R. Co., 61 Fed. 591; Philadelphia &c. R. Co. v. Peebles, 67 Fed. 591; Chicago &c. R. Co. v. Moon, 88 Ark. 231, 114 N. W. 228; Cleveland &c. R. Co. v. Moore, 45 Ind. App. 58, 90 N. E. 93; Reeves v. Dubuque &c. R. Co., 92 Iowa 32, 60 N. W. 243; Blackwell v. St. Louis &c. R. Co., 47 La. Ann. 268, 16 So. 818, 49 Am. St. 371; Thomas v. Chicago &c. R. Co., 86 Mich. 496, 49 N. W. 547; Nash v. New York &c. R. Co., 125 N. Y. 715, 26 N. E. 266; Dullea v. Chicago &c. R. Co., 86 Wis. 173, 56 N. W. 477; Brunette v. Chicago &c. R. Co., 86 Wis. 197, 56 N. W. 478; McKinney v. Chicago &c. R. Co., 87 Wis. 282, 58 N. W. 386. Or to protect himself from injury after reaching a point where he can discover the train. Washington &c. R. Co. v. Lacey, 94 Va. 460, 26 S. E. 834 (citing text). But see Alexander v. Richmond &c. R. Co., 112 N. Car. 720, 16 S. E. 896.

[51] Atchison &c. R. Co. v. Booth, 53 Ill. App. 303; Chicago &c. R. Co. v. Fretz, 173 Ind. 519, 90 N. E. 76 (side curtains down). See Grostick v. Detroit &c. R. Co., 90 Mich. 594, 51 N. W. 667, 49 Am. & Eng. R. Cas. 332; Stotler v. Chicago &c. R. Co., 204 Mo. 619, 103 S. W. 1. But it has been held not to be negligence for the driver of a wagon to sit on it in the usual manner adopted by persons engaged in the same business, although in thus sitting he was so low that he could not readily obtain a view of the track nor readily control his team. Bates v. New York &c. R. Co., 60 Conn. 259, 22 Atl. 538. The doctrine of the case cited is of doubtful soundness. Brady v. Toledo &c. R. Co., 81 Mich. 616, 45 N. W. 1110. See also Swanger v. Chicago &c. R. Co., 132 Iowa 32, 109 N. W. 308.

negligence.[52] One who suffers his attention to be attracted to the movements of another person, and takes no precautions to avoid danger from moving trains, cannot recover damages for injuries caused by a collision.[53] A man who crosses behind a freight train which obscures his view is held to be guilty of negligence if he proceeds without waiting until the train has moved a sufficient distance to enable him to obtain a clear view of the track.[54] A person who goes upon a railroad track in a vehicle, with others who are singing and shouting in such a manner as to prevent the approach of trains from being heard, has been held guilty of negligence.[55] It is held to be negligence for a person to rush rapidly across the tracks without making a careful observation to ascertain whether trains are approach-

[52] Texas &c. R. Co. v. Fuller, 5 Tex. Civ. App. 660, 24 S. W. 1090. See generally Horn v. Baltimore &c. R. Co., 54 Fed. 301; Garlich v. Northern Pac. R. Co., 131 Fed. 837; Colorado &c. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801. In Blight v. Camden &c. R. Co., 143 Pa. St. 10, 21 Atl. 995, it was held that failure to see a train because of rain and an umbrella did not excuse the traveler, and in Rodrian v. New York &c. R. Co., 125 N. Y. 526, 26 N. E. 741, 11 Am. St. 917, it was held that a woman who attempted to cross with her head covered with a shawl was guilty of contributory negligence. But see Petrie v. Columbia &c. R. Co., 29 S. Car. 303, 7 S. E. 515.

[53] Adams v. New York &c. R. Co., 21 N. Y. S. 681, 66 Hun (N. Y.) 634. As we have elsewhere shown, a person about to get upon a railroad track must not suffer his attention to be absorbed so that he cannot exercise care proportionate to the danger before him, and upon this principle it is held that one who permits his attention to be absorbed by an effort to get on a train is guilty of contributory negligence. Weeks v. New Orleans &c. R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. 560. So of one who is engaged in conversation with a companion. Jensen v. Michigan &c. R. Co., 102 Mich. 176, 60 N. W. 57.

[54] Kraus v. Pennsylvania &c. R. Co., 139 Pa. St. 272, 20 Atl. 993; Daniels v. Staten Island &c. R. Co., 125 N. Y. 407, 26 N. E. 466. See Chicago &c. R. Co. v. Florens, 32 Ill. App. 365; Baltimore &c. R. Co. v. Walborn, 127 Ind. 142, 26 N. E. 207. See also Jackson v. Mobile &c. R. Co., 89 Miss. 32, 42 So. 236. It is held that one does not become a trespasser by passing around a car obstructing the crossing, though he steps into the yard of the company in so doing. Chicago &c. R. Co. v. McGrath, 107 Ill. App. 100, affirmed in 203 Ill. 511, 68 N. E. 69.

[55] Koehler v. Rochester &c. R. Co., 66 Hun 566, 21 N. Y. S. 844.

ing,[56] and so it is for a person who attempts to cross in front of a locomotive which is standing still, but is about to be set in motion, as anyone could see.[57] Where, however, there is no indication that the locomotive is to be put in motion, it may not be per se negligence to cross in front of it.[58]

§ 1660 (1165). **Duty of traveler—Generally.**—The duty of a traveler in attempting to cross or in crossing a railroad track, is to exercise ordinary care. This duty rests upon him in all cases, but what is ordinary care may in some instances depend upon the particular facts. As we shall see further on, the rule as to the quantum of care required at railroad crossings is different from the rule which ordinarily prevails. The duty to exercise ordinary care exists in all cases, but what is ordinary care in one case may not be ordinary care in another.[59] Care,

[56] Chicago &c. R. Co. v. Fitzsimmons, 40 Ill. App. 360. See Cottle v. New York &c. R. Co., 82 Conn. 142, 72 Atl. 727; McNamara v. New York &c. R. Co., 19 N. Y. S. 497; Whalen v. New York &c. R. Co., 61 Hun 623, 15 N. Y. S. 941; Smith v. New York &c. R. Co., 63 Hun 624, 17 N. Y. S. 400; Southern R. Co. v. Carroll, 138 Fed. 638.

[57] Mehegan v. New York &c. R. Co., 64 Hun 637, 19 N. Y. S. 444; Guta v. Lake Shore &c. R. Co., 81 Mich. 291, 45 N. W. 821. See also Chicago Terminal &c. R. Co. v. Korando, 129 Ill. App. 620; Chicago &c. R. Co. v. Laughlin, 74 Kans. 567, 87 Pac. 749. But compare Atchison &c. R. Co. v. Wilkie, 77 Kans. 791, 90 Pac. 775, 127 Am. St. 464, 11 L. R. A. (N. S.) 963 (standing train giving no evidence or indication of intention to move). We suppose that it cannot invariably be held negligence for a traveler to cross in front of a motionless locomotive (quoted in St. Louis &c. R. Co. v. Dawson, 64 Kans. 99, 67 Pac. 521, 525); but if he knows, or ought to know by the exercise of care proportionate to the dangers incident to railroad crossings, that the locomotive is about to be put in motion or be started, he is guilty of negligence if he assumes to risk crossing before it has passed. If the locomotive appears to be about ready to be started then it is negligence, as we think, for the traveler to take the chance of crossing before it moves. Union Pacific R. Co. v. Hutchinson, 39 Kans. 485, 18 Pac. 705.

[58] Atchison &c. R. Co. v. Wilkie, 77 Kans. 791, 90 Pac. 775, 127 Am. St. 464, 11 L. R. A. (N. S.) 963. Compare also Ohio &c. R. Co. v. Hill, 7 Ind. App. 255, 34 N. E. 646; Kurt v. Lake Shore &c. R. Co., 194 N. Y. 598, 88 N. E. 1122.

[59] Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. ed. 422;

it is said, is never ordinary care unless it is proportionate to the known danger.[60] The traveler is not relieved from the duty of exercising care by a breach of duty on the part of the railroad company. A violation of a municipal ordinance or of a statute is ordinarily negligence on the part of the railroad company, but the violation of an ordinance or a statute does not relieve the traveler from the duty which the law imposes upon him.[61] In all cases where the right of recovery is based

Baltimore &c. R. Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. ed. 274.

[60] Washington &c. R. Co. v. Lacey, 94 Va. 460, 26 S. E. 834, 839 (citing text); Stokes v. Southern R. Co., 104 Va. 817, 52 S. E. 855. See also Chicago &c. R. Co. v. Thomas, 155 Ind. 634, 58 N. E. 1040; Wabash R. Co. v. Tippecanoe Loan & Trust Co., 178 Ind. 113, 98 N. E. 64. More care or greater precaution may be required where view is obstructed than might otherwise be required. Atlantic &c. R. Co. v. Rieger, 95 Va. 418, 28 S. E. 590; Southern R. Co. v. Jones, 106 Va. 412, 56 S. E. 155. See also Erie R. Co. v. Weinstein, 166 Fed. 271; Phillips v. Washington &c. R. Co., 104 Md. 455, 65 Atl. 422; Fitzhugh v. Boston &c. R. Co., 195 Mass. 202, 80 N. E. 792.

[61] Schofield v. Chicago &c. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; Horn v. Baltimore &c. R. Co., 54 Fed. 301; Chicago &c. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286; Chicago &c. R. Co. v. Hedges, 118 Ind. 5, 9, 20 N. E. 530; Miller v. Terre Haute &c. R. Co., 144 Ind. 323, 43 N. E. 257; Moore v. Keokuk &c. R. Co., 89 Iowa 223, 56 N. W. 430; Blackwell v. St. Louis &c. R. Co., 47 La. Ann. 268, 16 So. 818, 49 Am. St. 371; Hinckley v. Cape Cod &c. R. Co., 120 Mass. 257; Freeman v. Duluth &c. R. Co., 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594 and note; Brown v. Milwaukee &c. R. Co., 22 Minn. 165; Marty v. Chicago &c. R. Co., 38 Minn. 108, 35 N. W. 670; Delaware &c. R. Co. v. Heferan, 57 N. J. L. 578, 30 Atl. 578; Collins v. New York &c. R. Co., 92 Hun 563, 36 N. Y. S. 942; Ernst v. Hudson River &c. R. Co., 39 N. Y. 61, 100 Am. Dec. 405 and note; Richardson v. New York &c. R. Co., 45 N. Y. 846; Cleveland &c. Railroad Co. v. Elliott, 28 Ohio St. 340; Pennsylvania Co. v. Rathgeb, 32 Ohio St. 66. See also Payne v. Chicago &c. R. Co., 136 Mo. 562, 38 S. W. 308, 317 (citing text); Stearns v. Boston &c. R. Co., 75 N. H. 40, 71 Atl. 21; Carmany v. West Jersey &c. R. Co., 78 N. J. L. 552, 74 Atl. 656. "Negligence of the company's employes, in their particular capacity, was no excuse for negligence on her (plaintiff's) part." Per Court in Railroad Co. v. Houston, 95 U. S. 697, 24 L. ed. 542. See generally Allyn v. Boston &c. R. Co., 105 Mass. 77; 2 Thomp. Neg. (2nd ed.), § 1606. The fact

upon negligence the rule supported by authority is, that in order to recover, the plaintiff must himself exercise care, and is not absolved from this duty no matter how clear the negligence of the defendant.[62] Where, however, the acts and conduct of the defendant are such as may be justly regarded as willful, the general rule does not apply, nor, we may say in passing, does it fully apply where the defendant is negligent and the negligence is such as to mislead the plaintiff. But the plaintiff cannot be heard to say that he has been misled unless he has used such care under the circumstances to ascertain the nature of the danger and guard against it, as a man of ordinary prudence would have exercised under similar conditions.[63] It cannot be inferred from the mere fact that a defendant was guilty of negligence that the plaintiff was misled. The fact that there was negligence on the part of the defendant must be supplemented by evidence that there were such acts as would mislead a man of ordinary prudence or the plaintiff cannot successfully assert that he was misled by the defendant. As a railroad track is a warning of danger, one who attempts to cross it must act with care proportionate to the danger, and not suffer his attention to be diverted from the danger before him, and he must keep his

that a train is moving at a rate of speed forbidden by statute or by ordinance will not excuse a traveler who attempts to cross in front of it. Korrady v. Lake Shore &c. R. Co., 131 Ind. 261, 265, 29 N. E. 1069; Railroad Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; Cadwallader v. Louisville &c. R. Co., 128 Ind. 518, 27 N. E. 161.

[62] Text quoted as stating the true rule in White v. Chicago &c. R. Co., 102 Wis. 489, 78 N. W. 585, 588. And to same effect see Koch v. Southern Cal. Ry. Co., 148 Cal. 677, 84 Pac. 516, 113 Am. St. 332; Carlson v. Chicago &c. Ry. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. 655, as well as numerous cases cited in last preceding note.

[63] Korrady v. Lake Shore &c. R. Co., 131 Ind. 261, 29 N. E. 1069; Cadwallader v. Louisville &c. R. Co., 128 Ind. 518, 27 N. E. 161; White v. Chicago &c. R. Co., 102 Wis. 489, 78 N. W. 585, 586 (citing text). See also cases cited in preceding notes and Moore v. Keokuk R. Co., 89 Iowa 223, 56 N. W. 430; Greenwood v. Railroad Co., 124 Pa. St. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. 614; Randall v. Railroad Co., 104 N. Car. 410, 10 S. E. 691; Russell v. Railroad Co., 118 N. Car. 1098, 24 S. E. 512; Brennan v. Pennsylvania R. Co., 73 N. J. 147, 62 Atl. 177, 178.

faculties in active exercise. It is his duty to keep his faculties in condition for exercise and to exercise them.[64] Mental absorption or reverie will not excuse the traveler who omits to perform the duty of looking and listening.[65] If the traveler could have seen the train by looking, the presumption is that he did not look, or if he did look did not heed what he saw.[66]

[64] In Oleson v. Lake Shore &c. R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149, after reviewing the authorities, the court said: "There is no exception to the rule stated as to the traveler's duty at a crossing, except where the traveler, by some act of the company, has been misled or thrown off his guard, and thus prevented from taking proper precautions." See generally Lake Erie &c. R. Co. v. Stick, 143 Ind. 449, 41 N. E. 365; Hinken v. Iowa Central R. Co., 27 Iowa 603, 66 N. W. 882; Cincinnati &c. R. Co. v. Duncan, 143 Ind. 524, 42 N. E. 37; Louisville &c. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863. The decision in Indianapolis &c. R. Co. v. Neubacher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669, seems to us to be opposed in some respects to the decisions of the supreme court of that state and to the general current of opinion.

[65] Lake Shore &c. R. Co. v. Sunderland, 2 Bradw. (Ill.) 307; Mann v. Belt R. Co., 128 Ind. 138, 143, 26 N. E. 819; Oleson v. Lake Shore &c. R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; Butterfield v. Western R. Co., 10 Allen (Mass.) 532, 87 Am. Dec. 678; Allyn v. Boston &c. R. Co., 105 Mass. 77; Wheelock v. Boston &c. R. Co., 105 Mass. 203; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Havens v. Erie R. Co., 41 N. Y. 296; Davis v. New York &c. R. Co., 47 N. Y. 400. See also Hood v. Lehigh &c. R. Co., 186 N. Y. 517, 78 N. E. 1105.

[66] Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014; Rollins v. Chicago &c. R. Co., 139 Fed. 639; Green v. Los Angeles &c. R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. 68; Oleson v. Lake Shore &c. R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; Cleveland &c. R. Co. v. Starks, 58 Ind. App. 341, 106 N. E. 646; Allen v. Boston &c. R. R., 197 Mass. 298, 83 N. E. 863; Weyl v. Chicago &c. R. Co., 40 Minn. 350, 42 N. W. 24; Brown v. Milwaukee &c. R. Co., 22 Minn. 165; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661; Payne v. Chicago &c. R. Co., 136 Mo. 562, 38 S. W. 308; Hook v. Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360; Dyrez v. Missouri Pac. R. Co., 238 Mo. 33, 141 S. W. 861; Conkling v. Erie R. Co., 63 N. J. L. 338, 43 Atl. 666, 668 (quoting text); Wilcox v. Rome &c. R. Co., 39 N. Y. 358, 100 Am. Dec. 440; Myers v. Baltimore &c. R. Co., 150 Pa. St. 386, 24 Atl. 747; Smith v. Philadelphia &c. R. Co., 160 Pa. St. 117, 28 Atl. 641; Haetsch v. Chicago &c. R. Co., 87 Wis. 304, 58 N. W. 393; Marshall v. Green Bay &c. R. Co., 125 Wis. 96, 103 N. W. 249. See also Martz

This presumption, in conjunction with the fact that the courts judicially know that great throngs of persons daily cross railroad tracks without receiving injury, seems to us to render logical the conclusion that prima facie an accident at a crossing is attributable to the negligence of the traveler, but enough has already been said on that subject. A traveler who knows that a train is due must take care to avoid it, and that this knowledge may impose upon him a somewhat higher exercise of care than if he was not in possession of such knowledge.[67] Principle requires that in such a case the person who attempts to cross the track should be held guilty of negligence as matter of law if there are obstructions to sight or hearing, so that he can not make an effective observation, since no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety. Analogous cases emphatically affirm that one who assumes to proceed upon a calculation of chances is guilty of negligence, and the rule established by those cases applies to such cases as we have mentioned.

v. Pacific Elec. Ry. Co., 31 Cal. App. 592, 161 Pac. 16; Boston &c. R. Co. v. Titcomb, 236 Fed. 129. But compare Birmingham So. R. Co. v. Lintner, 141 Ala. 420, 38 So. 363; Kansas City &c. R. Co. v. Weeks, 135 Ala. 614, 34 So. 16; Weigman v. St. Louis &c. R. Co., 223 Mo. 699, 123 S. W. 38. Numerous cases to the effect that if the undisputed facts are such that if the traveler had looked and listened he would have seen or heard the train, the rule stated in the text applies even though he testifies that he did look and listen, are cited in the note to the recent case of McCarthy v. Bangor &c. R. Co., 112 Maine 1, 90 Atl. 490, in L. R. A. 1915B, 140.

[67] Cleveland &c. R. Co. v. Houghland, 44 Ind. App. 73, 85 N. E. 369; Palys v. Erie R. Co., 30 N. J. Eq. 604; Brooks v. Buffalo &c. R. Co., 1 Abb. App. Dec. 211; Reynolds v. New York &c. R. Co., 58 N. Y. 248. See Boyd v. Southern Ry. Co., 115 Va. 11, 78 S. E. 548, Ann. Cas. 1914D, 1017, 1020 and note as to whether probability that no train will pass is any excuse for not looking or listening. Ordinarily the traveler must look out for extras. See numerous cases cited in note to Wise v. Delaware &c. R. Co., 81 N. J. L. 397, 80 Atl. 459, in Ann. Cas. 1914D, 1075.

§ 1661 (1166). **Duty of the traveler to look and listen.**—The overwhelming weight of authority affirms the rule to be that a traveler approaching a railroad crossing must look and listen.[68] If this duty is omitted the court is usually bound to instruct, as matter of law, that a verdict be returned in favor of the defendant company,[69] except in cases of a peculiar nature, where

[68] Elliott v. Chicago M. & St. P. R. Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. ed. 1058; Blount v. Grand Trunk &c. R. Co., 61 Fed. 375; Stowell v. Erie R. Co., 98 Fed. 520; Louisville &c. R. Co. v. Richards, 100 Ala. 365, 13 So. 944; St. Louis &c. R. Co. v. Martin, 61 Ark. 549, 33 S. W. 1070; Little Rock &c. R. Co. v. Blewett, 65 Ark. 235, 45 S. W. 548, 549 (citing text); Arkansas &c. R. Co. v. Graves, 96 Ark. 638, 132 S. W. 992; Vance v. Atchison &c. R. Co., 9 Cal. App. 20, 98 Pac. 41; Denver &c. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505; Wabash &c. R. Co. v. Wallace, 110 Ill. 114, 19 Am. & Eng. R. Cas. 359; Engrer v. Ohio &c. R. Co., 142 Ind. 618, 42 N. E. 217; Lake Erie &c. R. Co. v. Stick, 143 Ind. 449, 41 N. E. 365; Louisville &c. R. Co. v. Stephens, 13 Ind. App. 145, 40 N. E. 148; Romeo v. Boston &c. R. Co., 87 Maine 540, 33 Atl. 24; Sprow v. Boston &c. R. Co., 163 Mass. 330, 39 N. E. 1024; Gardiner v. Detroit &c. R. Co., 97 Mich. 240, 56 N. W. 603; Hayden v. Missouri &c. R. Co., 124 Mo. 566, 28 S. W. 74; Pennsylvania Co. v. Leary, 56 N. J. L. 705, 29 Atl. 678; Pennsylvania R. Co. v. Pfuelb, 60 N. J. L. 278, 37 Atl. 1100; Connerton v. Delaware &c. Co., 169 Pa. St. 339, 32 Atl. 416; Owmsbee v. Boston &c. R. Co., 14 R. I. 102, 51 Am. Rep. 354 and note; Gora v. Southern R., 67 S. Car. 347, 45 S. E. 810; Johnson v. Chesapeake &c. Co., 91 Va. 171, 21 S. E. 238; Schlimgen v. Chicago &c. R. Co., 90 Wis. 186, 62 N. W. 1045; Steinhofel v. Chicago &c. R. Co., 92 Wis. 123, 65 N. W. 852; White v. Chicago &c. R. Co., 102 Wis. 489, 78 N. W. 585, 587 (citing text); Elliott Roads and Streets (3rd ed.), 1033; 2 Thompson on Neg. (2nd ed.), § 1637, et seq; White's Supp., § 1637; note in 3 L. R. A. (N. S.) 391. See Cincinnati &c. R. Co. v. Wright, 16 Ky. L. 1277, 34 S. W. 526; Central &c. R. Co. v. Bush, 12 Tex. Civ. App. 291, 34 S. W. 133; Texas &c. R. Co. v. Spradling, 72 Fed. 152. Also Atchison &c. R. Co. v. Shaw, 56 Kans. 519, 43 Pac. 1129; Hart v. Missouri Pac. Ry. Co., 196 Fed. 180, 185. But compare Gulf &c. R. Co. v. Melville (Tex. Civ. App.), 87 S. W. 863; Southern R. Co. v. Tankersley, 3 Ga. App. 548, 60 S. E. 297; Elgin &c. R. Co. v. Lawlor, 229 Ill. 621, 82 N. E. 407; Wilson v. Chesapeake &c. R. Co., 27 Ky. 778, 86 S. W. 690; King v. St. Louis &c. Ry. Co., 143 Mo. App. 279, 127 S. W. 400. See Butler v. New York &c. R. Co., 177 Mass. 191, 58 N. E. 592 (citing text).

[69] Railroad Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; Little Rock &c. R. Co. v. Blewett, 65 Ark. 235,

there are facts excusing the performance of the duty.[70] The

45 S. W. 548, 549 (citing text); Tolman v. Syracuse &c. R. Co., 98 N. Y. 198, 50 Am. Rep. 649; Durkee v. President &c. Co., 88 Hun 471, 34 N. Y. S. 978. See post, § 1676; Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1128, 29 L. ed. 224; Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 58 So. 641; Powers v. Iowa Cent. R. Co., 157 Iowa 347, 136 N. W. 1049; Chicago &c. R. Co. v. Whealer, 80 Kans. 187, 101 Pac. 1001; Horandt v. Central R. Co., 81 N. J. L. 488, 83 Atl. 511; Cowen v. Dietrich, 101 Md. 46, 60 Atl. 282; O'Connor v. New York &c. R. Co., 189 Mass. 361, 75 N. E. 614. But see where failure to look is not a proximate cause, as where it would have been useless. Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. R. 633; Fejdowski v. Delaware &c. Co., 168 N. Y. 500, 61 N. E. 888.

[70] In Tiffin v. St. Louis &c. R. Co., 78 Ark. 55, 93 S. W. 564, 566, it is said: "The exceptions to the general rule usually fall within the following classes of cases: (1) Where the circumstances were such that it would have availed nothing in preventing the injury if the injured party had looked and listened. This exception is recognized in the case of Martin v. Little Rock &c. R. Co., 62 Ark. 156, 34 S. W. 545, where it is said that 'it is only when it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that his failure to look and listen will necessarily constitute negligence.' (2) Where the circumstances were so unusual as that the injured party could not reasonably have expected the approach of a train at the time he went upon the track. French v. Railroad Co., 116 Mass. 537; McGhee v. White, 66 Fed. 502; Bonnell v. Delaware &c. R. Co., 39 N. J. L. 189. (3) Where the injured person was a passenger or escort going to or alighting from a train, and hence under an implied invitation and assurance by the company that he could cross the track in safety. Railway Co. v. Johnson, 59 Ark. 122, 26 S. W. 593; St. Louis &c. R. Co. v. Tomlinson, 69 Ark. 489, 64 S. W. 347; Wheelock v. Boston &c. R. Co., 105 Mass. 203. (4) Where the direct act of some agent of the company had put the person off his guard and induced him to cross the track without precaution. 3 Elliott Railroads, § 1171; Chicago &c. R. Co. v. Prescott, 59 Fed. 237, 23 L. R. A. 654; Eddy v. Powell, 49 Fed. 814; Merrigan v. Boston &c. R. Co., 154 Mass. 189, 28 N. E. 149; Directors &c. v. Wales, L. R. 7 H. of L. 12; Cleveland &c. R. Co. v. Keely, 138 Ind. 600, 37 N. E. 406; Abbett v. Chicago &c. R. Co., 30 Minn. 482, 16 N. W. 266." See also St. Louis &c. R. Co. v. Hudson, 86 Ark. 183, 110 S. W. 590; Winn v. Cleveland &c. R. Co., 239 Ill. 132, 87 N. E. 954; Cooper v. North Carolina &c. R. Co., 140 N. Car. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391.

quantum of care in such cases is prescribed by law,[71] according to the rule in most jurisdictions, and it is a breach of duty precluding a recovery for the traveler to omit to look and listen. It is as much a breach of duty on the part of the traveler to omit to look and listen as it is for a railroad company to omit the signals required by law, because a duty may be as effectively prescribed by the common law as by legislative enactment.[72] The fact that a flagman signals the traveler to cross does not absolutely relieve the latter from the duty of looking and listening,[73] but that fact may be sufficient to carry the case to the jury.[74] The general rule is that it is not sufficient to look in one direction, but the traveler is under a duty to look in both directions.[75] The duty to look and listen requires the traveler

[71] Mann v. Belt R. Co., 128 Ind. 138, 142 (citing Ohio &c. R. Co. v. Hill, 117 Ind. 56, 18 N. E. 461); Smith v. Wabash R. Co., 141 Ind. 92, 40 N. E. 270; Atchison &c. R. Co. v. Holland, 60 Kans. 209, 56 Pac. 6; State v. Maine &c. R. Co., 76 Maine 357, 49 Am. Rep. 622; Payne v. Chicago &c. R. Co., 136 Mo. 562, 38 S. W. 308, 311; Pennsylvania Co. v. Beale, 73 Pa. St. 504, 13 Am. Rep. 753. See also Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014; Grand Trunk R. Co. v. Cobleigh, 78 Fed. 784; Woolf v. Washington R. &c. Co., 37 Wash. 491, 79 Pac. 997.

[72] Some of the courts hold, correctly as we believe, that the rule that the plaintiff must look and listen is a rule of law, and not merely a rule of evidence. Aiken v. Pennsylvania R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. 775. See Union &c. R. Co. v. State, 72 Md. 153, 19 Atl. 449, 42 Am. & Eng. R. Cas. 172; Allen v. Maine &c. R. Co., 82 Maine 111, 19 Atl. 105; Kohler v. Pennsylvania &c. R. Co., 135 Pa. St. 346, 19 Atl. 1049; Brown v. Texas &c. R. Co., 42 La. Ann. 350, 7 So. 682, 21 Am. St. 374; McBride v. Northern Pacific R. Co., 19 Ore. 64, 23 Pac. 814; Donnelly v. Boston &c. R. Co., 151 Mass. 210, 24 N. E. 38, 42 Am. & Eng. R. Cas. 182, and authorities in last preceding note. Contra, Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20, 39 Am. & Eng. R. Cas. 615; Chicago &c. R. Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. 87.

[73] Denver &c. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505; Berry v. Pennsylvania R. Co., 48 N. J. L. 141, 4 Atl. 303. In the case last cited it was said, in speaking of the plaintiff: "He must not rely entirely on the flagman." See also Brennan v. Pennsylvania R. Co., 73 N. J. 147, 62 Atl. 177, 178.

[74] Buchanan v. Chicago &c. R. Co., 75 Iowa 393, 39 N. W. 663.

[75] Dunning v. Bond, 38 Fed. 813;

to exercise care to select a position from which an effective observation can be made.[76] The mere fact of looking and listening is not always a full performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective,[77] and must

Northern Pac. Ry. Co. v. Tripp, 220 Fed. 286; Chicago &c. R. Co. v. Batsel, 100 Ark. 526, 140 S. W. 726; Mann v. Belt &c. R. Co., 128 Ind. 138, 26 N. E. 819; Thornton v. Cleveland &c. R. Co., 131 Ind. 492, 31 N. E. 185; Lake Erie &c. R. Co. v. Oland, 49 Ind. App. 494, 97 N. E. 543; Nixon v. Chicago &c. R. Co., 84 Iowa 331, 51 N. W. 157; McGee v. Consolidated &c. R. Co., 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300 and note, 47 Am. St. 507. See generally Griffe v. St. Louis &c. R. Co., 80 Ark. 186, 96 S. W. 750; Glascock v. Central &c. R. Co., 73 Cal. 137, 14 Pac. 518; Bloomfield v. Burlington &c. R. Co., 74 Iowa 607, 38 N. W. 431; Thompson v. New York &c. R. Co., 110 N. Y. 636, 17 N. E. 690; Marland v. Pittsburg &c. R. Co., 123 Pa. St. 487, 16 Atl. 623, 10 Am. St. 541; Bates v. San Pedro &c. R. Co., 38 Utah 568, 114 Pac. 527; New York &c. R. Co. v. Kellam, 83 Va. 851.

[76] In Owens v. Pennsylvania Co., 41 Fed. 187, it was said, in speaking of the duty of the traveler: "It was the duty of the plaintiff to select such a point as would enable him to see along the track both ways. If he could not see it, it was his business to stop, or to select some other place at which he could make the observation." See also Philadelphia &c. R. Co. v. Peebles, 67 Fed. 591; Chicago &c. R. Co. v. Smith, 141 Fed. 930; New York &c. R. Co. v. Thierer, 209 Fed. 316; Chicago &c. R. Co. v. Bennett, 181 Fed. 799; Northern Pac. Ry. Co. v. Tripp, 220 Fed. 286; Burns v. Louisville &c. R. Co., 136 Ala. 522, 33 So. 891; Colorado &c. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801; Fitzhugh v. Boston &c. R. Co., 195 Mass. 202, 80 N. E. 792; Houghton v. Chicago &c. R. Co., 99 Mich. 308, 58 N. W. 314; Weyl v. Chicago &c. R. Co., 40 Minn. 350, 42 N. W. 24; Moberley v. Kansas City &c. R. Co., 98 Mo. 183, 11 S. W. 569; Fowler v. New York &c. R. Co., 74 Hun 141, 26 N. Y. S. 218; Nelson v. Duluth &c. R. Co., 88 Wis. 392, 60 N. W. 703. Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308, 311 (citing text, stating however, that the precise number of feet at which the traveler must do so cannot, ordinarily, be exactly affirmed as a matter of law). In Calhoun v. Pa. R. Co., 223 Pa. St. 298, 72 Atl. 556, and Erie R. Co. v. Hanna, 197 Fed. 669, it is held that looking from the place usually selected by the public is evidence of due care in selecting it, so that looking from that place cannot be declared negligence as matter of law.

[77] Lennon v. New York &c. R. Co., 65 Hun 578, 20 N. Y. S. 557; Washington &c. R. Co. v. Lacey, 94 Va. 460, 26 S. E. 834, 839; McCanna

usually continue to be on the lookout and exercise his faculties until he has crossed.[78] The fact that one train has passed is not such an assurance of safety as authorizes the traveler to make the attempt to cross without carefully looking and listening for other trains.[79] The traveler has no right to confine his precautions to trains scheduled to pass at a designated time, but he

v. New England &c. R. Co., 20 R. I. 439, 39 Atl. 891, 892; Conkling v. Erie R. Co., 63 N. J. L. 338, 43 Atl. 666 (the last three all citing text). See §§ 1659, 1663, 1666; Schmolze v. Chicago &c. R. Co., 83 Wis. 659, 53 N. W. 743, 54 N. W. 106; Horan v. Boston &c. R. Co., 183 Fed. 559; Urias v. Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566.

[78] Chicago &c. Ry. Co. v. Bennett, 181 Fed. 799; Kelsey v. Missouri Pac. Ry. Co., 129 Mo. 362, 30 S. W. 339, 341; Mann v. Belt. R. Co., 128 Ind. 138, 144, 26 N. E. 819; Haetsch v. Chicago &c. R. Co., 87 Wis. 304, 58 N. W. 393; Grimm v. Milwaukee &c. R. Co., 138 Wis. 44, 119 N. W. 833; Schlimgen v. Chicago &c. R. Co., 90 Wis. 186, 62 N. W. 1045, and authorities cited in last preceding note. See also Louisville &c. R. Co. v. Calvert, 172 Ala. 597, 55 So. 812; Choctaw &c. R. Co. v. Baskins, 78 Ark. 355, 93 S. W. 757; St. Louis &c. R. Co. v. Portis, 81 Ark. 325, 99 S. W. 66; Walsh v. Pa. R. Co., 222 Pa. St. 162, 70 Atl. 1088; Chesapeake &c. R. Co. v. Hall, 109 Va. 296, 63 S. E. 1007. But compare Winey v. Chicago &c. R. Co., 92 Iowa 622, 61 N. W. 218; Defrieze v. Illinois Cent. R. Co. (Iowa), 94 N. W. 505; Wallenberg v. Missouri Pac. Ry. Co., 86 Nebr. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135, and cases reviewed in note showing under what circumstances it has been held negligence as matter of law to look more than once up and down the track and under what circumstances the question has been left to the jury. And see also Chesapeake &c. R. Co. v. Steele, 84 Fed. 93 (need not look from a point so near that it would be dangerous in itself).

[79] Baltimore &c. R. Co. v. Talmage, 15 Ind. App. 203, 43 N. E. 1019; Long v. Pac. Ry. &c. Co., 74 Ore. 502, 144 Pac. 462, 424 (quoting text). Some of the decisions of the Indiana appellate court seem to conflict with the doctrine of the Indiana case cited, but if so they are in conflict with the great weight of authority. McKinney v. Chicago &c. R. Co., 87 Wis. 282, 59 N. W. 499; Stowell v. Erie R. Co., 98 Fed. 520; Delaware &c. R. Co. v. Flannelly, 172 Fed. 328; Martin v. Little Rock &c. R. Co., 62 Ark. 156, 34 S. W. 545; Indianapolis &c. R. Co. v. Wilson, 134 Ind. 95, 33 N. E. 793; Bush v. Union Pac. R. Co., 62 Kans. 709, 64 Pac. 624; Guta v. Lake Shore &c. R. Co., 81 Mich. 291, 45 N. W. 821; Stopp v. Fitchburg Co., 80 Hun 178, 29 N. Y. S. 1008; Purdy v. New York &c. R. Co., 87 Hun 97, 33 N. Y. S. 952; Schlimgen v. Chicago &c. R. Co., 90 Wis. 186, 62 N. W. 1045.

must take precautions against all trains, "extra trains" and "wild trains," as well as against regular trains.[80] Trains may pass the crossing at any time, and the traveler must act upon the assumption that trains may pass at any time, and exercise care proportionate to the danger from the frequent movement of trains. He must look and listen for all trains and not merely for some trains, for he has no right to proceed upon the assumption that trains will cross only at specified times. He has, indeed, no right in any case to omit to take precautions for his own safety upon the supposition or assumption that he may safely cross the track, for, under all circumstances, he must himself exercise ordinary care, and must not rely entirely upon the acts of others,[81] but, as we have said, what is or is not ordinary care

[80] Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; Toledo &c. R. Co. v. Jones, 76 Ill. 311; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593, 19 Am. St. 96; McGill v. Minneapolis &c. R. Co., 113 Iowa 358, 85 N. W. 620; Bush v. Union Pac. R. Co., 62 Kans. 709, 64 Pac. 624; Tucker v. Chicago &c. R. Co., 122 Mich. 149, 80 N. W. 984; Schwartz v. Mineral Range &c. R. Co., 153 Mich. 40, 116 N. W. 540, 17 L. R. A. (N. S.) 1253; Judson v. Great Northern R. Co., 63 Minn. 248, 65 N. W. 447; Carlson v. Chicago &c. R. Co., 96 Minn. 504, 105 N. W. 555, 113 Am. St. 655; Wilcox v. Rome &c. R. Co., 39 N. Y. 358, 362, 100 Am. Dec. 440; Salter v. Utica &c. R. Co., 75 N. Y. 273; Durbin v. Oregon &c. R. Co., 17 Ore. 5, 17 Pac. 5, 11 Am. St. 778. See also Nixon v. Chicago &c. R. Co., 84 Iowa 331, 51 N. W. 157; Jackson v. Mobile &c. R. Co., 89 Miss. 32, 42 So. 236. But it is held that the fact that the traveler knows that a train is due from one direction and not the other may be taken into consideration in determining whether he is guilty of contributory negligence in looking more in the one direction than in the other. Cincinnati &c. R. Co. v. Farra, 66 Fed. 496; Wrightsville &c. R. Co. v. Gornto, 129 Ga. 204, 58 S. E. 769; Louisville &c. R. Co. v. Crominarity, 86 Miss. 464, 38 So. 633; Wise v. Delaware &c. R. Co., 81 N. J. L. 397, 80 Atl. 459, Ann. Cas. 1914D, 1071.

[81] Chicago &c. Board v. Chicago &c. R. Co., 44 Ill. App. 253; Duncan v. Missouri &c. R. Co., 46 Mo. App. 198; Drake v. Chicago &c. R. Co., 51 Mo. App. 562; Greenwood v. Philadelphia &c. R. Co., 124 Pa. St. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. 614; Lake Shore &c. R. Co. v. Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389; Beyel v. Newport News &c. R. Co., 34 W. Va. 538, 12 S. E. 532, 45 Am. & Eng. R. Cas. 188. See Jennings v. St. Louis &c. R. Co., 112 Mo. 268, 20 S. W. 490. "It is well settled in

depends very often upon the facts of the particular case. Under the rule just stated, namely, that whether due care was exercised depends upon the facts of the particular case, the question whether the traveler stopped at a proper place or the like is generally a question for the jury, but it is sometimes a question of law. If there is but one reasonable inference that men of average intelligence can justly draw from the facts, the question is one of law to be disposed of by the court.[82]

§ 1662 (1166a). Rule requiring traveler to look and listen not invariable and arbitrary as to time and place.[82a]—As stated in the last preceding section, a traveler, especially when familiar with the crossing, must exercise care to make his observation effective, but it cannot always be said that he is guilty of contributory negligence as matter of law because he looked and listened from one point rather than another, or because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well. Thus, in a recent case, it is said: "The law does not say how near the track the traveler shall make his observations. There is no arbitrary rule in this respect. What the law requires is that the traveler shall choose, in the vicinity of the crossing, according to environments, a place reasonably calculated to afford full opportunity for seeing and hearing."[83] He should

this state that, when a traveler approaches a railroad crossing, he must look both ways, and listen for coming trains, and the negligence of the company in failing to give proper signals will not excuse the traveler's duty to look and listen. Fletcher v. Railroad, 64 Mo. 484; Zimmerman v. Railroad, 71 Mo. 476; Baker v. Kansas City &c. R. Co., 122 Mo. 533, 26 S. W. 20; Purl v. Railroad, 72 Mo. 168; Donohue v. Railroad, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; Butts v. Railroad, 93 Mo. 272, 11 S. W. 754; Schmidt v. Railroad, 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196." Porter v. Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880, 883.

[82] For a review of the cases on this subject showing where the traveler is deemed negligent as matter of law and when the question is for the jury, see note in 37 L. R. A. (N. S.) 135-147.

[82a] This section is cited in Vincennes Trac. Co. v. Curry, 59 Ind. App. 691, 109 N. E. 62.

[83] Greenwaldt v. Lake Shore &c. R. Co., 165 Ind. 219, 73 N. E. 910.

usually continue to look and listen, and to vigilantly exercise his faculties, until he has passed the crossing, but the law does not arbitrarily and invariably fix the distance at which he must begin to look and listen, provided, in ordinary cases, that it is at a sufficient distance to enable him to discover the approaching train and avoid injury by the exercise of reasonable and ordinary care, nor require him in all cases to continue to do so at his peril, regardless of circumstances, especially when he has already made an observation that ought to be reasonably effective, and is misled, without his fault, by the wrongful act of the company.[84] It has also been held that the observation of the

See also Cleveland &c. R. Co. v. Lynn, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017; Pittsburg &c. R. Co. v. Lynch, 43 Ind. App. 177, 87 N. E. 40.

[84] See Farrell v. Erie R. Co., 138 Fed. 28; Chicago &c. R. Co. v. Pearson, 184 Ill. 386, 56 N. E. 633; Chicago &c. R. Co. v. Pollock, 195 Ill. 156, 62 N. E. 831; Pittsburg &c. R. Co. v. Martin, 82 Ind. 476; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426, 30 N. E. 37; Stoy v. Louisville &c. R. Co., 160 Ind. 144, 66 N. E. 615; Louisville &c. R. Co. v. Williams, 20 Ind. App. 576, 51 N. E. 128; Wabash &c. R. Co. v. Biddle, 27 Ind. App. 161, 59 N. E. 248, 60 N. E. 12; Cleveland &c. R. Co. v. Penbeth, 27 Ind. App. 210, 60 N. E. 1095; Chicago &c. R. Co. v. Turner, 33 Ind. App. 264, 69 N. E. 484; Pennsylvania Co. v. Fertig, 34 Ind. App. 459, 70 N. E. 834; Baltimore &c. R. Co. v. Rosborough, 40 Ind. App. 14, 80 N. E. 869; Louisville &c. R. Co. v. Cooper, 23 Ky. L. 1658, 65 S. W. 795; Clark v. Boston &c. R. Co., 164 Mass. 434, 41 N. E. 666; Coffee v. Pere Marquette R. Co., 139 Mich. 378, 102 N. W. 953; Woehrle v. Minnesota &c. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348; Jennings v. St. Louis &c. R. Co., 112 Mo. 268, 20 S. W. 490; O'Keefe v. St. Louis &c. R. Co., 108 Mo. App. 177, 83 S. W. 308; Newark &c. R. Co. v. Block, 55 N. J. L. 605, 27 Atl. 1067; Greaney v. Long Island &c. R. Co., 101 N. Y. 419, 5 N. E. 425; Oldenburg v. New York &c. R. Co., 124 N. Y. 414, 26 N. E. 1021; Arnold v. Philadelphia &c. R. Co., 161 Pa. St. 1, 28 Atl. 941; Cromley v. Pennsylvania R. Co., 208 Pa. St. 445, 57 Atl. 832. See also Loreny v. Burlington &c. R. Co., 115 Iowa 377, 88 N. W. 835, 56 L. R. A. 752; Case v. Chicago &c. R. Co., 147 Iowa 747, 126 N. W. 1037; Hinkle v. Railroad Co., 109 N. Car. 472, 13 S. E. 884, 26 Am. St. 581; Lloyd v. Railroad Co., 118 N. Car. 1010, 24 S. E. 805, 54 Am. St. 764; Mayer v. Railway Co., 119 N. Car. 758, 26 S. E. 148. In Wallenburg v. Missouri Pac. Ry. Co., 86 Nebr. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135, and the note thereto many additional cases are cited to the same effect.

traveler "need not," at least as a matter of law, "extend beyond the distance within which vehicles moving at lawful speed would endanger him."[85]

§ 1663 (1167). Duty of the traveler to stop and look and listen.[85a]—Ordinary care often requires that the traveler should stop, look and listen for moving trains, from a place where danger can be discerned and precaution taken to avert it. If, for instance, the noise is so great that an approaching train can not be heard, and the obstructions are such that it cannot be seen, then the traveler must come to a halt and look and listen. It cannot be said that one who simply looks and listens where he knows, or should know, such acts are fruitless and unavailing, exercises that degree of care which the law requires. While it cannot be justly affirmed, as we believe, as matter of law, that there is a duty to stop in all cases,[86] yet there are cases where the failure to stop must be deemed such a breach of duty as will defeat a recovery by the plaintiff. There are very many cases holding that the surroundings may be such as to impose upon the traveler the duty of stopping, looking and listening, and these cases, as we think, assert the true doctrine.[87] Some of the courts, in well reasoned cases, press

[85] Newark &c. R. Co. v. Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374; Farrell v. Erie R. Co., 138 Fed. 28. See also Marden v. Portsmouth &c. R., 100 Maine 41, 60 Atl. 530, 69 L. R. A. 300.

[85a] This section is cited in Vincennes Trac. Co. v. Curry, 59 Ind. App. 691, 109 N. E. 62.

[86] Pittsburg &c. R. Co. v. Terrell, 177 Ind. 447, 95 N. E. 1109; Chicago &c. R. Co. v. Dunn, 53 Ind. App. 382, 387, 101 N. E. 731 (citing text); Reed v. Chicago &c. R. Co., 74 Iowa 188, 37 N. W. 149; Union Pac. R. Co. v. Ruzicka, 65 Nebr. 621, 91 N. W. 543; Peck v. Oregon &c. R. Co., 25 Utah 21, 69 Pac. 153; Winstanley v. Chicago &c. R. Co., 72 Wis. 375, 39 N. W. 856. "Exceptional circumstances may also require him to stop, although this proposition generally presents itself as a mixed question of law and fact." Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308, 311 (citing text). The syllabus in Maguire v. Missouri Pac. Ry. Co. (Mo. App.), 165 S. W. 849, erroneously states that the court decides that the traveler must stop, look and listen.

[87] Houghton v. Chicago &c. R. Co., 99 Mich. 308, 58 N. W. 314 (citing, among other cases, Chase v. Maine &c. R. Co., 78 Maine 346,

the rule further, and hold that the traveler must, in all cases, stop, look and listen.[88] As we have said, we do not think that

5 Atl. 771; Brady v. Toledo &c. R. Co., 81 Mich. 616, 45 N. W. 1110; Greenwood v. Philadelphia &c. R. Co., 124 Pa. St. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. 614; Northern Pac. R. Co. v. Holmes, 3 Wash. Ter. 202, 14 Pac. 688); Tucker v. Duncan, 9 Fed. 867; Chicago &c. R. Co. v. Williams, 56 Kans. 333, 43 Pac. 246; Missouri &c. R. Co. v. Jenkins, 74 Kans. 487, 87 Pac. 702; Sullivan v. New York &c. R. Co., 154 Mass. 524, 28 N. E. 911; Hass v. Grand Rapids &c. R. Co., 47 Mich. 401, 11 N. W. 216; Shufelt v. Flint &c. R. Co., 96 Mich. 327, 55 N. W. 1013; Clark v. Northern Pac. R. Co., 47 Minn. 380, 50 N. W. 365; Louisville &c. R. Co. v. French, 69 Miss. 121, 12 So. 338; Kelly v. Chicago &c. R. Co., 88 Mo. 534; Pennsylvania Co. v. Morel, 40 Ohio St. 338; Abbott v. Dwinnell, 74 Wis. 515, 43 N. W. 496; Olson v. Chicago &c. R. Co., 81 Wis. 41, 50 N. W. 412. See also Central of Georgia R. Co. v. Barnett, 151 Ala. 407, 44 So. 392; Flemming v. Western &c. R. Co., 49 Cal. 253; Colorado &c. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801; Atchison &c. R. Co. v. Townsend, 39 Kans. 115, 17 Pac. 804; Chicago &c. R. Co. v. Fisher, 49 Kans. 460, 30 Pac. 462; Fletcher v. Fitchburg R. Co., 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743 and note; Chase v. Maine Cent. R. Co., 167 Mass. 383, 388, 45 N. E. 911; Rogers v. Boston &c. R. Co., 187 Mass. 217, 72 N. E. 945; Phillips v. Detroit &c. R. Co., 111 Mich. 274, 66 Am. St. 392, 69 N. W. 946; Mantel v. Chicago &c. R. Co., 33 Minn. 62; Louisville &c. R. Co. v. Crominanty, 86 Miss. 464, 38 So. 633; Henze v. St. Louis R. Co., 71 Mo. 636; Merkle v. New York &c. R. Co., 49 N. J. L. 473, 9 Atl. 680; Clark v. St. Louis &c. R. Co., 24 Okla. 764, 108 Pac. 361; Blackburn v. Southern Pac. Co., 34 Ore. 215, 55 Pac. 225, 227; Ellis v. Lake Shore &c. R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. 914; Ash v. Wilmington &c. R. Co., 148 Pa. St. 133, 23 Atl. 898; Cable v. Spokane &c. R. Co., 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224; Seefeld v. Chicago &c. R. Co., 70 Wis. 216, 35 N. W. 278, 5 Am. St. 168.

[88] Cincinnati &c. R. Co. v. Howard, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593, 19 Am. St. 96; Louisville &c. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60, 88 Am. Dec. 482; Pennsylvania Co. v. Beale, 73 Pa. St. 504, 13 Am. Rep. 753; Ely v. Pittsburgh &c. R. Co., 158 Pa. St. 233, 27 Atl. 970. But see Cohen v. Philadelphia &c. R. Co., 211 Pa. St. 227, 60 Atl. 729; Gray v. Pennsylvania R. Co., 172 Pa. St. 383, 33 Atl. 697. In a note to the case of Illinois Central R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358, 60 Am. & Eng. R. Cas. 690, 694, a great number of cases are collected, and they are, impliedly, at least asserted to support the position that the general rule is

it can justly be affirmed, as matter of law, that there is a duty to stop in all cases, but we do think that the duty often exists in cases where there is an obstruction to sight or hearing, and that where the surroundings are such that but one conclusion can be reasonably drawn, and that conclusion is that it is negligence to proceed without halting, the court should without hesitation direct a verdict if no halt is made.[89] In the majority of cases, however, the question is one of fact, or a mixed question of law and fact, rather than a pure question of law.[90]

that the traveler must always stop, but many of the cases cited do not go so far. There is, however, substantial agreement upon the proposition that when a reasonably effective observation cannot be made without stopping, then the traveler must stop and look and listen. We think it entirely safe to affirm that the presence of obstructions invariably requires increased care and vigilance on the part of the traveler. In Terre Haute &c. R. Co. v. Clark, 73 Ind. 168, Woods, J. said: "The counsel for the appellees insist that the presence of the houses obstructing the view, and the fact that it was snowing, were circumstances that made it gross negligence on the part of the appellant to move the train at the rate of speed at which it was running at the time of the accident. It seems to us, on the contrary, that there were circumstances which enhanced the degree of caution with which the deceased ought to have approached the crossing." It seems, also, that under peculiar circumstances ordinary and reasonable care may require the traveler to even get out of his vehicle and look, or lead his horse. Pennsylvania Co. v. Beale, 73 Pa. St. 504, 13 Am. Rep. 753; Kintner v. Pennsylvania R. Co., 204 Pa. St. 497, 54 Atl. 276, 93 Am. St. 795; Chicago &c. R. Co. v. Thomas, 155 Ind. 634, 640, 58 N. E. 1040. But compare Louisville &c. R. Co. v. Bryant, 141 Ala. 292, 37 So. 370; Pittsburgh &c. R. Co., v. Terrell, 177 Ind. 447, 95 N. E. 1109; Hinkle v. Richmond &c. R. Co., 109 N. Car. 472, 13 S. E. 84, 26 Am. St. 581; Chicago &c. R. Co. v. Turner, 33 Ind. App. 264, 69 N. E. 484.

[89] Blackburn v. Southern Pac. Co., 34 Ore. 215, 55 Pac. 225, 227 (quoting text). See also Philadelphia &c. R. Co. v. Holden, 93 Md. 417, 49 Atl. 625; Hook v. Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360; Shotte v. Erie R. Co., 121 Fed. 678.

[90] Gray v. Pennsylvania Co., 172 Pa. St. 383, 33 Atl. 697; Davidson v. Lake Shore &c. R. Co., 171 Pa. St. 522, 33 Atl. 86; Chicago &c. R. Co. v. Daun, 53 Ind. App. 382, 386, 101 N. E. 734 (citing text); Southern R. Co. v. Davis, 34 Ind. App. 377, 72 N. E. 1053, 1054 (citing text, but holding the plaintiff guilty of contributory negligence).

§ 1664 (1168). Attempting to cross in front of an approaching engine or train.—The general rule is that it is negligence for a traveler to attempt to cross closely in front of an engine or train which he sees or knows is approaching the crossing, for a person who knows of danger is under an obligation to refrain from incurring it and endeavoring to avoid it upon a calculation of chance.[91] Where a train is at such a distance as that an ordinarily prudent man would, without hesitation, attempt to cross the track, it may be that there is no negligence.[92] But where an attempt to cross in front of an approaching train is voluntarily made upon a nice calculation of chances the person making the attempt will be regarded as negligent if he under-

[91] Railroad Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; Horn v. Baltimore &c. R. Co., 54 Fed. 301; Korrady v. Lake Shore &c. R. Co., 131 Ind. 261, 29 N. E. 1069; Grows v. Maine Central &c. R. Co., 67 Maine 100; Young v. Old Colony R. Co., 156 Mass. 178, 30 N. E. 560; Carney v. Chicago &c. R. Co., 46 Minn. 220, 48 N. W. 912; Watson v. Mound City &c. R. Co., 133 Mo. 246, 34 S. W. 573; Wendell v. New York &c. R. Co., 91 N. Y. 420; McNeal v. Pittsburgh &c. R. Co., 131 Pa. St. 184, 18 Atl. 1026; Marks v. Petersburg R. Co., 88 Va. 1, 13 S. E. 299. See also Southern R. Co. v. Carroll, 138 Fed. 638; Martz v. Pacific Elect. Ry. Co., 31 Cal. App. 592, 161 Pac. 16; Ohio &c. R. Co. v. Maisch, 29 Ill. App. 640; Chicago &c. R. Co. v. Laughlin, 74 Kans. 567, 87 Pac. 749; Pritchard v. Atchison &c. Ry. Co., 99 Kans. 600, 162 Pac. 315; Khoury v. Louisiana &c. Ry. Co., 140 La. Ann. 369, 72 So. 998; Studley v. St. Paul &c. R. Co., 48 Minn. 249, 51 N. W. 115; Porter v. Missouri Pac. R. Co., 199 Mo. 82, 97 S. W. 880; Coby v. Quincy &c. R. Co., 174 Mo. App. 648, 161 S. W. 290; Collins v. Long Island &c. R. Co., 56 Hun 647, 10 N. Y. S. 701; Belton v. Baxter, 54 N. Y. 245, 13 Am. Rep. 578; Davenport v. Brooklyn City Railroad Co., 100 N. Y. 632, 3 N. E. 305; Buzby v. Philadelphia &c. R. Co., 126 Pa. St. 559, 17 Atl. 895, 12 Am. St. 919; Hovenden v. Pennsylvania R. Co., 180 Pa. St. 731, 36 Atl. 731; Lewis v. Puget Sound R. Co., 4 Wash. 188, 29 Pac. 1061.

[92] Thomas v. Delaware &c. R. Co., 8 Fed. 729; Bruggeman v. Illinois Cent. R. Co., 147 Iowa 187, 123 N. W. 1007, Ann. Cas. 1912B, 876; Detroit &c. R. Co. v. Van Steinburg, 17 Mich. 99; Welch v. Michigan Cent. R. Co., 147 Mich. 207, 110 N. W. 1069; Bonnell v. Delaware &c. R. Co., 39 N. J. L. 189; Mentz v. Second Ave. R. Co., 3 Abb. App. (N. Y.) 274; Baxter v. Second Ave. R. Co., 30 How. Pr. (N. Y.) 219; Langhoff v. Milwaukee &c. R. Co., 19 Wis. 489. See also Illinois Cent. R. Co. v. Hays, 27 Ky. 91, 84 S. W. 338; Ward v. Marshalltown &c. R. Co., 132 Iowa 578, 108 N. W. 323.

takes to proceed upon the assumption that he has correctly calculated the chances of crossing in safety[93] and is thereby injured. The failure of the employes of the company to give warning through the appropriate signals is not the proximate cause of the injury where the plaintiff sees the train and assumes the risk of crossing in front of it,[94] so that in such a case there are really two grounds of defense, contributory negligence and the failure to show that the negligence of the defendant was the proximate cause of the injury.[95]

§ 1665 (1169). Passing under, over or between cars.—Although a railroad company may be guilty of negligence in suddenly moving cars without warning which it has left at a crossing, with a space between them inviting people to pass through,[96] yet there can be no recovery for mere negligence

[93] Graf v. Chicago &c. R. Co., 94 Mich. 579, 54 N. W. 388; Purl v. St. Louis &c. Railroad Co., 72 Mo. 168; Wendell v. New York &c. R. Co., 91 N. Y. 420; Lake Shore &c. R. Co. v. Geiger, 8 Ohio C. C. 41; Hansen v. Chicago &c. R. Co., 83 Wis. 631, 53 N. W. 909; 2 Thomp. Neg. (2nd ed.) § 1669. See also Dieckmann v. Chicago &c. R. Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A. (N. S.) 339, 139 Am. St. 420; McGee v. Consolidated St. R. Co., 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. 507; Terien v. St. Paul City R. Co., 70 Minn. 532, 73 N. W. 412; Watson v. Mound City R. Co., 133 Mo. 246, 34 S. W. 573; Craig v. Chicago &c. R. Co., 97 Nebr. 426, 150 N. W. 374, 378; Guilmont v. Central Vt. R. Co., 78 Vt. 185, 62 Atl. 54. But see Alexander v. Richmond &c. R. Co., 112 N. Car. 720, 16 S. E. 896; Olsen v. Oregon &c. R. Co., 9 Utah 129, 33 Pac. 623. In Stearns v. Boston &c. R. Co., 75 N. H. 40, 71 Atl. 21, the question was held for the jury as to whether ordinary care was exercised.

[94] In Pakalinsky v. New York &c. R. Co., 82 N. Y. 424, the court, in speaking of the question of proximate cause, said: "He thus had all the notice the ringing of a bell could have given him, and the omission had nothing whatever to do with the accident." See generally Helm v. Louisville &c. R. Co. (Ky.), 16 S. W. 125; Gresham v. Louisville &c. R. Co., 15 Ky. L. 599, 24 S. W. 869; Belton v. Baxter, 54 N. Y. 245, 13 Am. Rep. 78; Culhane v. New York &c. R. Co., 60 N. Y. 133; Sheldon v. Hudson River &c. R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

[95] Text quoted in Chicago &c. R. Co. v. Williams (Tex. Civ. App.), 41 S. W. 501, 502. See also Guilmont's Adm'r v. Central Vt. R. Co., 78 Vt. 185, 62 Atl. 54.

[96] Schmitz v. St. Louis &c. R. Co., 119 Mo. 256, 24 S. W. 472, 23

in this respect if the injured party is guilty of contributory negligence, which is a proximate cause of his injury.[97] In such cases question of negligence on the part of the company and that of contributory negligence on the part of the person injured are usually questions of fact for the jury to determine under all the circumstances.[98] But where no space is left between the cars, and an engine is attached to them which is liable to move them at any moment, one who attempts to pass under or between them may be declared guilty of contributory negligence as matter of law.[99] The same is true where he

L. R. A. 250; Cleveland &c. R. Co. v. Keely, 138 Ind. 600, 37 N. E. 406; Ft. Worth &c. R. Co. v. Dennis (Tex.), 33 S. W. 884. So, where train had blocked the crossing for an unreasonable time and many persons had crossed over and between the cars during that time. Gesas v. Oregon &c. R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. (N. S.) 1074, where other cases on that phase of the subject are reviewed.

[97] See authorities cited in following notes. Thus, in a recent case, where cars had been left at a crossing with an open space between them, while the trainmen were switching, and the plaintiff's intestate was found caught between them after the space was closed up, but no one saw the accident or knew what care, if any, he exercised, it was held there could be no recovery, as the burden was upon the plaintiff to show freedom from contributory negligence, and that the court properly directed a verdict for the defendant. Kauffman v. Cleveland &c. R. Co., 144 Ind. 456, 43 N. E. 446. So in Passman v. West Jersey &c. R. Co., 68 N. J. L. 719, 54 Atl. 809, 61 L. R. A. 609, 96 Am. St. 573, it is held that cutting cars at a crossing is not an invitation to cross without using senses and taking reasonable precaution, and that bicycle riders, as well as pedestrians must do so. See also Curtis v. St. Louis &c. R. Co., 96 Ark. 394, 131 S. W. 947, 34 L. R. A. (N. S.) 466, Ann. Cas. 1912B, 685, and cases there cited.

[98] Chicago &c. R. Co. v. Prescott, 59 Fed. 237, 23 L. R. A. 654; Cleveland &c. R. Co. v. Keely, 138 Ind. 600, 37 N. E. 406; Weber v. Atchison &c. R. Co., 54 Kans. 389, 38 Pac. 569; Baltimore &c. R. Co. v. Fitzpatrick, 35 Md. 32; Henderson v. St. Paul &c. R. Co., 52 Minn. 497, 55 N. W. 53; Vicksburg &c. R. Co. v. Alexander, 62 Miss. 496; Burger v. Missouri Pac. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. 379; Schmitz v. St. Louis &c. R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Walker v. Southern R. Co., 77 S. Car. 161, 57 S. E. 764; Fort Worth &c. R. Co. v. Dennis (Tex.), 33 S. W. 884. See also Murray v. Fitchburg R. Co., 165 Mass. 448, 43 N. E. 190.

[99] Memphis &c. R. Co. v. Cope-

attempts to climb over them without looking to see whether they are attached to an engine or not and is injured in consequence thereof,[1] or to pass between cars which had broken loose, and which he knows, or ought to know by using his faculties, are likely to move at any moment.[2] So, it has been

land, 61 Ala. 376; Westbrook v. Kansas City &c. R. Co., 170 Ala. 574, 54 So 231 (and brakeman has no authority to invite and give assurance of safety); Studer v. Southern Pac. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. 39; Central R. Co. v. Dixon, 42 Ga. 327; Andrews v. Central R. Co., 86 Ga. 192, 10 L. R. A. 58, 45 Am. & Eng. R. Cas. 171; Russell v. Central &c. R. Co., 119 Ga. 705, 46 S. E. 858; Rumpel v. Oregon &c. R. Co., 4 Idaho 13, 35 Pac. 700; Chicago &c. R. Co. v. Dewey, 26 Ill. 255, 79 Am. Dec. 374; Howard v. Kansas City &c. R. Co., 41 Kans. 403, 21 Pac. 267 (held where he climbed over at the suggestion of the brakeman); Jones v. Illinois Cent. R. Co., 31 Ky. L. 825, 104 S. W. 258, 13 L. R. A. (N. S.) 1066, and other cases cited in note; Lewis v. Baltimore &c. R. Co., 38 Md. 588, 17 Am. Rep. 521; McMahon v. Northern &c. R. Co., 39 Md. 438; Hudson v. Wabash &c. R. Co., 123 Mo. 445, 27 S. W. 717; Rauch v. Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747; Rodriguez v. International &c. R. Co., 27 Tex. Civ. App. 325, 64 S. W. 1005; Haldan v. Great Western R. Co., 30 U. C. C. P. 89. Contra, Spencer v. Baltimore &c. R. Co., 4 Mackey (D. C.) 138, 54 Am. Rep. 269; 2 Thomp. Neg. (2nd. ed.) § 1674. And see Sheridan v. Baltimore &c. R. Co., 101 Md. 50, 60 Atl. 280. The text is cited with approval in Curtis v. St. Louis &c. R. Co., 96 Ark. 394, 131 S. W. 947, Ann. Cas. 1912B, 685, 687, 34 L. R. A. (N. S.) 466; and in Gulf &c. R. Co. v. Dus, 44 Okla. 118, 143 Pac. 852, L. R. A. 1918E, 396, 399, where it is correctly held that the company is not guilty of negligence in not anticipating such action and giving warning that it is about to start, citing also Platt v. Vicksburg &c. R. Co., 134 La. 444, 64 So. 282, 50 L. R. A. (N. S.) 1012, Ann. Cas. 1916A, 507.

[1] Corcoran v. St. Louis &c. R. Co., 105 Mo. 399, 16 S. W. 411, 24 Am. St. 394; Hudson v. Wabash R. Co., 101 Mo. 13, 14 S. W. 15; O'Mara v. Delaware &c. Canal Co., 18 Hun (N. Y.) 192; Magoon v. Boston &c. R. Co., 67 Vt. 177, 31 Atl. 156. See also Hall v. Cleveland &c. R. Co., 15 Ind. App. 496, 44 N. E. 489; Curtis v. St. Louis &c. R. Co., 96 Ark. 394, 131 S. W. 947, 34 L. R. A. (N. S.) 466, Ann. Cas. 1912B, 685, and other cases cited in notes.

[2] Lake Shore &c. R. Co. v. Pinchin, 112 Ind. 592, 13 N. E. 677. Approved in Magoon v. Boston &c. R. Co., 67 Vt. 177, 31 Atl. 156. See also Pannell v. Nashville &c. R. Co., 97 Ala. 298, 12 So. 236; Lake Shore &c. R. Co. v. Clemens, 5 Ill. App. 77; Hall v. Cleveland &c. R. Co., 15 Ind. App. 496, 44 N. E. 489; Illinois Cent. R. Co. v. Broughton, 25

held that a child, only thirteen years old, was guilty of negligence as matter of law in attempting to pass between two sections of a freight train eight feet apart, although they were at a standstill when she reached the crossing, but were started together just before she stepped on the track between them.[3] But it is held that where the company obstructs a crossing for an unreasonable time or longer than the law permits, one does not become a trespasser, so as to preclude recovery on that ground alone by attempting to cross over or between or around the cars.[4]

§ 1666 (1170). Smoke and like obstructions to the view.— Where the smoke emitted from moving trains obscures the view it is the duty of the traveler to wait until the smoke has

Ky. L. 1752, 78 S. W. 876; Flynn v. Eastern R. Co., 83 Wis. 238, 53 N. W. 494.

[3] Wallace v. New York &c. R. Co., 165 Mass. 236, 42 N. E. 1125. See also Shirk v. Wabash R. Co., 14 Ind. App. 126, 42 N. E. 656; Central &c. R. Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634; Pittsburgh &c. R. Co. v. Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767. But compare Philadelphia &c. R. Co. v. Layer, 112 Pa. St. 414, 3 Atl. 874; Chicago &c. R. Co. v. Johnson (Tex.), 111 S. W. 758.

[4] Smith v. Savannah &c. R. Co., 84 Ga. 698, 11 S. E. 455; Lake Erie &c. R. Co. v. Mackey, 53 Ohio St. 37, 41 N. E. 980, 53 Am. St. 641; Crowley v. Pa. R. Co., 231 Pa. St. 286, 80 Atl. 175; Walker v. Southern R. Co., 77 S. Car. 161, 12 Ann. Cas. 591; Littlejohn v. Richmond &c. R. Co., 49 S. Car. 12, 26 S. E. 967; Texas &c. R. Co. v. Bean, 55 Tex. Civ. App. 341, 119 S. W. 328; Gesas v. Oregon &c. R. Co., 33 Utah 156, 93 Pac. 274, 13 L. R. A. (N. S.) 1074. See also Johnson v. Atlantic &c. R. Co., 59 Fla. 302, 51 So. 851, 138 Am. St. 126; Kurt v. Lake Shore &c. R. Co., 194 N. Y. S. 98, 88 N. E. 1122. But compare Hasting v. Southern R. Co., 143 Fed. 260, 5 L. R. A. (N. S.) 775, and note where cases on both sides of the question as to whether one going on the company's property to get around the train is a trespasser as cited; McCollum v. Cleveland &c. R. Co., 154 Ind. 97, 55 N. E. 1024. In Lynch v. Boston &c. R. Co., 226 Mass. 522, 116 N. E. 248, L. R. A. 1917F, 819, it is held that the fact that a train obstructing a crossing will delay a traveler fifteen minutes in getting his dinner does not justify him in going outside the limits of the highway to cross, and that the invitation of the crossing tender to cross outside the limits of the highway was not within the scope of his authority and did not bind the company. But compare Spain v. St. Louis &c. R. Co. (Mo. App.), 190 S. W. 358.

disappeared and the view becomes unobstructed.[5] Cases of the class to which we have referred illustrate and enforce the general principle that it is not enough that the traveler looks and listens, but he must also exercise care to choose a place where the act of looking and listening will enable him to discover and avoid danger from moving trains. The mere fact that the traveler looked and listened will not be a performance of the duty required of him by law, inasmuch as merely looking and listening from a position where such an act will be unavailing does not come up to the standard prescribed.[6]

[5] McCrory v. Chicago &c. R. Co., 31 Fed. 531; Chicago &c. R. Co. v. Andrews, 130 Fed. 65, 73; Oleson v. Lake Shore &c. R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; Quinn v. Chicago &c. R. Co., 162 Ind. 442, 70 N. E. 526; West Jersey &c. R. Co. v. Ewan, 55 N. J. L. 574, 27 Atl. 1064; Heaney v. Long Island &c. R. Co., 112 N. Y. 122, 19 N. E. 422; Baltimore &c. R. Co. v. McClellan, 69 Ohio St. 142, 68 N. E. 816; Beynon v. Pennsylvania R Co., 168 Pa. St. 642, 32 Atl. 84; Hovenden v. Pennsylvania R. Co., 180 Pa. St. 731, 36 Atl. 731. See Powell v. New York &c. R. Co., 109 N. Y. 613, 15 N E. 891; Gorton v. Erie R. Co., 45 N. Y. 660; Shaber v. St. Paul &c. R. Co., 28 Minn. 103, 9 N. W. 575; Stowell v. Erie R. Co., 98 Fed. 520; Grand Trunk R. Co. v. Cobleigh, 78 Fed. 785. See also Baker v. Tacoma &c. R. Co., 44 Wash. 575, 87 Pac. 826. In Chicago &c. R. Co. v. Fisher, 49 Kans. 460, 30 Pac. 462, 55 Am. & Eng. R. Cas. 223, it was held that where the view was obstructed by clouds of dirt it was negligence on the part of the traveler to attempt to cross. The court cited, among others, the following cases: Union Pac. Railway Co. v. Adams, 33 Kans. 427, 6 Pac. 529, 19 Am. & Eng. R. Cas. 376; Atchison &c. R. Co. v. Townsend, 39 Kans. 115, 17 Pac. 804; Fletcher v. Fitchburg Railroad Co., 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743 and note; Blight v. Camden Railroad Co., 143 Pa. St. 10, 21 Atl. 995; Flemming v. Western &c. Railroad Co., 49 Cal. 253. See, for an extreme application of the general doctrine, Pennsylvania R. Co. v. Beale, 73 Pa. St. 504, 13 Am. Rep. 753. And see generally Cleveland &c. R. Co. v. Pace, 179 Ind. 415, 101 N. E. 479; Blanchard v. Maine Cent. R. Co., 116 Maine 179, 100 Atl. 666. As to what are or are not temporary obstructions within this rule and whether obstructions of a somewhat permanent character are or are not included, see and compare New York &c. R. Co. v. Theirer, 209 Fed. 316, 319 (within the rule) with Cleveland &c. R. Co. v. Markle, 187 Ind. 553, 119 N. E. 371 (not within the rule).

[6] The general doctrine stated is illustrated in a great variety of cases. Jobe v. Memphis &c. R.

§ 1667 (1171). Misleading traveler—Invitation to cross.—Where the employes of a railroad company by negligent or wrongful acts mislead a traveler, and put him off his guard, the company may be liable although the traveler may have done that which, but for the wrongful or negligent acts of the company, must have been considered negligence on his part.[7] The

Co., 71 Miss. 734, 15 So. 129; Littaur v. Narragansett &c. R. Co., 61 Fed. 591; Boston &c. R. Co. v. McGrath, 179 Fed. 323; Philadelphia &c. R. Co. v. Peebles, 67 Fed. 591; Highland &c. R. Co. v. Maddox, 100 Ala. 618, 13 So. 615; Atchison &c. R. Co. v. Booth, 53 Ill. App. 303; Reeves v. Dubuque &c. R. Co., 32 Iowa 92, 60 N. W. 243; Brehm v. Philadelphia &c. R. Co., 114 Md. 302, 79 Atl. 592; Frost v. Milwaukee &c. R. Co., 96 Mich. 470, 56 N. W. 19; Jensen v. Michigan &c. R. Co., 102 Mich. 176, 60 N. W. 57; Hayden v. Missouri &c. R. Co., 124 Mo. 566, 28 S. W. 74; Merkle v. New York &c. R. Co., 49 N. J. L. 473, 9 Atl. 680; Bates v. New York &c. R. Co., 84 Hun (N. Y.) 287, 32 N. Y. S. 337; McPeak v. New York &c. R. Co., 85 Hun (N. Y.) 107, 32 N. Y. S. 647; Syme v. Richmond &c. R. Co., 113 N. Car. 558, 18 S. E. 114; Dirk v. Northern &c. R. Co., 164 Pa. St. 243, 30 Atl. 231; Plummer v. New York &c. R. Co., 168 Pa. St. 62, 31 Atl. 887; Gangawer v. Philadelphia &c. R. Co., 168 Pa. St. 265, 32 Atl. 21; Nelson v. Duluth &c. R. Co., 88 Wis. 392, 60 N. W. 703.

[7] Central &c. Co. v. Wabash R. Co., 27 Fed. 159; Whelan v. New York &c. R. Co., 38 Fed. 15; Eddy v. Powell, 49 Fed. 814; Union Pac. R. Co. v. Rosewater, 157 Fed. 168, 15 L. R. A. (N. S.) 803; Chicago &c. R. Co. v. Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; Pennsylvania R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 130; Kleiber v. People's &c. R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; Scaggs v. Delaware &c. R. Co., 74 Hun 198, 26 N. Y. S. 323. See Tiffin v. St. Louis &c. R. Co., 78 Ark. 55, 93 S. W. 564, 566 (citing text); St. Louis &c. R. Co. v. Hitt, 76 Ark. 227, 88 S. W. 908, 990; Dieckmann v. Chicago &c. R. Co., 145 Iowa 250, 121 N. W. 767, 31 L. R. A. (N. S.) 338, 139 Am. St. 420; Illinois Cent. R. Co. v. Ruoff, 141 Ky. 623, 133 S. W. 553; Woehrle v. Minnesota &c. Co., 82 Minn. 105, 84 N. W. 791, 52 L. R. A. 348; Dickinson v. Erie R. Co., 81 N. J. 464, 81 Atl. 104, 37 L. R. A. (N. S.) 150; Feeney v. Long Island &c. R. Co., 116 N. Y. 375, 22 N. E. 402, 39 Am. & Eng. R. Cas. 639, 5 L. R. A. 544; Messinger v. Pennsylvania R. Co., 215 Pa. 497, 64 Atl. 682. The rule where the flagman does not see the traveler, Louisville &c. R. Co. v. Webb, 90 Ala. 185, 8 So. 518, 11 L. R. A. 674; Little Rock &c. R. Co. v. Cullen, 54 Ark. 431, 16 S. W. 169. The absence of a flagman where one is occasionally kept is not an invitation to cross. Whalen v. New York &c. R. Co., 58 Hun 431, 12 N. Y. 527. See also Peck v. Grand

negligence of the company will not, however, excuse the traveler for a failure to himself exercise ordinary care. As we have elsewhere shown, the better reasoned decisions adjudge that in all cases the traveler must himself exercise due care, and not rely entirely upon flagmen or other employes of the company.[8] Where the employes of the company direct or invite a traveler to cross the track the traveler may rely upon such invitation, provided it is not plainly and clearly imprudent or hazardous to attempt to do so.[9] If, however, the

Trunk &c. R. Co., 155 Mich. 430, 119 N. W. 578.

[8] Berry v. Pennsylvania &c. R. Co., 48 N. J. L. 141, 4 Atl. 303; Denver &c. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505. In the case cited it was said: "It was error for the court to charge the jury as a matter of law that the plaintiff was excused from doing anything for his own safety except to obey the signals of the flagman." See also Brommer v. Pennsylvania R. Co., 179 Fed. 577, 29 L. R. A. (N. S.) 924; Lake Erie &c. R. Co. v. Fike, 35 Ind. App. 554, 74 N. E. 636; Conkling v. Erie R. Co., 63 N. J. 338, 43 Atl. 666, 669 (citing text); Swanson v. Central R. Co., 63 N. J. L. 605, 44 Atl. 852; Brennan v. Pennsylvania R. Co., 73 N. J. 147, 62 Atl. 177, 178; Missouri Pac. Ry. Co. v. Ray, 25 Tex. Civ. App. 567, 63 S. W. 912.

[9] Chicago &c. R. Co. v. Prescott, 59 Fed. 237, 23 L. R. A. 654 citing Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 55 Am. & Eng. R. Cas. 159, 36 L. ed. 485; Eddy v. Powell, 49 Fed. 814; Chicago &c. R. Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Cleveland &c. R. Co. v. Keely, 138 Ind. 600, 37 N. E. 406; Lake Erie &c. R. Co. v. Fike, 35 Ind. App. 564, 74 N. E. 636; Spencer v. Illinois &c. R. Co., 29 Iowa 55; Sweeny v. Old Colony &c. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644 and note; Chaffee v. Boston &c. R. Co., 104 Mass. 108; Wheelock v. Boston &c. R. Co., 105 Mass. 203; Robbins v. Fitchburg &c. R. Co., 161 Mass. 145, 36 N. E. 752; Henning v. Caldwell, 63 Hun 635, 18 N. Y. S. 339; Bond v. New York &c. R. Co., 69 Hun 476, 23 N. Y. S. 450; Philadelphia &c. R. Co. v. Killips, 88 Pa. St. 405; St. Louis &c. R. Co. v. Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946; Hoye v. Chicago &c. R. Co., 62 Wis. 672, 19 Am. & Eng. R. Cas. 347; Lunt v. London &c. R. Co., L. R. 1 Q. B. 277; Directors &c. v. Wanless, L. R. 7 H. of L. 12. He cannot rely on the invitation of the employe where it is clearly hazardous and imprudent. Charlton v. Baltimore &c. R. Co., 252 Pa. St. 107, 97 Atl. 126. The extent to which he may do so is said to usually be a question of fact unless he relied exclusively thereon. Woehrle v. Minnesota &c. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348. And an invitation by an employe having no express or implied authority may

danger is such that a man of ordinary prudence would not undertake to cross then it may be contributory negligence to undertake to cross.[10] And an adult traveler has no right to act entirely upon directions or invitations of employes and to omit the exercise of his own faculties, for under all circumstances he is bound to exercise care proportionate to the dangers of the place of which dangers he is bound to take notice. Some of the decisions hold that the fact that statutory signals are not given, or municipal ordinances obeyed, is sufficient evidence of an invitation to cross, and excuses want of care on the part of the traveler,[11] but this is certainly a mistake. If the failure to obey statutory requirements or provisions of municipal ordinances excused the traveler from himself exercising the care which the law requires of him there would seldom be any question of contributory negligence, and a multitude of decisions would be rendered nugatory.[12] The omission of signals or the like cannot ordinarily be regarded as a direction or invitation to cross, or as an assurance that there is no danger.[13] It is the duty of a railway company to exercise

not excuse him. Westbrook v. Kansas City &c. R. Co., 170 Ala. 574, 54 So. 231, 34 L. R. A. (N. S.) 469; Southern R. Co. v. Clark, 32 Ky. L. 69, 105 S. W. 384, 13 L. R. A. (N. S.) 1071. See also Lynch v. Boston &c. Maine R., 226 Mass. 522, 116 N. E. 248, L. R. A. 1912E, 819.

[10] But in almost all such cases the question is one of fact for the jury.

[11] Pittsburg &c. R. Co. v. Martin, 82 Ind. 476. The decision in the case cited seems to be contrary to the later decisions of the same court. Miller v. Terre Haute &c. R. Co., 144 Ind. 323, 43 N. E. 257; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593, 19 Am. St. 96. But other recent cases cite it with approval on some phases of the general subject.

[12] May v. Texas &c. Ry. Co., 123 La. 647, 49 So. 272, 273 (quoting text).

[13] Blount v. Grand Trunk &c. R. Co., 61 Fed. 375; Louisville &c. R. Co. v. Webb, 90 Ala. 185, 8 So. 518, 11 L. R. A. 674; Chicago &c. R. Co. v. Nuney, 19 Colo. 36, 34 Pac. 288; Cadwallader v. Louisville &c. R. Co., 128 Ind. 518, 27 N. E. 161; Smith v. Wabash &c. R. Co., 141 Ind. 92, 40 N. E. 270; Pittsburgh &c. R. Co. v. Bennett, 9 Ind. App. 92, 35 N. E. 1033; Blackwell v. St. Louis &c. R. Co., 47 La. Ann. 268, 16 So. 818, 49 Am. St. 371; Gardner v. Detroit &c. R. Co., 97 Mich. 240, 56 N. W. 603; Studley v. St. Paul &c. R. Co., 48 Minn. 249, 51 N. W. 115; Drake v. Chicago &c. R. Co., 51 Mo. App. 562; Delaware &c. R. Co. v. Hefferan, 57 N. J. L. 149, 30 Atl. 578; Krauss v.

ordinary care in the management of gates at crossings, and it is responsible to a traveler who is himself without fault and is injured by a negligent management of such gates.[14] But a traveler who fails to keep a vigilant lookout for signals of gatemen or flagmen, or who gives them no heed, is guilty of negligence,[15] at least under ordinary circumstances.

§ 1668 (1172). Children and infirm persons.—There is much confusion and conflict upon the question as to whether persons of non-age may be guilty of contributory negligence; not, indeed, as to whether persons, although not of full legal age,

Wallkill &c. R. Co., 69 Hun 482, 23 N. Y. S. 432; Connerton v. Delaware &c. R. Co., 169 Pa. St. 339, 32 Atl. 416; Hogan v. Tyler, 90 Va. 19, 17 S. E. 723; ante, § 1652. But see Sullivan v. Missouri &c. R. Co., 117 Mo. 214, 23 S. W. 149; Cincinnati &c. R. Co. v. Farra, 66 Fed. 496; Jennings v. St. Louis &c. R. Co., 112 Mo. 268, 20 S. W. 490. See also Cleveland &c. Ry. Co. v. Heine, 28 Ind. App. 163, 62 N. E. 455.

[14] Feeney v. Long Island &c. R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544, 39 Am. & Eng. R. Cas. 639 (citing, as to the degree of care required of the traveler, Weber v. New York &c. R. Co., 58 N. Y. 451, 456; Whelan v. New York &c. R. Co., 38 Fed. 15; Pennsylvania &c. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136; Bernhard v. Rennselaer &c. R. Co., 1 Abb. App. (N. Y.) Dec. 131; Callaghan v. Delaware &c. R. Co., 52 Hun 276, 5 N. Y. S. 285; Newson v. New York &c. R. Co., 29 N. Y. 383; Beisiegel v. New York &c. R. Co. 34 N. Y. 622, 90 Am. Dec. 741 and note; Barker v. Savage, 45 N. Y. 191, 6 Am. Rep. 66; McGovern v. New York &c. R. Co., 67 N. Y. 417). See upon general subject of negligence of gateman, Fletcher v. Fitchburg R. Co., 149 Mass. 127, 3 L. R. A. 743; Parsons v. New York &c. R. Co., 113 N. Y. 355, 3 L. R. A. 683, 10 Am. St. 450. As to the duty of the traveler to exercise due care, see Greenwood v. Philadelphia &c. R. Co., 124 Pa. St. 572, 17 Atl. 188, 3 L. R. A. 42, 10 Am. St. 614; Lake Shore &c. R. Co. v. Frantz, 127 Pa. St. 297, 18 Atl. 22, 4 L. R. A. 389.

[15] Deikman v. Morgan &c. R. Co., 40 La. Ann. 787, 5 So. 76; Baltimore &c. R. Co. v. Colvin, 118 Pa. St. 230, 12 Atl. 337. But see Kelly v. Southern &c. R. Co., 28 Minn. 98, 9 N. W. 588. See generally Union &c. R. Co. v. State, 72 Md. 153, 19 Atl. 449; Allerton v. Boston &c. R. Co., 146 Mass. 241, 15 N. E. 621; Salmon v. New York &c. R. Co., 52 Hun (N. Y.) 612, 5 N. Y. S. 225; Lake Shore &c. R. Co. v. Ehlert, 63 Ohio St. 320, 58 N. E. 812. Attention directed to a train that had previously passed held no excuse for not looking and listening in Bush v. Union Pac. R. Co., 62 Kans. 709, 64 Pac. 624.

may be guilty of contributory negligence, but upon the question as to what age shall be deemed the age of discretion so as to make it the duty of a person of non-age to exercise that degree of care required of adult persons at railroad crossings. We think that, as a rule, children of "a tender age," that is, very young children, cannot as a matter of law be deemed guilty of contributory negligence for failing to look and listen at railroad crossings,[16] but that where the age and intelligence of the child are such that it can understand the dangers of the place it may be deemed guilty of contributory negligence in attempting to cross without exercising care.[17] In most in-

[16] Baker v. Flint &c. R. Co., 68 Mich. 90, 35 N. W. 836. The case cited carries the doctrine very far. Central &c. R. Co. v. Golden, 93 Ga. 510, 21 S. E. 68; Cleveland &c. R. Co. v. Tartt, 64 Fed. 830. See Lake Shore &c. R. Co. v. Orvis, 1 Ohio Dec. (C. C.) 492. Compare Cox v. New York &c. R. Co., 69 App. Div. (N. Y.) 451, 74 N. Y. S. 1011.

[17] In Shirk v. Wabash &c. R. Co., 14 Ind. App. 126, 42 N. E. 656, a girl of twelve years of age was held guilty of contributory negligence, but in Citizens' Street R. Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723, the same court held that a child five years of age could not be guilty of contributory negligence, citing Terre Haute &c. R. Co. v. Tappenbock, 9 Ind. App. 422, 36 N. E. 915 in which it was held that a child nine years of age could not be presumed to be incapable of exercising ordinary care. In Wendell v. New York &c. R. Co., 91 N. Y. 131, a boy seven years of age was held to be guilty of contributory negligence. Chicago &c. R. Co. v. White, 46 Ill. App. 446; Atchison &c. R. Co. v. Todd, 54 Kans. 551, 38 Pac. 804; Marden v. Boston &c. R. Co., 159 Mass. 393, 34 N. E. 404; Lennon v. New York &c. R. Co., 65 Hun 578, 20 N. Y. S. 557; Friess v. New York &c. R. Co., 67 Hun (N. Y.) 205, 22 N. Y. S. 104; Serano v. New York &c. R. Co., 114 App. Div. 684, 99 N. Y. S. 1103 (child between five and six). But see Omaha &c. R. Co. v. Morgan, 40 Nebr. 604, 59 N. W. 81; Spillane v. Missouri &c. R. Co., 111 Mo. 555, 20 S. W. 293; Chicago &c. R. Co. v. Russell, 72 Nebr. 114, 100 N. W. 156, it is said that it is no arbitrary rule as to the exact age. In Anderson v. Central R. Co., 68 N. J. L. 269, 53 Atl. 391, a verdict was directed for the defendant where a child nine years of age failed to look and listen. And in several other cases children from ten to fourteen years of age were held guilty of contributory negligence. Studer v. Southern Pac. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. 39; Givens v. Kentcky Cent. R. Co., 12 Ky. L. 950, 15 S. W. 1057; Mollica v. Michigan Cent. R. Co., 170 Mich. 96, 135 N. W. 927; McGee v. Wabash R. Co., 214 Mo. 530, 114 S. W. 33; Chicago &c. R. Co. v. Laughlin, 79 Kans. 567, 87 Pac. 749; Sheets v. Connolly St. R. Co., 54 N. J. L. 518, 24 Atl. 483; Gehring v.

stances the question as to whether the person is so young as to excuse the failure to exercise care, or at least as to whether he exercised the care and discretion ordinarily possessed and exercised by children of the same age, capacity and intelligence, is a question of fact for the jury,[18] but there are unquestionably cases in which the court may adjudge as matter of law that the age of the person, although majority had not been attained, is such as to require him to look and listen and to this extent the same measure of care as that required of adult persons,[19] or at least some vigilance and caution. The age of the injured child is always proper matter for consideration in determining whether there was contributory negligence, but age is by no means the only matter to be considered, unless the child is so young that as matter of law it can

Atlantic City R. Co., 75 N. J. L. 490, 68 Atl. 61, 14 L. R. A. (N. S.) 312; Tucker v. New York &c. R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. 670. But there are decisions to the contrary, especially where there was something to mislead or distract attention. Louisville &c. R. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010; Cleveland &c. R. Co. v. Miles, 162 Ind. 646, 654, 70 N. E. 985; Duggan v. Boston &c. R. Co., 74 N. H. 250, 66 Atl. 829; Finklestein v. New York &c. R. Co., 41 Hun (N. Y.) 34; McGuire v. Chicago &c. R. Co., 37 Fed. 54.

[18] Central &c. Co. v. Wabash R. Co., 31 Fed. 246; Bay Shore R. Co. v. Harris, 67 Ala. 6; Baltimore &c. R. Co. v. Hickman, 40 Ind. App. 315, 81 N. E. 1086; O'Flaherty v. Union R. Co., 45 Mo. 70, 100 Am. Dec. 343; Holmes v. Missouri Pac. R. Co., 267 Mo. 149, 105 S. W. 624; Mangam v. Brooklyn &c. R. Co. 38 N. Y. 455, 98 Am. Dec. 66, and note; Sinkoff v. Lehigh Val. R. Co., 190 N. Y. 256, 83 N. E. 15; Byrne v. New York &c. R. Co., 83 N. Y. 620; Barry v. New York &c. R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Manly v. Wilmington &c. R. Co., 74 N. Car. 655; North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187; Pittsburgh &c. R. Co. v. Caldwell, 74 Pa. St. 421; Houston &c. R. Co. v. Simpson, 60 Tex. 103. See generally Weber v. Atchison &c. R. Co., 54 Kans. 389, 38 Pac. 569; East Tennessee &c. R. Co. v. Harshaw, 16 Ky. L. 526, 29 S. W. 289; Mulligan v. Curtis, 100 Mass. 512, 97 Am. Dec. 121; Wright v. Detroit &c. R. Co., 77 Mich. 123, 43 N. W. 765; Twist v. Winona &c. R. Co., 39 Minn. 164, 39 N. W. 402, 12 Am. St. 626; Payne v. Chicago &c. R. Co., 129 Mo. 405, 31 S. W. 885; Hemmingway v. Chicago &c. R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. 823, and note.

[19] Lofdahl v. Minneapolis &c. R. Co., 88 Wis. 421, 60 N. W. 795. See also Cox v. New York &c. R. Co., 69 App. Div. 451, 74 N. Y. S. 1011; Anderson v. Central &c. R. Co., 68 N. J. L. 269, 53 Atl. 391. But a com-

be adjudged incapable of exercising care for its own safety.[20] Where the employes of a railroad company see a young child on the track they cannot rightfully act upon the presumption which prevails in cases of adults that it will leave the track in time to avoid injury.[21] A person who in appearance is of mature age may, where there is nothing to indicate the contrary, be reasonably expected to leave the track before the train is upon him, but in many instances the question whether the employes were justified in acting upon the presumption referred to must be a question of fact and not of law. A blind or deaf person is not absolved from the duty to exercise due care at railroad crossings, and the general rule is that where there is a destruction or impairment of the faculties more care in some respects is required than in the case of persons in the full possession of their faculties.[22] We suppose, it is quite

paratively young child is not necessarily required to exercise the same care as an adult. Texas &c. R. Co. v. Ball, 38 Tex. Civ. App. 279, 85 S. W. 456; Thompson v. Missouri Pac. R. Co., 93 Mo. App. 548, 67 S. W. 693.

[20] Schmitz v. St. Louis &c. R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Texas &c. R. Co. v. Fletcher, 6 Tex. Civ. App. 736, 26 S. W. 446. The jury usually determines the question under all the circumstances properly bearing upon it. See Garrison v. St. Louis &c. R. Co., 92 Ark. 437, 123 S. W. 657; Mason v. Northern Pac. R. Co., 45 Mont. 474, 124 Pac. 271; Wade v. Chicago &c. R. Co., 146 Wis. 99, 130 N. W. 890.

[21] Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387. See also Duggan v. Boston &c. R. Co., 74 N. H. 250, 66 Atl. 829 But where the engineer of a fast train sees children running off from the track in plenty of time to get out of the way, he has a right to suppose they will do so, and the company is not liable because one of them catches her foot in the track and thus does not succeed in getting out of the way. Wyrick v. Southern Ry. Co., 172 N Car. 549, 90 S. E. 563. See for case in which company was held liable where the engineer with defective sight and the fireman with defective hearing did not discover the child. Missouri &c. R. Co. v. Nesbit, 43 Tex. Civ. App. 630, 97 S. W. 825.

[22] Illinois Cent. R. Co. v. Buckner, 28 Ill. 299, 81 Am. Dec. 282; Toledo &c. R. Co. v. Hammett, 220 Ill. 9, 77 N. E. 72; Snow v. Indianapolis &c. Ry. Co., 47 Ind. App. 189, 93 N. E. 1089; Williams v. Chicago &c. R. Co., 139 Iowa 552, 117 N. W. 956; Johnson v. Louisville &c. R. Co., 91 Ky. 651, 25 S. W. 754; Elkins v. Boston &c. R. Co., 115 Mass. 190; Zimmerman v. Hannibal &c. R. Co., 71 Mo. 476; Purl v. St. Louis &c. R. Co., 72 Mo. 168; Maloy v. Wabash &c. R. Co., 84 Mo. 270; West v. New

clear, however, that if the employes of the company had knowledge of the infirmities of the person upon or near the track they would have no right to act upon the presumption, which obtains in cases of adult persons really or apparently in possession of their faculties, that they will leave the track in time to avoid injury.[23] The fact that a person crossing a track is intoxicated does not absolve him from the duty to exercise that degree of care which the law requires of adult persons who undertake to cross railway tracks,[24] and the fact that a traveler is intoxicated is often a strong circumstance tending to prove contributory negligence.[25] A drunken man is not,

Jersey &c. R. Co., 32 N. J. L. 91; Morris &c. R. Co. v. Haslan, 33 N. J. L. 147; Cleveland &c. R. Co. v. Terry, 8 Ohio St. 570; Central &c. R. Co. v. Fellar, 84 Pa. St. 226; Osteen v. Southern R. Co., 76 S. Car. 368, 57 S. E. 196; Galveston &c. R. Co. v. Ryon, 80 Tex. 59, 15 S. W. 588; International &c. R. Co. v. Garcia, 75 Tex. 583, 13 S. W. 223; Marks v. Petersburg &c. R. Co., 88 Va. 1, 13 S. E. 299; Tyler v. Sites, 88 Va. 470, 13 S. E. 978. See also Oliver v. Iowa Cent. R. Co., 122 Iowa 217, 97 N. W. 1072. But it has been held that a person with an impediment in his walk is not required to exercise more care than one not so afflicted. Gulf &c. R. Co. v. Melville (Tex. Civ. App.), 87 S. W. 863.

[23] The rule is well settled that the presumption is that an adult person will leave the track in time to avert a collision with the train. Ohio &c. R. Co. v. Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. 638; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Brown v. North Carolina R. Co., 172 N. Car. 604, 90 S. E. 783; McMillan v. Atlanta &c. Ry. Co., 172 N. Car. 853, 90 S. E. 683; ante, § 1646. See also Porter v. Missouri Pac. Ry. Co., 199 Mo. 82, 97 S. W. 880. There may, of course, be circumstances which would make the general rule stated inapplicable. Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155. Thus the engineer cannot indulge the presumption where he sees a man prone on the track. Louisville &c. Ry. Co. v. Rayburn, 198 Ala. 191, 73 So. 461; Brown v. North Carolina R. Co., 172 N. Car. 604, 90 S. E. 783.

[24] Toledo &c. R. Co. v. Riley, 47 Ill. 514; Illinois Cent. R. Co. v. Hutchinson, 47 Ill. 408; Cincinnati &c. R. Co. v. Reed, 154 Ky. 380, 157 S. W 721; Kean v. Baltimore &c. R. Co., 61 Md. 154; Yarnall v. St. Louis &c. R. Co., 75 Mo. 575; Smith v. Union Pac. R. Co., 83 Nebr. 198, 119 N. W. 230; Houston &c. R. Co. v. Sympkins, 54 Tex. 615, 38 Am. Rep. 632; Norfolk &c. R. Co. v. Harman, 83 Va. 553, 8 S. E. 251. But see Mercer v. Southern R. Co., 66 S. Car. 246, 44 S. E. 750.

[25] Little Rock &c. R. Co. v. Pankhurst, 36 Ark. 371; Carlin v. Chicago

however, an outcast, and if he is so drunk as to be helpless or irresponsible, and that fact is known to the employes of the company, it is their duty to exercise reasonable care to avoid injuring him.[26] But if the employes do not know of the condition of the intoxicated person, they may, as a rule, act upon the presumption that he will exercise care and leave the track in time to avoid injury, for they are under no obligation to take unusual precautions to protect a man from the consequences of his own folly or wrong.[27]

§ 1669 (1173). **Sudden peril as affecting the duty of a traveler.**—Where the traveler is placed in a position of sudden peril by the negligence of the railroad company, the omission on his part to exercise such care as one not influenced by sudden danger would exercise is not necessarily a breach of duty constituting negligence. A person placed in a position of sudden peril by the negligence of a railroad company is not necessarily guilty of contributory negligence unless he acts recklessly and heedlessly. Where one is deprived of the power to act deliberately and calmly, the person whose wrongful act took from him that power cannot justly be permitted to aver that such precautions as under ordinary circumstances would be necessary were not taken. The cases generally recognize

&c. R., 37 Iowa 316; McIntosh v. Standard Oil Co., 89 Kans. 289, 131 Pac. 151, 47 L. R. A. (N. S.) 730, and note where additional cases are cited; Herring v. Wilmington &c. R. Co., 10 Ired. L. (N. Car.) 402, 51 Am. Dec. 395; Richardson v. Wilmington &c. R. Co., 8 Rich. (S. Car.) 120. See also Stewart v. North Carolina R. Co., 136 N. Car. 385, 48 S. E. 793.

[26] Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, and note, 16 Am. St. 334; Atchison &c. R. Co. v. Weber, 33 Kans. 543, 6 Pac. 877, 52 Am. Rep. 543; Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601. See also Murphy v. Wabash R. Co., 228 Mo. 56, 128 S. W. 481. As to intoxication as affecting the last clear chance doctrine, see note in 31 L. R. A. (N. S.) 1032.

[27] Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. 334; Welty v. Indianapolis &c. R. Co., 105 Ind. 55, 4 N. E. 410; McClelland v. Louisville &c. R. Co., 94 Ind. 276; Louisville &c. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Little Rock Ry. &c. Co. v. Billings, 173 Fed. 903, 31 L. R. A. (N. S.) 1031 and note.

and enforce the doctrine we have stated, and as to the general doctrine itself there is no substantial conflict,[28] but there is some diversity of opinion as to the manner and extent of its application. The peril which will exonerate the traveler from the exercise of that care which the law requires of travelers at railroad crossings must be in its nature an extraordinary one, in the sense that it is not such as ordinarily pertains to railroad crossings, for, as matter of fact and of law, such crossings are places of great danger, exacting from the traveler care and caution. Where a traveler, not being in fault himself, in endeavoring to escape from a sudden and threatening peril caused by the negligence of the company, places himself in a position of danger, his act is generally held not to proximately contribute to the injury, and the sole proximate cause of the injury is the negligence of the railroad company. The rule, however, can not obtain where the danger is one incident to the place, its use or surroundings, for such danger is not a sudden peril within the meaning of the law, but a danger to be anticipated

[28] Central Trust Co. v. Wabash &c. R. Co., 27 Fed. 159; Southwestern &c. Co. v. Paulk, 24 Ga. 356; Pennsylvania &c. R. Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136; Baltimore &c. R. Co. v. Abegglen, 41 Ind. App. 603, 84 N. E. 566; Michigan City v. Werner, 86 Ind. 149, 114 N. E. 636; Middleburg R. Co. v. Stallard, 24 Ky. L. 1666, 72 S. W. 17; Chesapeake &c. R. Co. v. Ogles, 24 Ky. L. 2160, 73 S. W. 751; Moore v. Maine Cent. R. Co., 106 Maine 297, 76 Atl. 871; Borders v. Boston &c. R. Co., 115 Maine 207, 98 Atl. 662; Cody v. New York &c. R. Co., 151 Mass. 462, 24 N. E. 402, 8 L. R. A. 486, and note; Barton v. Springfield, 110 Mass. 131; Weare v. Fitchburg, 110 Mass. 334; La Fond v. Boston &c. R. Co., 208 Mass. 451, 94 N. E. 693; Voak v. Northern &c. R. Co., 75 N. Y. 320; Hinton v. Southern Ry. Co., 172 N. Car. 587, 90 S. E. 756; Pennsylvania &c. Co. v. Varnau (Pa. Sf.), 15 Atl. 624; Houston &c. R. Co. v. Byrd (Tex. Civ. App.). 61 S. W. 147; Gumz v. Chicago &c. Co., 52 Wis. 672, 10 N. W. 11. See generally White's Supp. to Thomp. Neg. § 196; Schall v. Cole, 107 Pa. St. 1; Bilton v. Southern Pac. R. Co., 148 Cal. 443, 83 Pac. 440; Woolery v. Louisville &c. R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; Chicago &c. R. Co. v. Parkinson, 56 Kans. 652, 44 Pac. 615; Reary v. Louisville &c. R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. 497; Sullivan v. New York &c. R. Co., 154 Mass. 524, 28 N. E. 911; Wright v. Great Northern &c. R. Co., 8 Irish L. R. 257; Northeastern &c. R. Co. v. Wanless, L. R. 7 H. L. Cas. 12 (L. R. 6 Q. B. 481).

and guarded against by proper care and precaution.[29] The rule, however, in some jurisdictions, goes further than to exonerate the traveler where the peril is caused by the act of the railroad company, for, if without fault himself, the traveler is placed in a position of sudden peril by a third person or by some accident, as, for instance, by horses running away, he may be absolved from exercising that degree of care required of one under ordinary circumstances.[30] Some of the courts carry the rule very far, for it is held that where the attention of the traveler is distracted by a commotion in the street or highway he will be excused,[31] but while there may be cases in which this doctrine should prevail, it is one to be cautiously applied and carefully limited.[32] If there is time for deliberation it will generally be negligence, on the part of the traveler,

[29] See Beaty v. Missouri &c. Ry. Co. (Tex. Civ. App.), 175 S. W. 450, 451, (citing text). In this case a passenger jumped from the train but the company was not negligent.

[30] Moore v. Central &c. R. Co., 47 Iowa 688. See generally Collins v. Davidson, 19 Fed. 83; Wesley Coal Co. v. Healer, 84 Ill. 126; Knapp v. Sioux City &c. Co., 65 Iowa 91, 21 N. W. 198, 54 Am. Rep. 1; Coulter v. American Express Co., 56 N. Y. 585; Iron &c. R. Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597; Stickney v. Maidstone, 30 Vt. 738; Dublin &c. Co. v. Slattery, L. R. 3 App. Cas. 1155.

[31] Alabama &c. R. Co. v. Lowe, 73 Miss. 203, 19 So. 96; Chattanooga Elec. Ry. Co. v. Cooper, 109 Tenn. 308, 70 S. W. 72 (quoting text). In Cassida v. Oregon &c. R. Co., 14 Ore. 551, 13 Pac. 438, it was held that a child, who, in endeavoring to escape from cattle, ran on a trestle, was not guilty of contributory negligence, but great stress was placed upon the fact that the child had not reached the years of discretion. The court cited Hurst v. Burnside, 12 Ore. 520, 8 Pac. 888; McGovern v. New York &c. R. Co., 67 N. Y. 417; Eckert v. Long Island &c. R. Co., 43 N. Y. 502, 3 Am. Rep. 721.

[32] Ordinarily, perhaps, the rule should be confined to cases in which the peril was caused by the defendant, or the like, and certainly not extended to cases where the emergency arises from the injured party's own negligence. See Woolery v. Louisville &c. R. Co., 107 Ind. 381, 387, 8 N. E. 226, 57 Am. Rep. 114; Sutherland v. Cleveland &c. R. Co., 148 Ind. 308, 47 N. E. 624, (but see Indiana Union Tract. Co. v. Love, 180 Ind. 442, 99 N. E. 1005, stating the rule in general terms); Briscoe v. Southern R. Co., 103 Ga. 224, 28 S. E. 638; Richfield v. Mich. Cent. R. Co., 110 Mich. 406, 68 N. W. 218; Weeks v. Wilmington &c. R. Co., 131 N. Car. 78, 42 S. E. 541; Baltzer v. Chicago &c. R. Co., 83 Wis. 459, 53 N. W. 885.

to omit reasonable precautions, and so it will be if his attention is diverted where there is no element of danger and there is nothing more than curiosity to know what the commotion means. Where the sudden peril is attributable to the negligence of the plaintiff he cannot successfully assert that he is absolved from the duty to exercise due care. If the plaintiff voluntarily goes into a place of danger without exercising the care required by law, he is guilty of negligence although after so getting into the place of danger he exercises his judgment to the best of his ability,[33] to escape from the danger. Care is required to keep out of danger as well as to avoid it after getting into it, and the rule that sudden peril excuses does not govern where the plaintiff without exercising due care goes into a place of danger, such as a railroad crossing is, and of which danger the track itself is a warning.[34] Where there is evidence that there was a sudden peril, that is, a peril not incident to railroad crossings, the question whether the plaintiff was guilty of contributory negligence is generally one of fact,[35] but where there is no evidence of sudden peril, then the question is often one of law.

§ 1670 (1174.) Negligence of driver of vehicle not imputed to passenger therein.[35a]—The general rule is that the negligence of the driver of a vehicle with whom the injured person is riding will not be imputed to such injured person.[36] The negligence

[33] Leiman v. Chicago &c. R. Co., 82 Wis. 286, 52 N. W. 91, 33 Am. St. 37. See also Birmingham &c. R. Co. v. Fox, 174 Ala. 657, 56 So. 1013; Wabash R. Co. v. Keister, 163 Ind. 609, 616, 67 N. E. 521 (citing text); Louisville &c. Trac. Co. v. Worrell, 74 Ind. App. 480, 86 N. E. 78; Barr v. Southern Ry. Co., 105 Tenn. 544, 58 S. W. 849; Chesapeake &c. R. Co. v. Hall, 109 Va. 296, 63 S. E. 1007. But compare Houston &c. R. Co. v. Byrd (Tex. Civ. App.), 61 S. W. 147; Missouri &c. Ry. Co. v. Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039.

[34] Wabash R. Co. v. Keister, 163 Ind. 609, 616, 617, 67 N. E. 521 (quoting text) and see authorities cited in last preceding note.

[35] Louisville &c. R. Co. v. Stewart, 128 Ala. 313, 29 So. 562, 568; Chicago &c. R. Co. v. Smith, 180 Ill. 453, 54 N. E. 325. See also Beaty v. Missouri &c. R. Co. (Tex. Civ. App.), 175 S. W. 450, 451 (citing text).

[35a] This section is cited in Burton v. Pryor (Mo. App.), 198 S. W. 1120.

[36] The doctrine of Thorogood v. Bryan, 8 C. B. 115, is generally denied, but there are cases approving

of the driver or chauffeur cannot be imputed to a mere guest or passenger who has no control and to justify such imputation in

it. Artz v. Chicago &c. R. Co., 34 Iowa 153; Slater v. Burlington &c. R. Co., 71 Iowa 209, 32 N. W. 264; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558. Denying the doctrine are the cases of Carlisle v. Sheldon, 38 Vt. 440; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. ed. 652; Whelan v. New York &c. R. Co., 38 Fed. 15; Lapsley v. Union &c. R. Co., 50 Fed. 172; Hot Springs R. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245; Tompkins v. Clay St. &c. R. Co., 66 Cal. 163, 4 Pac. 1165; East Tennessee &c. R. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281; Wabash &c. R. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; West Chicago St. R. Co. v. Daugherty, 209 Ill. 241, 70 N. E. 586; Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Pittsburgh &c. R. Co. v. Spencer, 98 Ind. 186; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Indianapolis St. R. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571; New York &c. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804 (husband's negligence not imputed to wife, but this does not relieve her of taking care); Chicago &c. R. Co. v. Lake County Sav. & Trust Co., 186 Ind. 358, 114 N. E. 454; Lake Shore &c. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; City of Gary v. Geisel, 59 Ind. App. 565, 108 N. E. 876, 877 (citing text); Larkin v. Burlington &c. R. Co., 85 Iowa 492, 52 N. W. 480; Denton v. Missouri &c. R. Co., 90 Kans. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 820; Danville &c. Co. v. Stewart, 2 Metc. (Ky.) 119; Cahill v. Cincinnati &c. R. Co., 92 Ky. 345, 18 S. W. 2; State v. Boston &c. R. Co., 80 Maine 430, 15 Atl. 36, 38 Alb. L. J. 269; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583; Follman v. Mankato, 35 Minn. 522, 29 N. W. 318, 59 Am. Rep. 340; Becke v. Missouri &c. R. Co., 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157 and note; Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648; Noyes v. Boscawen, 64 N. H. 361, 10 Atl. 690, 10 Am. St. 410; Bennett v. New Jersey &c. R. Co., 36 N. J. L. 225, 13 Am. Rep. 435; New York &c. R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; Robinson v. New York &c. R. Co., 66 N. Y. 11, 23 Am. Rep. 1 and note; Masterson v. New York &c. R. Co., 84 N. Y. 247, 38 Am. Rep. 510; Duval v. Atlantic Coast &c. R. Co., 134 N. Car. 331, 46 S. E. 750, 65 L. R. A. 722, 728; Transfer Co. v. Kelly, 36 Ohio St. 86, 33 Am. Rep. 558; Street Railway Co. v. Eadie, 43 Ohio 91, 54 Am. Rep. 802; Central Tex. &c. R. Co. v. Gibson (Tex. Civ. App.), 83 S. W. 862; Chartered &c. Bank v. Netherlands &c. Co., L. R. 9 Q. B. Div. 118; The Berninia, L. R. 12 Prob. Div. 58, 57 Am. Rep. 494 and note. In Nesbit v. Gainer, 75 Iowa 314, 1 L. R. A. 152 and note, 9 Am. St. 486, the earlier cases are explained, and in Dean v. Pennsylvania R. Co., 129 Pa. St. 514, 18 Atl. 718,

any case the general rule is that the relation of master and servant or principal and agent must exist or the parties must be engaged in a joint enterprise.[37] But where persons riding in a vehicle all take part in managing it and the team drawing it, there is reason for holding that all are bound to exercise ordinary care to avoid collisions with railroad trains.[38] Where the driver is the agent or servant of the injured person it is held that the negligence of the former is attributable to the latter.[39] It is obvious that where the negligence of the person who receives the injury contributes to the injury he cannot escape the consequences of his own carelessness.[40] Thus where one

6 L. R. A. 143, 15 Am. St. 733, it is said that the doctrine of Thorogood v. Bryan, 8 C. B. 115, was partially adopted in Pennsylvania. But see Dryden v. Pennsylvania R. Co., 211 Pa. St. 620, 61 Atl. 249; Evensen v. Lexington &c. R. Co., 187 Mass. 77, 72 N. E. 355; Lightfoot v. Winnebago Trac. Co., 123 Wis. 479, 102 N. W. 30.

[37] St. Louis &c. R. Co. v. Bell, 58 Okla. 84, 159 Pac. 336, L. R. A. 1917A, 543. See also Corley v. Atchison &c. R. Co., 90 Kans. 70, 133 Pac. 555, Ann. Cas. 1915B, 764 and note; Lange v. New York &c. R. Co., 89 N. J. L. 604, 99 Atl. 346; Martindale v. Oregon &c. R. Co., 48 Utah 464, 160 Pac. 275.

[38] Colorado &c. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801; Brannen v. Kokomo &c. Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. 411; Nesbit v. Gainer, 75 Iowa 314, 39 N. W. 516, 1 L. R. A. 152 and note, 9 Am. St. 486. See also Stotelmeyer v. Chicago &c. R. Co., 148 Iowa 278, 127 N. W. 205.

[39] Brickell v. New York &c. R. Co., 120 N. Y. 290, 24 N. E. 449; Markowitz v. Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389. See generally Georgia &c. R. Co. v. Underwood, 90 Ala. 49, 80 So. 116, 24 Am. St. 756; Stotelmeyer v. Chicago &c. R. Co., 148 Iowa 278, 127 N. W. 205. But compare Howe v. Minneapolis &c. R. Co., 62 Minn. 11, 64 N. W. 102, 30 L. R. A. 684, 688, 54 Am. St. 616. A husband is not the agent of his wife, so as to impute his negligence to her where she has not control. Denton v. Missouri &c. R. Co., 90 Kans. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 820; Louisville v. Zoeller, 155 Ky. 192, 160 S. W. 500; Senft v. Western Md. R. Co., 246 Pa. St. 446, 92 Atl. 553. See also Chicago &c. R. Co. v. Biddinger, 61 Ind. App. 419, 109 N. E. 953.

[40] Cincinnati &c. R. Co. v. Howard, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593, 19 Am. St. 96; Miller v. Louisville &c. R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416; Durkee v. President &c., 88 Hun 471, 34 N. Y. S. 978; Hoag v. New York &c. R. Co., 111 N. Y. 199, 18 N. E. 648; Brickell v. New York &c. R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. 648; Dean v. Pennsylvania R. Co., 129 Pa. St. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. 733; note in L. R. A. 1915B, 955.

person riding with another saw the headlight of an approaching locomotive it was held that he was guilty of contributory negligence in failing to warn the driver of the vehicle in which he was riding.[41] If the person riding in the vehicle knows that the driver is negligent, and he takes no precautions to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver.[42] The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge, yet it cannot be said as matter of law that a passenger must look and listen and exercise care in all respects to the same extent as if he were driving.[43] It has been held that where a child of tender years is entrusted to the care of the driver of the vehicle the contributory negligence of the driver will defeat a recovery by the child,[44] but if the doctrine of the cases referred to can

[41] Smith v. Maine Central R. Co., 87 Maine 339, 32 Atl. 967. See Howe v. Minneapolis &c. R. Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. 616; Brommer v. Pennsylvania R. Co., 179 Fed. 577, 29 L. R. A. (N. S.) 924; and note in L. R. A. 1915B, 955, et seq.

[42] Rebillard v. Minneapolis &c. R. Co., 216 Fed. 503, L. R. A. 1915B, 953; Township of Crescent v. Anderson, 114 Pa. St. 643, 8 Atl. 379, 60 Am. Rep. 367; O'Toole v. Pittsburgh &c. R. Co., 158 Pa. St. 99, 27 Atl. 737, 22 L. R. A. 606, 38 Am. St. 830; Willfong v. Omaha &c. R. Co., 116 Iowa 548, 90 N. W. 358 (wife riding with husband); Illinois Cent. R. Co. v. McLeod, 78 Miss. 334, 29 So. 76, 52 L. R. A. 954, 84 Am. St. 630; Fechley v. Springfield Trac. Co., 119 Mo. App. 358, 96 S. W. 421, 423 (citing text). Cunningham v. Erie R. Co., 137 App. Div. 506, 121 N. Y. S. 706; and note in L. R. A. 1915B, 955, where many cases are reviewed showing when and how the passenger is required to act under various circumstances.

[43] Thomas v. Illinois Cent. R. Co., 169 Iowa 337, 151 N. W. 387; Howe v. Railroad Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. 616. The question as to whether the guest or other passenger used due care under the circumstances is usually, though not always, a question for the jury. Clarke v. Connecticut Co., 83 Conn. 219, 76 Atl. 523; Indiana Union Trac. Co. v. Love, 180 Ind. 442, 99 N. E. 1005; Corley v. Atchison &c. R. Co., 90 Kans. 70, 133 Pac. 555; Chadbourne v. Springfield St. R. Co., 199 Mass. 574, 85 N. E. 737.

[44] Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Payne v. Chicago &c. R. Co., 39 Iowa 523; Elkins v. Boston &c. R. Co., 115 Mass. 190. Compare also Morgan v. Aroostook Valley R. Co.,

be regarded as sound in any event it cannot, as we think, be so regarded where the child is riding as a passenger in a public conveyance.

§ 1671 (1175). Negligence after discovery of traveler's danger —Last clear chance—Wilfulness.—Although, as we have already shown, the general rule is that contributory negligence will defeat a recovery, yet there is an exception to the rule, or perhaps it would be better to say that the rule does not apply, where the injury is wilfully inflicted[45] or the failure of the company to exercise reasonable care after discovering the traveler's peril is the proximate cause of the injury.[46] In this con-

115 Maine 171, 98 Atl. 628. But see Henry v. Epstein, 53 Ind. App. 265, 101 N. E. 647; (negligence of father not imputed to girl eleven years old); Lake Erie &c. R. Co. v. Fleming, 183 Ind. 511, 109 N. E. 753; Mattson v. Minnesota &c. R. Co., 95 Minn. 477, 104 N. W. 443, 111 Am. St. 483; Hampel v. Detroit &c. R. Co., 138 Mich. 1, 100 N. W. 1002. See generally upon the subject of imputed negligence, Alabama &c. R. Co. v. Davis, 69 Miss. 444, 13 So. 693, 60 Am. & Eng. R. Cas. 719; Pennsylvania R. Co. v. Goodenough, 55 N. J. L. 577, 28 Atl. 3; Honey v. Chicago &c. R. Co., 59 Fed. 423; Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Chicago &c. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218, 55 Am. & Eng. R. Cas. 200. It is to be said of the last named case that in some respects the doctrine it asserts is erroneous.

[45] Georgia Pac. R. Co. v. Lee, 92 Ala. 262, 9 So. 230; Louisville &c. R. Co. v. Webb, 97 Ala. 308, 12 So. 374; Wabash R. Co. v. Speer, 156 Ill. 244, 40 N. E. 835; Chicago &c. R. Co. v. Hedges, 105 Ind. 398, 404, 7 N. E. 801; Belt R. Co. v. Mann, 107 Ind. 89, 7 N. E. 893; Palmer v. Chicago &c. R. Co., 112 Ind. 250, 14 N. E. 70; Louisville &c. R. Co. v. Collins, 2 Duv. (Ky.) 114, 87 Am. Dec. 486; Brownell v. Flagler, 5 Hill (N. Y.) 282; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; 2 Thomp. Neg. (2nd ed.), § 1627. As to what is not wilfullness see Gibson v. Southern Ry. Co., 140 Fed. 410; Louisville &c. R. Co. v. Muscat, 147 Ala. 701, 41 So. 302; Cleveland &c. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445. As to whether there is wilfullness when peril is not actually discovered, see Atchison &c. R. Co. v. Baker, 79 Kans. 183, 98 Pac. 804, 21 L. R. A. (N. S.) 427 and note reviewing many cases on both sides and stating that the Kansas case is probably contrary to the weight of authority in holding that there was wilfullness. One of the strongest cases to the effect that the peril must be actually discovered is Anderson v. Minneapolis &c. R. Co., 103 Minn. 224, 114 N. W. 1123, 14 L. R. A. (N. S.) 886.

[46] Island &c. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653,

nection, however, it is necessary to bear in mind the rule that the company, or its employes, have a right to presume, under ordinary circumstances, that an adult who is upon or near the track, and apparently able to take care of himself will do so, and stay off or get off in due time.[47] Some of the courts, misapplying, as we think, the doctrine of an old English case,[48] have held even in cases where the doctrine of that case seemed to have no proper application, that the company is liable not

35 L. ed. 270; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 676, 36 L. ed. 485; Texas &c. R. Co. v. Spradling, 72 Fed. 152; Denver &c. Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106; Evansville &c. R. Co. v. Hiatt, 17 Ind. 102; Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436, 49 N. E. 843; Keefe v. Chicago &c. R. Co., 92 Iowa 182, 60 N. W. 503; Atchison &c. R. Co. v. Walz, 40 Kans. 433, 19 Pac. 787; Kean v. Baltimore &c. R. Co., 61 Md. 154, 19 Am. & Eng. R. Cas. 321; Baltimore &c. R. Co. v. Kean, 65 Md. 394, 5 Atl. 325, 28 Am. & Eng. R. Cas. 580; Judson v. Great Northern R. Co., 63 Minn. 248, 65 N. W. 447; Donohue v. St. Louis &c. R. Co., 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Cincinnati &c. R. Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Carrico v. West Virginia &c. R. Co., 35 W. Va. 389, 14 S. E. 12; Valin v. Milwaukee &c. R. Co., 82 Wis. 1, 51 N. W. 1084, 33 Am. St. 17; 2 Thomp. Neg. (2nd ed.), § 1601. If the negligence of each is contemporaneous and continues to the moment of the injury there is no room for the application of the last clear chance doctrine and the plaintiff's contributory negligence is a good defence. Wabash R. Co. v. Tippecanoe &c. Co., 178 Ind. 113, 121, 98 N. E. 64, 38 L. R. A. (N. S.) 1167 (citing text). In Bogan v. Carolina Cent. R. Co., 129 N. Car. 154, 39 S. E. 808, 55 L. R. A. 418, it is held that the company is liable where it discovered or should have discovered the plaintiff's peril in time to have avoided the injury by the exercise of ordinary care, and numerous authorities upon the general subject of the "last clear chance" are reviewed in the note to the case as reported in 55 L. R. A. 418. See also Galveston &c. R. Co. v. Murray (Tex. Civ. App.), 99 S. W. 144.

[47] Authorities in support of this proposition have already been cited, but we call attention to the case of Gahagan v. Boston &c. R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426, and authorities cited in note; Little Rock &c. Ry. Co. v. Billings, 173 Fed. 903, 31 L. R. A. (N. S.) 1031; and note to Woolf v. Washington Ry. Co., 37 Wash. 491, 79 Pac. 997. See also ante, § 176, and post, §§ 1791, 1795. In Green v. Los Angeles &c. R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. 68, it is held that a traveler is not in a position of peril charging the engineer until he steps upon the track.

[48] Davies v. Mann, 10 Mees. & W. 546.

only where it discovers the danger of the traveler in time to avoid the effect of his negligence, and fails to exercise reasonable care to avoid it, but also where it fails to exercise reasonable care to look out for the traveler, and thus fails to discover his danger in the first instance, or if it might, in any event, have avoided the consequences of the plaintiff's negligence by the exercise of reasonable care.[49] It seems to us that while this doctrine may be applicable in some cases it is much like the exploded doctrine of comparative negligence, and that, unless it is limited in its application, it loses sight of the elements of duty and of proximate cause, and virtually nullifies the doctrine of contributory negligence. We think the better rule is that, except where the injury is wilfully inflicted or is inflicted under such circumstances as to amount of wilfulness, the rule that contributory negligence is a good defense applies without qualification unless the company is guilty of negligence subsequent to that of the plaintiff, and not merely contemporaneous and concurrent with that of the plaintiff. In other words, while the company may be liable where it fails to exercise reasonable care, by which it could have avoided the consequences of the plaintiff's negligence after discovering it and his danger, or if reasonable care requires that it should have made such discovery after the plaintiff had negligently incurred the danger, and it fails to do so and to use reasonable care by which injury could have been avoided, yet it is stating the rule too broadly to say without limitation or qualification that the company is liable if it might have avoided the injury or the consequences of the plaintiff's negligence by the exercise of reasonable care.[50] So, it does not

[49] See Louisville &c. R. Co. v. Krey, 16 Ky. L. 797, 29 S. W. 869; McGuire v. Vicksburg &c. R. Co., 46 La. Ann. 1543, 16 So. 457; Battishill v. Humphreys, 64 Mich. 514, 38 N. W. 581; Bergman v. St. Louis &c. R. Co., 88 Mo. 678, 28 Am. & Eng. R. Cas. 588; Lloyd v. St. Louis &c. R. Co., 128 Mo. 595, 29 S. W. 153, 31 S. W. 110; Gass v. Missouri Pac. R. Co., 57 Mo. App. 574; Tuff v. Warman, 5 C. B. N. S. 573. See also Grank Trunk &c. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485. But compare Holwerson v. St. Louis & Suburban Ry. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850, 855.

[50] Texas &c. R. Co. v. Nolan, 62 Fed. 552, 556; Kirtley v. Chicago &c. R. Co., 65 Fed. 386; New York &c. R. Co. v. Kelly, 93 Fed. 745; Gil-

always follow that the company is liable because the engineer did not do the best thing possible upon the spur of the moment,[51] and where it was conclusively shown that it was impossible for the engineer to avoid collision after he saw the vehicle in which the plaintiff's intestate was riding, it was held error, in a recent case, for the court to submit the issue of discovered peril to the jury.[52] The last clear chance doctrine has, however, a proper application in many crossing cases.

§ 1672. **Last clear chance—Wilfulness.**—We have said so much in regard to the doctrine of last clear chance in other connections that it is unnecessary to treat it further here. But the distinction between that doctrine and the doctrine that contributory negligence is not a defense in case of wilful injury is so well drawn in a recent annotation to one of the cases, and

bert v. Erie R. Co., 97 Fed. 747; St. Louis &c. R. Co. v. Ross, 61 Ark. 617, 33 S. W. 1054; Hot Springs R. Co. v. Johnson, 64 Ark. 420, 42 S. W. 833; Dull v. Cleveland &c. R. Co., 21 Ind. App. 571, 593, 52 N. E. 1013; Indiana &c. Co. v. Stewart, 7 Ind. App. 563, 34 N. E. 1019; Terre Haute &c. Trac. Co. v. Latham, 53 Ind. App. 366, 101 N. E. 746; Kean v. Baltimore &c. R. Co., 61 Md. 154, 19 Am. & Eng. R. Cas. 321; Maryland Cent. R. Co. v. Neubeur, 62 Md. 391; Murphy v. Deane, 191 Mass. 455, 3 Am. Rep. 390; Holwerson v. St. Louis & Suburban R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850, 855 (quoting text); International &c. R. Co. v. Eason (Tex.), 35 S. W. 208; Galveston &c. R. Co. v. Murray (Tex. Civ App.), 99 S. W. 144, 148; Schmolze v. Chicago &c. R. Co., 83 Wis. 659, 54 N. W. 106; 2 Thomp. Neg. (2nd ed.), § 1597, et seq. Such a rule would do away with the doctrine of contributory negligence almost entirely and make the company liable if the injury could have been avoided by it by due care in the first instance regardless of the contributory negligence of the plaintiff thereafter. But see Bogan v. Carolina Cent. R. Co., 129 N. Car. 154, 39 S. E. 808, 55 L. R. A. 418 and note. See also as to its application to licensees and trespassers, post §§ 1787-1795.

[51] Dull v. Cleveland &c. R. Co., 21 Ind. App. 571, 591, 592, 593, 52 N. E. 1013; Kirtley v. Chicago &c. R. Co., 65 Fed. 386, 391. See also Rowe v. Southern R. Co., 4 Cal. App. 1, 87 Pac. 220; Pittsburgh &c. R. Co. v. Ferrell, 39 Ind. App. 515, 78 N. E. 988.

[52] Colorado &c. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801; Wilson v. Illinois Cent. R. Co., 150 Iowa 33, 129 N. W. 340, 34 L. R. A. (N. S.) 687. See also Gilbert v. Missouri Pac. Ry. Co., 91 Kans. 711, 139 Pac. 380.

the whole subject has received such thorough treatment in other recent cases, that it may be well to call particular attention to these authorities, especially as they are in line with the view we have already taken. The difference between the doctrine of last clear chance and the doctrine that contributory negligence is not a defense against a wilful or wanton injury is that the latter permits a recovery notwithstanding contributory negligence, and the former, instead of so doing, strips the plaintiff's or deceased's antecedent negligence of its character as contributory negligence by relegating it to the position of a remote cause or condition, as distinguished from one of the proximate causes, of the accident, and when applicable permits recovery even though the defendant was guilty of negligence merely and not wilfulness. Some of the courts have apparently assumed that the doctrine of last clear chance may be properly applied so as to support a recovery against a defendant whose negligence consisted merely of the omission of a duty before the discovery of the peril, notwithstanding that the negligence of the plaintiff or deceased was contemporaneous and concurrent with that of the defendant, and continued until the very instant of the impact. The better considered cases, however, take the view that the doctrine of last clear chance is inapplicable, at least inapplicable so as to sustain a recovery by plaintiff—if the negligence of the plaintiff or deceased must be regarded as continuing or concurrent with the negligence of defendant until the instant of the impact.[53] Recent well-considered cases, as well as most of the earlier decisions to which attention has already been called, sustain this statement.[54]

[53] This is substantially as stated in the note in 21 L. R. A. (N. S.) 729.

[54] Terre Haute &c. Trac. Co. v. Latham, 53 Ind. App. 366, 101 N. E. 746; Indianapolis Trac. &c. Co. v. Croly, 54 Ind. App. 566, 96 N. E. 973; Bourrett v. Chicago &c. R. Co., 152 Iowa 579, 132 N. W. 973, 36 L. R. A. (N. S.) 957 and other cases there cited in note; Dyerson v. Union Pac. R. Co., 74 Kans. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, and note reveiwing cases and showing conflict in many; see also notes in 21 L. R. A. (N. S.) 427; 31 L. R. A. (N. S.) 1032; and 36 L. R. A. (N. S.) 957. In Wilson v. Illinois Cent. R. Co., 150 Iowa 33, 129 N. W. 340, 34 L. R. A. (N. S.) 686, 691, the court explains the doctrine as follows:

"The doctrine of last clear chance presupposes negligence on the part of the party injured, and proceeds

§ 1673 (1176). Injuries at defective crossings.—Where a railroad company, whose duty it is to restore and keep in repair a highway crossing, negligently fails to perform that duty, it will be liable to a traveler upon the highway who, in the exercise of due care, is injured thereby.[55] It has also been

upon the theory that notwithstanding this negligence, if the other party, being cognizant of that negligence and of the peril in which the party had placed himself, failed to take the necessary precautions to avoid injuring him, he is liable on the theory that he had a fair chance to avoid the catastrophe by the use of ordinary care, and his failure to exercise it is in such cases the proximate cause of the injury. It is defendant's subsequent negligence, after discovering the peril, differing in every essential from the mere continuation of the original negligence, for which he is liable. In order that this rule may be available to an injured party, he must show that the party whom he seeks to charge with negligence knew of the perilous position or saw the injured party, and knew or should have known that he was in a position of peril. It is not enough that he should have been on the lookout for him, for in such cases it is the equal duty of each to look out for the other, and mere failure to look for another who is a trespasser, or who is just as much bound as the party charged to keep a lookout, does not come within what is known as the last-clear-chance doctrine. In such cases there is nothing more than continuing negligence on the part of each, each having a duty to perform which he neglects. To apply the doctrine of last fair chance to such a case would be to introduce into our law the rule of comparative negligence, which did not, before the adoption of the employer's liability act by Congress, obtain in this state."

[55] St. Louis &c. Ry. Co. v. Smith, 118 Ark. 72, 175 S. W. 415, 416 (citing text); Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Cleveland &c. R. Co. v. Federle, 50 Ind. App. 147, 98 N. E. 123; Hanson v. Chicago &c. R. Co., 94 Iowa 409, 62 N. W. 788; Black v. Rock Island &c. R. Co., 125 La. Ann. 101, 57 So. 82, 26 L. R. A. (N. S.) 166; Veazie v. Penobscot &c. R. Co., 49 Maine 119; Snow v. Housatonic R. Co., 8 Allen (Mass.) 441, 85 Am. Dec. 720; O'Connor v. Boston &c. R. Co., 135 Mass. 352; Tobias v. Michigan &c. R. Co., 103 Mich. 330, 61 N. W. 514; Jeffrey v. Detroit &c. R. Co., 108 Mich. 221, 65 N. W. 755, 31 L. R. A. 170; Johnson v. St. Paul &c. R. Co., 31 Minn. 283, 17 N. W. 622; Omaha &c. R. Co. v. Brady, 39 Nebr. 27, 57 N. W. 767; Omaha &c. R. Co. v. Ryburn, 40 Nebr. 87, 58 N. W. 541; Paine v. Grand Trunk &c. R. Co., 58 N. H. 611; Oakland &c. R. Co. v. Fielding, 48 Pa. St. 320; Pittsburgh &c. R. Co. v. Dunn, 56 Pa. St. 280; International &c. R. Co. v. Douglas, 7 Tex. Civ. App. 554, 27 S. W. 793; Mann v. Central Vermont R. Co., 55 Vt. 484, 45 Am. Rep. 628, 14 Am. & Eng.

held that if it constructs a crossing at a point where all the travel is, although not the true line of the highway as established, it is liable for a defect in such crossing the same as if it were on the true line of the highway.[56] A hole in the crossing may constitute such a defect as will render the company liable to one injured thereby,[57] and so may a defect in the planking between the tracks.[58] Thus, where a greater space is left between the planking and the rail than is required for the running of trains and the operation of the road, the company is liable to one who, while exercising due care, gets his foot, or that of his horse, fastened therein, and is run over or otherwise injured by the negligence of the company in that regard.[59] So,

R. Cas. 620; Grand Trunk R. Co. v. Sibbald, 20 Can. S. C. R. 259; Oliver v. Northeastern R. Co., L. R. 9 Q. B. 409; Kearney v. London &c. R. Co., L. R. 5 Q. B. 411. The defect in the crossing must, however, be a proximate cause of the injury. Murphy v. Michigan Cent. R. Co., 108 Mich. 221, 65 N. W. 753, 31 L. R. A. 170. See cases last cited in note 255 infra, and also see Cleveland &c. R. Co. v. Clark, 51 Ind. App. 392, 97 N. E. 822, where the defect was found to be a proximate cause under somewhat doubtful circumstances.

[56] Taylor &c. R. Co. v. Warner (Tex. Civ. App.), 31 S. W. 66. See also Texas &c. R. Co. v. Neill (Tex. Civ. App.), 30 S. W. 369; Missouri Pac. R. Co. v. Bridges, 74 Tex. 520, 12 S. W. 210, 15 Am. St. 856; Ruddell v. Seaboard &c. R. Co., 75 S. Car. 290, 55 S. E. 528.

[57] Washburn v. Chicago &c. R. Co., 68 Wis. 474, 32 N. W. 234; Georgia &c. R. Co. v. Parks, 93 Ga. 228, 18 S. E. 652; Louisville &c. R. Co. v. Pritchard, 131 Ind. 564, 31 N. E. 358, 31 Am. St. 451. See also Potter v. Bunnell, 20 Ohio St. 150; Oakland R. Co. v. Fielding, 48 Pa. St. 320.

[58] Pennsylvania R. Co. v. Boylan, 104 Ill. 595; O'Connor v. Boston &c. R. Corp., 135 Mass. 352; Retan v. Lake Shore &c. R. Co., 94 Mich. 146, 53 N. W. 1094; Lillstrom v. Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587; Tetherow v. St. Joseph &c. R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. 617 and note; Payne v. Troy &c. R. Co., 83 N. Y. 572; Dillingham v. Fields, 9 Tex. Civ. App. 1, 29 S. W. 214.

[59] Elgin &c. R. Co. v. Raymond, 148 Ill. 241, 35 N. E. 729; Toledo &c. R. Co. v. Clark, 49 Ill. App. 17; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155; Burlington &c. R. Co. v. Koonce, 34 Nebr. 479, 51 N. W. 1033; Payne v. Troy &c. R. Co., 83 N. Y. 572, 6 Am. & Eng. R. Cas. 54; Spooner v. Delaware &c. R. Co., 115 N. Y. 22, 21 N. E. 696. See for decisions on the question of proximate cause and contributory negligence in such cases,

where the company left its rails projecting four or five inches above the surface of the street, without any planking or filling between them, it was held that it was for the jury to determine whether it was negligent, and therefore liable to a traveler who was injured at the crossing.[60] And where a railroad company permitted "engineer stakes" to remain upon a street, and a traveler on such street was injured by falling over the stakes, the company was held liable therefor.[61] In another case the company had left its track nine inches above the surface of the highway, and it was held liable for the death of the plaintiff's horse from the extraordinary exertion in pulling a loaded wagon over the obstruction.[62] In still another case, decided by the same court, the railroad company was held liable where it had so constructed the crossing as to leave an obstruction, or embankment in the highway, which was the plaintiff's only means of access to his home, and the plaintiff, without fault on his part, while

some of which apparently conflict with one another, Garland v. Maine Cent. R. Co., 85 Maine 519, 27 Atl. 615; Day v. Missouri &c. R. Co., 132 Mo. App. 707, 112 S. W. 1019; Flanery v. St. Louis &c. R. Co., 129 Mo. App. 652, 108 S. W. 575; Dickey v. Boston &c. R. Co., 70 N. H. 34, 47 Atl. 79; Gehring v. Atlantic City R. Co., 75 N. J. L. 490, 68 Atl. 61, 14 L. R. A. (N. S.) 312; Thompson v. Seaboard Air Line R. Co., 81 S. Car. 333, 62 S. E. 396, 20 L. R. A. (N. S.) 426; Strait v. Yazoo &c. R. Co., 209 Fed. 157, 49 L. R. A. (N. S.) 1068 (for jury).

[60] Wasmer v. Delaware &c. R. Co., 80 N. Y. 212, 36 Am. Rep. 608. See also Evansville &c. R. Co. v. Pritchard, 131 Ind. 564, 31 N. E. 358, 31 Am. St. 451; Milwaukee &c. R. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699; Louisville &c. R. Co. v. Hubbard, 148 Ala. 45, 41 So. 814.

[61] Gudger v. Western &c. R. Co., 87 N. Car. 325. See also Judson v. New York &c. R. Co., 29 Conn. 434 (liability to traveler falling into culvert); Bowen v. Detroit &c. R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822 (liability for failing to remove snow as required by ordinance). So where it left an iron spike protruding at the crossing. Louisville &c. R. Co. v. Hubbard, 148 Ala. 45, 41 So. 814.

[62] Evansville &c. R. Co. v. Carvener, 113 Ind. 51, 14 N. E. 738. It is not, perhaps, altogether certain that the plaintiff was free from contributory negligence in this case, but the court, while admitting that contributory negligence would bar a recovery, held that he had a right to use the crossing and could not have anticipated any such result.

riding homeward was severely injured by reason of such obstruction, combined with the fright of his horse at a hand-car negligently managed by the company's employes.[63] So, railroad companies have been held liable in other cases for injuries caused by their failure to construct barriers or guards where they were necessary to make the crossing reasonably safe.[64] It should not be forgotten, however, that contributory negligence will prevent a recovery here as in other cases.[65] Nor does the law require the exercise of extraordinary care and vigilance on the part of a railroad company to keep its crossings safe for travelers upon the highway,[66] and it has been held that the company is not liable for an injury received by such a traveler because of its crossing being out of repair, unless it had notice thereof, or unless the defect had existed for such a length of time that it ought to have taken, or may be presumed to have had, notice of such defect.[67]

§ 1674 (1177). Evidence of subsequent repairs and other accidents at the same place.—Evidence of repairs made, or pre-

[63] Evansville &c. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. 865. See also Williams v. San Francisco &c. R. Co., 6 Cal. App. 715, 93 Pac. 122.

[64] Veazie v. Penobscot R. Co., 49 Maine 119; Evansville &c. R. Co. v. Allen, 34 Ind. App. 636, 73 N. E. 630; Atlanta &c. R. Co. v. Wood, 48 Ga. 565; Queen v. Rigley, 14 Q. B. 687; Oliver v. Northeastern R. Co., L. R. 9 Q. B. 409. And for defects in approaches, Southern Indiana R. Co. v. McCarrell, 163 Ind. 469, 71 N. E. 156. But see Gulf &c. R. Co. v. Sneed, 84 Miss. 252, 36 So. 261.

[65] International &c. R. Co. v. Robertson (Tex. Civ. App.), 27 S. W. 564; Nashville &c. R. Co. v. Ragan, 167 Ala. 277, 52 So. 522; Ford v. Chicago &c. R. Co., 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657 and note; Reynolds v. Missouri &c. Ry. Co., 70 Kans. 340, 78 Pac. 801; McClelland v. Missouri Pac. Ry. Co., 82 Kans. 167, 107 Pac. 545. But see See v. Wabash R. Co., 123 Iowa 443, 99 N. W. 106.

[66] Terre Haute &c. R. Co. v. Clem, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. 303 and note, 42 Am. & Eng. R. Cas. 229; St. Louis &c. R. Co. v. Johnson, 38 Tex. Civ. App. 322, 85 S. W. 476. See also Goodson v. Fitzgerald, 52 Tex. Civ. App. 329, 115 S. W. 50 (citing text).

[67] Mann v. Chicago &c. R. Co., 86 Mo. 347. See also Flanery v. St. Louis &c. R. Co., 129 Mo. App. 652, 108 S. W. 575; Hill v. Port Royal &c. R. Co., 31 S. Car. 393, 10 S. E. 91, 5 L. R. A. 349, 39 Am. & Eng. R. Cas. 607.

cautions taken, after the injury was received is not competent to prove antecedent negligence,[68] according to the better rule, nor is evidence that other persons have been injured at the same place.[69] But evidence of both of these things may sometimes be competent for other purposes. Thus, for the purpose of showing notice of the defect on the part of the company,

[68] Isaacs v. Southern Pac. R. Co., 49 Fed. 797; Nashville &c. R. Co. v. Ragan, 167 Ala. 277, 52 So. 522; Sappenfield v. Main St. &c. R. Co., 91 Cal. 48, 27 Pac. 590, citing Elliott Roads and Streets, 646-649; Nalley v. Hartford &c. Co. 51 Conn. 524, 50 Am. Rep. 47; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423; Terre Haute &c. R. Co. v. Clem, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. 303 and note; Board of Comrs. v. Pearson, 129 Ind. 456, 28 N. E. 1120; Hudson v. Chicago R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692 and note, 8 Am. & Eng. R. Cas. 464; See v. Wabash R. Co., 123 Iowa 443, 99 N. W. 106; Menard v. Boston &c. R. Co., 150 Mass. 386, 23 N. E. 214; Morse v. Minneapolis &c. Co., 30 Minn. 465, 16 N. W. 358, disapproving earlier Minnesota cases; Ely v. St. Louis &c. Co., 77 Mo. 34; Dougan v. Champlain Co., 56 N. Y. 1; Dale v. Delaware &c. R. Co., 73 N. Y. 468; Heucke v. Milwaukee &c. R. Co., 69 Wis. 401, 34 N. W. 243. See also Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Augusta &c. R. Co. v. Renz, 55 Ga. 126; St. Joseph &c. R. Co. v. Chase, 11 Kans. 47; Martin v. Towle, 59 N. H. 31; Pennsylvania Co. v. Henderson, 51 Pa. St. 315; West Chester &c. R. Co. v. McElwee, 67 Pa. St. 311; Lederman v. Penna. R. Co., 165 Pa. St. 118, 30 Atl. 735, 44 Am. St. 644; Galveston &c. R. Co. v. Evansich, 63 Tex. 54; 2 Elliott Ev., § 228; 3 Elliott Ev., § 2516.

[69] Chicago &c. R. Co. v. Lee, 60 Ill. 501; Cleveland &c. R. Co. v. Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. 644; Hudson v. Chicago &c. R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692 and note, 8 Am. & Eng. R. Cas. 464; O'Hagan v. Dillon, 76 N. Y. 170; Dubois v. Kingston, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804; Davis v. Oregon &c. R. Co., 8 Ore. 172; Richards v. City of Oshkosh, 81 Wis. 226, 51 N. W. 256, 257, 42 Am. & Eng. Corp. Cas. 109, 111, citing Elliott Roads and Streets 646, 647; 3 Elliott Ev., § 2506; 2 Elliott Roads and Streets (3rd ed.), §§ 1056, 1159. But see Mobile &c. R. Co. v. Ashcraft, 48 Ala. 15; Gordon v. Boston &c. R. Co., 58 N. H. 396; Wooley v. Grand St. R. Co., 83 N. Y. 121; Stone v. Seattle, 33 Wash. 644, 74 Pac. 808; 3 Elliott Ev., § 2506. In Birmingham &c. R. Co. v. Alexander, 93 Ala. 133, 9 So. 525, it was held proper to show that others crossed safely about the same time. See also Nivitte v. New Orleans &c. R. Co., 42 La. Ann. 1153, 8 So. 581. But compare Mobile &c. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416.

evidence that others have been injured from the same defect is admissible in a proper case.[70] So, evidence of other accidents at the same place is sometimes admissible for the same purpose, or to show its condition or the like.[71] But the court, upon proper request, should, by instructions, restrict the evidence to the point upon which it is competent, and not permit it to be considered as proof of antecedent negligence.[72]

§ 1675 (1178). Collisions with street cars.—The rules which we have heretofore stated in regard to the respective rights of

[70] District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. ed. 618; Augusta v. Hafers, 61 Ga. 48, 34 Am. Rep. 95; Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418; Delphi v. Lowery, 74 Ind. 520, 39 Am. Rep. 98; Jeffersonville v. McHenry, 22 Ind. App. 10, 53 N. E. 183; Hill v. Portland R. Co., 55 Maine 438, 92 Am. Dec. 601; Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Elliott Roads and Streets (3d ed.), § 809. But see Collins v. Dorchester, 6 Cush. (Mass.) 396; Blair v. Pelham, 118 Mass. 420, with which compare, however, Rockwell v. McGovern, 202 Mass. 6, 88 N. E. 436, 23 L. R. A. (N. S.) 1022 and note. Condition of the place before and after the accident may be shown. Baltimore &c. R. Co. v. Howard, 113 Md. 404, 77 Atl. 930.

[71] Chicago &c. R. Co. v. Netolicky, 67 Fed. 665; Chicago v. Dalle, 115 Ill. 386, 5 N. E. 578; Lafayette v. Weaver, 92 Ind. 477; Mackie v. Central R. Co., 54 Iowa 405, 6 N. W. 723; Kolsti v. Minneapolis &c. R. Co., 32 Minn. 133, 19 N. W. 655; Phelps v. Winona &c. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. 62, 867; Hirsch v. Buffalo, 107 N. Y. 671, 14 N. E. 608. See also Newvahner v. Wabash R. Co. (Mo.), 105 S. W. 21. So, evidence of the condition of the track near by has been held admissible to show the surroundings as part of the res gestae. Tethrow v. St. Joseph &c. R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. 617; Sparkbracker v. Larrabee, 64 Wis. 573, 25 N. W. 555; Armstrong v. Ackley, 71 Iowa 76, 32 N. W. 180; Aurora v. Hillman, 90 Ill. 61. But see Dundas v. Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143 and note, 13 Am. St. 457; St. Louis &c. R. Co. v. Smith, 49 Tex. Civ. App. 1, 107 S. W. 638; Hiner v. Fond du Lac, 71 Wis. 74, 31 N. W. 632; Pittsburgh &c. R. Co. v. Williams, 74 Ind. 462; Reed v. New York &c. R. Co., 45 N. Y. 574. See generally 3 Elliott Ev., §§ 2506, 2516.

[72] Richards v. Oshkosh, 81 Wis. 226, 51 N. W. 256, 42 Am. & Eng. Corp. Cas. 109, citing Elliott Roads and Streets 650; Sewelly. City of Cohoes, 11 Hun (N. Y.) 626; Lafayette v. Weaver, 92 Ind. 477.

railroad companies and travelers upon a highway apply as between the railroad company and a street railway company. Their rights and duties are, in a sense, mutual and reciprocal, but the cars of the commercial or steam railroad company have the superior right of way or passage.[73] As to the railroad company, the driver or other proper employe of the street car company should exercise the same care as the driver of a private vehicle.[74] But as between the street car company and its passengers, he is required, as in other cases, to exercise the higher care which is due to its passengers by such a carrier.[75] It has been held, however, that the fact that a street car driver has been instructed to obey the signal of a flagman employed by the commercial railroad company does not make such flagman an agent of the street car company so as to render it responsible for his negligence.[76] The contributory negligence of the employes of the street railway company is not to be imputed to a passenger in its car in an action by him against the commercial railroad company for negligently injuring him in a collision.[77] He may maintain an action against either

[73] DuBois &c. R. Co. v. Buffalo &c. R. Co., 10 Pa. Co. R. 401, affirmed in 149 Pa. St. 1; ante, § 1536.

[74] Philadelphia &c. R. Co. v Boyer, 97 Pa. St. 91, 2 Am. Eng. R. Cas. 172. See also Minneapolis St. R. Co. v. Chicago &c. R. Co., 33 Minn. 62, 21 N. W. 853, 19 Am. & Eng. R. Cas. 362.

[75] Parker v. Des Moines City R. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas. 1913E, 174, and note where many other cases are cited to the same effect; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610. See also Douglas v. Sioux City St. R. Co., 91 Iowa 94, 58 N. W. 1070; Central Passenger R. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Am. St. 309; Smith v. St. Paul &c. R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550 and note; Watkins v. Atlantic Ave. R. Co., 20 Hun (N. Y.) 237; Graham v. Great Western R. Co., 41 U. C. Q. B. 324.

[76] Chicago R. Co. v. Volk, 45 Ill. 175. Compare Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91. Otherwise where flagman was employed by the companies jointly. Augustus v. Chicago &c. R. Co., 153 Mo. App. 572, 134 S. W. 23.

[77] Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. ed. 652; Little Rock &c. R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Pittsburgh &c. R. Co. v. Spencer, 98 Ind. 186, 21 Am. & Eng. R. Cas.

company by whose negligence he is injured,[78] and if his injury

478; Holzab v. New Orleans &c. R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; Baltimore &c. R. Co. v. State, 79 Md. 335, 29 Atl. 578, 47 Am. St. 415 and note; Bennett v. New Jersey R. Co., 36 N. J. L. 225, 13 Am. Rep. 435; New York &c. R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126 and note; Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558; Gulf &c. R. Co. v. Pendery, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. 125; New York &c. R. Co. v. Cooper, 85 Va. 939, 9 S. E. 321, 37 Am. & Eng. R. Cas. 33; note to Gray v. Philadelphia &c. R. Co., 22 Am. & Eng. R. Cas. 351; Elliott Roads and Streets, 632; 1 Thomp. Neg. (2nd ed.), § 500. But see Lockhart v. Lichtenthaler, 46 Pa. St. 151, with which compare O'Toole v. Pittsburgh &c. R. Co., 158 Pa. St. 99, 27 Atl. 737, 22 L. R. A. 606. The same rule obtains where one is riding in the private vehicle of another, and the doctrine of Thorogood v. Bryan, 8 C. B. 115, is now denied both in England and in nearly all of the states. Roach v. Western &c. R. Co., 93 Ga. 785, 21 S. E. 67; Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452, 9 Am. St. 827; Louisville &c. R. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733 and note; Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Nesbit v. Garner, 75 Iowa 314, 39 N. W. 516, 1 L. R. A. 152 and note; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, 57 Am. Rep. 492; Alabama &c. R. Co. v. Davis, 69 Miss. 444, 13 So. 693; Robinson v. New York &c. R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Masterson v. New York &c. R. Co., 84 N. Y. 247, 38 Am. Rep. 510; Street Railway Co. v. Eadie, 43 Ohio St. 91, 1 N. E. 519, 54 Am. Rep. 802; The Bernina L. R., 12 Prob. Div. 58, reported also in note to Borough of Carlisle v. Brisbane, 113 Pa. St. 544, 6 Atl. 372, 57 Am. Rep. 483, 494 and text books above cited. But see Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Carlisle v. Sheldon, 38 Vt. 440; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Mullen v. Owosso, 100 Mich. 103, 58 N. W. 663, 43 Am. St. 436 and note; Whitaker v. Helena, 14 Mont. 124, 35 Pac. 904, 43 Am. St. 621. Where, however, he has control and should look out for himself, his failure to do so may prevent a recovery. Brickell v. New York &c. R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. 648; Louisville &c. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Miller v. Louisville &c. R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416 and note; Yahn v. Ottumwa, 60 Iowa 429, 15 N. W. 257; Dean v. Pennsylvania R. Co., 129 Pa. St. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. 733; Galveston &c. R. Co. v. Kutac, 76 Tex. 473, 13 S. W. 327; ante, § 1670.

[78] Wabash &c. R. Co. v. Shacklet, 205 Ill. 364, 44 Am. Rep. 791 and cases cited in following note. In an action by a passenger of the street railway company against it, the fact that the railroad company was also guilty of negligence is no

is caused by the concurrent negligence of both of them he is not obliged to sue them severally, but may sue them jointly.[79] Further consideration of this subject at this place is unnecessary, as it has already been treated in the chapters on street railroads and crossings of highways and railroads.[80]

§ 1676 (1179.) Directing a verdict in crossing cases.—Where there is an omission of the duty of the traveler to look and listen before attempting to cross a railroad track, and such omission is a proximate cause of the injury complained of, the general rule is that it is the duty of the trial court to direct a verdict for the defendant.[81] In such cases the duty of the trav-

defense. Parker v. Des Moines City R. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas. 1913E, 174; Matthews v. Delaware &c. R. Co., 56 N. J. L. 34, 27 Atl. 919; Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752.

[79] Tompkins v. Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165 (may sue both, and, by dismissing as to one which the evidence does not make a case against recover from the other upon sufficient evidence); Georgia Pac. R. Co. v. Hughes, 87 Ala. 610, 6 So. 413; Louisville &c. R. Co. v. Case, 9 Bush. (Ky.) 728; Flaherty v. Northern Pac. R. Co., 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680 and note 12 Am. St. 654; Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; Colegrove v. New York &c. R. Co., 20 N. Y. 492, 75 Am. Dec. 418 and note; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752; Downey v. Philadelphia &c. R. Co., 161 Pa. St. 588, 29 Atl. 126, 58 Am. & Eng. R. Cas. 594. But where both companies were in fault it was held that neither could recover against the other and that the jury in returning a verdict against both could not at the same time return a verdict over in favor of one of them against the other. Texas &c. R. Co. v. Doherty (Tex. Civ. App.), 15 S. W. 44.

[80] See ante, § 1536; also note in Ann. Cas. 1913E, 179.

[81] Blount v. Grand Trunk &c. R. Co., 61 Fed. 375 (citing Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434; Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. ed. 213; Elliott v. Chicago M. & St. P. R. Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. ed. 1058; Mobile &c. R. Co. v. Coerner, 112 Fed. 489; Rollins v. Chicago &c. R. Co., 139 Fed. 639; Gardner v. Detroit &c. R. Co., 97 Mich. 240, 56 N. W. 603; Schwartz v. Mineral Range R. Co., 153 Mich. 70, 116 N. W. 540, 17 L. R. A. (N. S.) 1253 and note; Braudy v. Detroit &c. R. Co., 107 Mich. 100, 64 N. W. 1056; Conkling v. Erie R. Co., 63 N. J. L. 338, 43 Atl. 666, 667 (citing text); Gehring

eler, in most jurisdictions, is definitely fixed to that extent by law, and there is no question of fact to be submitted to the jury.[82] There may be cases where the facts are such that it

v. Atlantic City R. Co., 75 N. J. L. 490, 8 Atl. 61, 14 L. R. A. (N. S.) 312; Christopherson v. Minneapolis &c. Ry. Co., 28 N. Dak. 128, 147 N. W. 79, L. R. A. 1915A, 761; Blackburn v. Southern Pac. R. Co., 34 Ore. 215, 55 Pac. 225, 229 (citing text). The rule in relation to directing a verdict was thus stated in North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. ed. 287. "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way." See also Schofield v. Chicago M. & St. P. R. Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. ed. 224; Randall v. Baltimore & O. R. R. Co., 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. ed. 1003; McCrory v. Chicago &c. R. Co., 31 Fed. 531; Oleson v. Lake Shore &c. R. Co., 143 Ind. 405, 42 N. E. 736 (citing Elliott Gen. Practice, § 889), 32 L. R. A. 149; Lake Shore &c. R. Co. v. Brown, 41 Ind. App. 435, 84 N. E. 25 (question of law for court); Sala v. Chicago &c. R. Co., 85 Iowa 678, 52 N. W. 664; Blumenthal v. Boston &c. R. Co., 97 Maine 255, 54 Atl. 747; Grippen v. New York &c. R. Co., 40 N. Y. 34, 47; Cordell v. New York &c. R. Co., 70 N. Y. 119, 125, 26 Am. Rep. 550; Heaney v. Long Island &c. R. Co., 112 N. Y. 122, 19 N. E. 422; Woolf v. Washington R. &c. Co., 37 Wash. 491, 79 Pac. 997, 999 (citing text). The cases of Nixon v. Chicago &c. R. Co., 84 Iowa 331, 51 N. W. 187; Shufelt v. Flint &c. R. Co., 96 Mich. 327, 55 N. W. 1013, and Blodgett v. Vermont Cent. R. Co. (Vt.), 73 Atl. 590, supply apt examples of the duty of the court to direct a verdict. See also post, § 1678. But compare Antonian v. Southern Pac. Co., 9 Cal. App. 718, 100 Pac. 877; Wheeler v. Oregon &c. R. Co., 16 Idaho 375, 102 Pac. 347; International &c. R. Co. v. Edwards (Tex.), 91 S. W. 643, and cases cited in next following section.

[82] Woolf v. Washington Ry. &c. Co., 37 Wash. 491, 79 Pac. 997, 999 (quoting text). See also Chicago &c. R. Co. v. Rossow, 117 Fed. 491; Lake Shore &c. R. Co. v. Brown, 41 Ind. App. 435, 84 N. E. 25; Missouri &c. Ry. Co. v. Bussey, 66 Kans. 735, 71 Pac. 261; Steber v. Chicago &c. R. Co., 115 Wis. 200, 91 N. W. 654. In Hollinger v. Canadian &c. R. Co., 20 Ont. App. 244, 55 Am. & Eng. R Cas. 269, 21 Ont. App. 705, 55 Am. & Eng. R. Cas. 192, a somewhat different view is taken, but it is difficult to reconcile that view with the doctrine of the English courts. Davey v. London &c. R. Co., L. R. 11 Q. B. D. 213, L. R. 12 Q. B. D. 70; Scott v. Dublin &c. R. Co., 11 Irish C. L. 377. The conclusion asserted in the case first cited is certainly in conflict with the great number of cases which hold that the negligence of the defendant does not

would not be proper for the court to direct a verdict although the plaintiff did not look and listen, as, for instance, where, without any fault, he was misled by the negligent acts of the company, and so, on the other hand, there may be cases where it would be proper to direct a verdict although the plaintiff did look and listen, as, for instance, where he looked and listened only from a place where he knew that looking and listening would be of no avail, or recklessly took the chances of crossing immediately in front of a rapidly moving train.

§ 1677 (1179a). Question of contributory negligence left to the jury.—Questions of negligence and of contributory negligence are usually questions of fact, or mixed questions of law and fact. Where the evidence is without conflict, and an absolute standard of care exists or is prescribed, or but one reasonable inference can be drawn, the question usually becomes one of law for the court, and, in many instances, the court can well say that there are at least some things that must usually be done in order to constitute reasonable and ordinary care. This is, perhaps, peculiarly true in railroad crossing cases, and many decisions, some of which are referred to in the next section, illustrate this doctrine. But "circumstances alter cases," and there are not only some jurisdictions in which the inclination is to leave the question of contributory negligence to be nearly always determined by the jury under all the circumstances, but there are also cases in nearly every jurisdiction in which

absolve the plaintiff from the duty of exercising ordinary care. The true rule is that laid down in Grippen v. New York &c. R. Co., 40 N. Y. 34, where it was held that: "The law will not permit a party to neglect his own means of self-preservation on the plea that he assumed that other parties would be duly careful, and for that reason subject himself to injury, which by due care he might nevertheless have avoided. The right to assume that others will perform their duty to be duly careful does not warrant him in omitting due precautions. On the contrary, such an omission makes the negligence of both concur in producing the result." See also Slattery v. New York &c. R. Co., 203 Mass. 453, 89 N. E. 622, 133 Am. St. 311. And McGrath v. New York &c. R. Co., 59 N. Y. 468, 473, 17 Am. Rep. 359 and note.

it has been left to the jury to determine whether the traveler looked and listened at such a time and place and in such a manner as to constitute reasonable and ordinary care, whether his failure, if any, was a proximate cause of his injury, or the like, and even, in some instances, whether, under the peculiar circumstances, he was excused from looking and listening, or, at least, from not looking and listening to such an extent as might otherwise have been required. The following are some of the cases that seem to go the furthest in this direction. Where the plaintiff was struck on the south-bound track while a north-bound train was passing on the next track furthest from him, and he could have seen the approaching train by which he was struck if he had looked before he stepped on the track, it was held that the question of contributory negligence was for the jury.[83] In a New York case, where a woman was injured at a crossing, the court said: "Whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined as matter of law and whether upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as one which they alone could answer.[84] And in another case decided

[83] Chicago &c. R. Co. v. Pearson, 184 Ill. 386, 56 N. E. 633. And in the course of the opinion it is said: "It is not a rule of law that the omission of the duty to look and listen will bar a recovery where there are facts excusing the performance of that duty (Elliott Railroads, § 1661), and it is the settled rule of this court that it cannot be said as a matter of law, that a person is in fault in failing to look and listen if misled without his fault, or where the surroundings may excuse such failure. Pennsylvania Co. v. Frana, 112 Ill. 398; Chicago &c. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Chicago &c. R. Co. v. Hansen, 166 Ill. 623, 46 N. E. 1071; Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20. The jury were to determine, as a question of fact, in view of all the surroundings, whether the deceased was guilty of negligence in failing to look and listen for the other train." See also Wabash R. Co. v. McDaniels, 183 Ind. 104, 107 N. E. 291; Lutterloh v. Atlantic Coast Line R. Co., 172 N. Car. 116, 90 S. E. 8.

[84] Greany v. Long Island R. Co.,

by the same court a similar ruling was made.[85] It has also been held that one approaching a railroad crossing in a city "is not bound to anticipate that an approaching train will proceed at an unlawful or an unusual rate of speed, and is not chargeable with negligence, as matter of law, in attempting to cross, if, in view of the distance at which the track seems to be clear, he would have time to cross before a train going at the usual and lawful speed would reach the crossing."[86] Again, in a recent case, where the plaintiff's intestate was killed while crossing a

101 N. Y. 419, 5 N. E. 425. See also Minot v. Boston &c. R. Co., 73 N. H. 317, 61 Atl. 509; Chicago &c. R. Co. v. Keegan, 112 Ill. App. 338.

[85] Oldenburg v. New York &c. R. Co., 124 N. Y. 414, 26 N. E. 1021. The court, referring to the plaintiff, said: "Had he stopped and looked toward the west at the instant that he reached the said point (a point five feet from the track), he could have seen the danger in time to avoid it, but less than two steps forward brought him in contact with the crossbeam of the tender, which projected about two feet beyond the rails of the track on each side, and he was thrown under the wheels and killed. He did not look toward the west at the critical moment when he could have seen the engine, but went with his head down, as if looking at the sidewalk, which was rough, and the planks composing it very uneven. The gateman had begun to lower the south gate, and it was half down when the accident happened. As he was lowering the gate, he shouted to the deceased, who paid no attention, and whether he heard or not was a question of fact, under the circumstances. The space between the middle and south tracks, where Oldenburg could have stood without danger from the passenger coach behind or the advancing tender in front, was only three feet long. In order to reverse this judgment, it is necessary to hold that, notwithstanding the peculiar facts surrounding him, he was bound, as matter of law, while passing over this distance of three feet, to look to the west so as to see the engine, or else to look in front of him and up high enough to see the gate as it began to fall. We do not think that the law required this, but agree with the courts below in holding that the question of contributory negligence, under all the circumstances, was one of fact for the jury and not of law for the court. . . . While he was bound to use his eyes, we cannot say that he was bound to use them in a particular manner, at a particular instant of time."

[86] Farrell v. Erie R. Co., 138 Fed 29. See also Baltimore &c. R. Co v. Rosborough, 40 Ind. App. 14, 80 N. E. 869.

side-track, by a work train which was backed against him, and there was no proof that he knew an engine was attached to the cars on the side-track, and if he did there was nothing to show that he might not reasonably have assumed that the train would pull out of the switch forward, and not backward, it was held that, though he was not justified in ignoring the probability of the train backing toward him, and in failing to keep a lookout therefor, yet it was for the jury to consider whether decedent might not, in the discharge of the duty of looking both ways for his own safety, have reasonably relaxed his vigilance in failing to look toward the rear of that train.[87] Even in Indiana, where the rule as to looking and listening is well established, it is held that particular circumstances requiring the traveler to direct his attention temporarily elsewhere, or misleading him, may make the case one for the jury, and that the rule is not inflexible and unvarying as to time and place, so as to always, and under all circumstances, require the case to be taken from the jury merely because the traveler might have seen the train if he had looked in the right direction at a particular instant from a particular place.[88] Many other instances in which the courts went fully as far in holding that the question of contribu-

[87] Choctaw &c. R. Co. v. Baskins, 78 Ark. 355, 93 S. W. 757. See also St. Louis &c. R. Co. v. Tomlinson, 69 Ark. 489, 64 S. W. 347, 349; Atlantic City R. Co. v. Goodin, 62 N. J. L. 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. 652; St. Louis &c. R. Co. v. Hitt, 76 Ark. 227, 88 S. W. 908, 990.

[88] See Louisville &c. R. Co. v. Williams, 20 Ind. App. 576, 51 N. E. 128; Greenwald v. Lake Shore &c. R. Co., 165 Ind. 219, 74 N. E. 1081; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426, 30 N. E. 37; Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308; Cleveland &c. Ry. Co. v. Lynn, 171 Ind. 589, 85 N. E. 1000 (quoting text). See also St. Louis &c. R. Co. v. Hitt, 76 Ark. 227, 88 S. W. 908, 911, 990; Chicago &c. R. Co. v. Hutchinson, 120 Ill. 82, 11 N. E. 855; Chicago &c. R. Co. v. Clough, 134 Ill. 586, 25 N. E. 664; Wabash &c. R. Co. v. Biddle, 27 Ind. App. 161, 59 N. E. 284; New York &c. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Richmond v. Chicago &c. R. Co., 87 Mich. 374, 49 N. W. 621; Coffee v. Pere Marquette R. Co., 139 Mich. 378, 102 N. W. 953; Hopson v. Kansas City &c. R. Co., 87 Miss. 789, 40 So. 872; Jennings v. St. Louis &c. R. Co., 112 Mo. 268, 20 S. W. 490; Nutter v. Boston &c. R. Co., 60 N. H. 483, 485.

tory negligence was a question for the jury are found in recent cases.[89]

§ 1678 (1179b). Question of contributory negligence decided by court.—In many jurisdictions, as already shown, the quantum of care required of a traveler at a railroad crossing is prescribed by law, and it is held that, under ordinary circumstances, he must at least look and listen, and even in jurisdictions in which this is not laid down as an absolute rule of law verdicts have often been directed or new trials granted on the ground of contributory negligence on the part of the traveler where he did not look or listen and was deemed to have failed to exercise reasonable care. In this section an attempt will be made to collect and review some of the strongest and most extreme cases in which verdicts were so directed or the question decided as one of law. In one case a girl only twelve years old was held guilty of contributory negligence as a matter of law where the special verdict showed that she attempted to walk across a railroad track in front of an approaching train which she could have seen if she had looked when five feet from the track.[90] So, in a number of other cases, travelers have been held guilty of contributory negligence as a matter of law where there were obstructions or the like and they did not look or listen from a point at which such observation would be availing, even though such point was only a short distance from the track.[91] In many other cases where the undis-

[89] Louisville &c. R. Co. v. Lloyd, 186 Ala. 119, 65 So. 153; Cleveland &c. R. Co. v. Starks, 58 Ind. App. 341, 106 N. E. 646; Lake Shore &c. R. Co. v. Myers, 52 Ind. App. 59, 100 N. E. 313; Cleveland &c. R. Co. v. Nichols, 52 Ind. App. 349, 99 N. E. 497; Illinois Cent. R. Co. v. Sullenger, 160 Ky. 455, 169 S. W. 858 (an extreme case); Texas &c. Ry. Co. v. Moody (Tex. Civ. App.), 169 S. W. 1057.

[90] Shirk v. Wabash R. Co., 14 Ind. App. 126, 42 N. E. 656.

[91] Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462, 64 N. E. 233; Gardner v. Detroit R. Co., 97 Mich. 240, 56 N. W. 603; Weyl v. Chicago &c. R. Co., 40 Minn. 350, 352, 353, 42 N. W. 24; Clark v. Northern Pac. R. Co., 47 Minn. 380, 50 N. W. 365; Jobe v. Memphis &c. R. Co., 71 Miss. 734, 15 So. 129; Derk v. Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231. See also Owens v. Pennsylvania R. Co., 41 Fed. 187, 191; Green v. Los Angeles &c. R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. 68; Chicago &c. R. Co. v. Hedges, 18 Ind. 5, 9, 10, 11, 20 N. E.

puted physical facts showed that the plaintiff could and should have known of the approach of the train in time to have avoided injury if he had properly looked and listened a like ruling has been made.[92] Again, in a recent case,[93] applying this rule, it is said: "When the uncontradicted evidence conclusively shows that the colliding train must have been plainly visible from the point at which the testimony shows that the injured or killed person looked and listened for the train, the law conclusively presumes either that he did not look and listen, or that if he did look or listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained and negligently went into an obvious danger. In neither view is the company operating the train responsible under ordinary circumstances for the damages consequent upon the collision, of which the person injured or killed was the proximate cause.[94] . . . If that

530; Louisville &c. R. Co. v. Stommel, 126 Ind. 35, 41, 25 N. E. 863; Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Phillips v. Detroit &c. R. Co., 111 Mich. 274, 69 N. W. 496, 66 Am. St. 392; Coleman v. New York &c. R. Co., 98 App. Div. 349, 90 N. Y. S. 264; Washington &c. R. Co. v. Lacey, 94 Va. 460, 26 S. E. 834, 839.

[92] See ante, § 1660; also Northern Pac. Ry. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014; Stowell v. Erie R. Co., 98 Fed. 520; McCann v. Chicago &c. R. Co., 105 Fed. 480; Work v. Chicago &c. R. Co., 105 Fed. 874; Rollins v. Chicago &c. R. Co., 139 Fed. 639; Quinn v. Chicago &c. R. Co., 162 Ind. 442, 70 N. E. 526; Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462, 64 N. E. 233; Southern R. Co. v. Davis, 34 Ind. App. 377, 72 N. E. 1053; McCarthy v. Bangor &c. R. Co., 112 Maine 1, 90 Atl. 490; Kemp v. Northern Pac. R. Co., 89 Minn. 139, 94 N. W. 439; Sims v. St. Louis &c. R. Co., 116 Mo. App. 572, 92 S. W. 909; Nashville &c. R. Co. v. Parks, 136 Tenn. 367, 189 S. W. 695; Marshall v. Green Bay &c. R. Co., 125 Wis. 96, 103 N. W. 249.

[93] Carlson v. Chicago &c. R. Co., 96 Minn. 504, 105 N. W. 555.

[94] Citing Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014; Chicago &c. R. Co. v. Andrews, 130 Fed. 65; Brown v. St. Paul R. Co., 22 Minn. 165, 167; Weyl v. Chicago &c. R. Co., 40 Minn. 350, 42 N. W. 24; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661; Howe v. Minneapolis R. Co., 62 Minn. 78, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. 616; Nelson v. St. Paul &c. R. Co., 76 Minn. 193, 78 N. W. 1041, 79 N. W. 530; Schmidt v. Great Northern R. Co., 83 Minn. 105, 85 N. W. 935; Kemp v. Northern Pac. R. Co., 89 Minn. 139, 142, 94 N. W. 439; Wardner

point be so far distant from the track as to enable the person injured or killed to know of the approaching train in due season[95] to avoid the collision with it, he is guilty of contributory

v. Great Northern R. Co., 96 Minn. 382, 104 N. W. 1084.

[95] Citing Blount v. Grand Trunk R. Co., 61 Fed. 375; Straugh v. Detroit &c. R. Co., 65 Mich. 706, 36 N. W. 161; Huggart v. Mo. Pac. R. Co., 134 Mo. 673, 36 S. W. 220; Stopp v. Fitchburg R. Co., 80 Hun (N. Y.) 178, 29 N. Y. S. 1008; Morris v. Lake Shore R. Co., 148 N. Y. 182, 42 N. E. 579; Maryland v. Pittsburg &c. R. Co., 123 Pa. St. 487, 16 Pa. 624, 10 Am. St. 541; Butler v. Gettysburg &c. R. Co., 126 Pa. St. 160, 19 Atl. 37. In the course of the opinion it is also said: "Another principle is well established: That a person crossing as deceased was could not rely upon signals to remind him of danger. He is bound to be awake and alive for his own protection." Lewis, J., in Sandberg v. Railway Co., 80 Minn. 442, 83 N. W. 411. Accordingly, the failure of plaintiff's intestate to look and listen would be negligence or not according to the circumstances, but without being controlled by the defendant's failure to do its duty. Beach Con. Neg., § 185; Schneider v. Northern Pac. R. Co., 81 Minn. 383, 84 N. W. 124. Negligence of the defendant's employes in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of the person about to cross in failing to use the senses to discover danger. Chicago &c. R. Co. v. Houston, 95 U. S. 697, 702, 24 L. ed. 542; Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014. And see cases collected in Judson v. Great Northern R. Co., 63 Minn. 248, 254, 65 N. W. 447. The duty of exercising caution in attempting to cross a railway track, a place of known danger, is not relaxed by the opportunity or occasion for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution. Dodge, J., in Guhl v. Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. 889. That the train which did the damage in this case was an "extra" did not relieve either party from the respective duty of the exercise of care. Swiftly moving and irregular trains are to be expected, and it is the duty of persons about to go upon crossings to look and listen for such trains, as well as those on time or which run slowly. Collins, J., in Judson v. Great Northern R. Co., 63 Minn. 248, 254, 65 N. W. 447. It is true that, in the absence of evidence to the contrary, there is sometimes a presumption that one was killed while crossing a railroad track stopped, looked, and listened before attempting to cross the track. Texas &c. R. Co. v. Gentry, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. ed. 186; Baltimore &c. R. Co. v. Landrigan, 191 U. S. 461, 474, 24 Sup. Ct. 137, 48 L. ed.

negligence as a matter of law, and there is nothing for a jury to pass upon." Most of the cases already referred to in the section on directing a verdict are equally strong.[96]

§ 1679 (1179c). Collision with traction engines.—The right to move traction engines along a public highway exists in most of the states, although, in many of them, under certain statutory restrictions intended to minimize the likelihood of injuries to other users of the road or street.[97] These machines are not so constructed as to easily go over a ridge in the highway and have a tendency to stall at highway crossings and numerous collisions have resulted from this cause. In the main the law relating to the care to be exercised by the railroad company and the drivers of vehicles generally at crossings, apply to traction engines under the same circumstances.[98]

262. But in this case the plaintiff introduced evidence of the daughter of deceased, who was driving with him, as to what happened. Moreover, when it appears from the undisputed evidence that, if deceased had looked and listened before driving upon the crossing, he must have seen and heard the train approaching, as was the case here, the presumption is destroyed. Rollins v. Chicago &c. R. Co., 139 Fed. 639. Accordingly, upon appellant's own view of the facts in this case, that deceased looked up the track at a point 50 feet from it, it is not necessary to determine how far there is to be applied to it the ordinary rule that one who attempts to cross a railroad is bound to use his senses continually while approaching and while crossing the place of known danger (Rogstad v. St. Paul R. Co. 31 Minn. 208, 17 N. W. 287; Sandberg v. St. Paul &c. R. Co., 80 Minn. 442, 83 N. W. 411; Wright v. Cincinnati &c. R. Co., 94 Ky. 114, 21 S. W. 581; Renwick v. New York &c. R. Co., 36 N. Y. 132; Whitman v. Pennsylvania R. Co., 156 Pa. 175, 27 Atl. 290; Thompson v. New York &c. R. Co., 110 N. Y. 636, 17 N. E. 690; Moore v. Chicago &c. R. Co., 102 Iowa 595, 71 N. W. 569), in view of the fact that he was riding in a covered carriage, making it inconvenient for him to look up and down the road. See Stackus v. New York &c. R. Co., 79 N. Y. 464; Hicks v. New York &c. R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. 471."

[96] Ante § 1676.

[97] 1 Thomp. Neg. (2nd ed.) 1312. See also McFarland v. Sayen, 156 Mich. 426, 120 N. W. 794; McCarter v. Ludlum Steel Co., 71 N. J. Eq. 330, 63 Atl. 761.

[98] Chesapeake &c. R. Co. v. Crews, 118 Tenn. 52, 99 S. W. 368.

Thus in Tennessee where the statute makes it the duty of a person using a traction engine on a highway to have a watchman two hundred yards in advance of the machine, it has been held that a recovery for injuries in a collision with a railroad train was not barred to one who failed to obey the statute, unless the failure to have the watchman contributed to the accident.[99] But, even in the absence of such a statute, the operator of a traction engine was held guilty of contributory negligence where it stuck on a curved track and he saw a train coming several miles away and made no effort to flag it or go along the track and attract attention.[1] On the question of the amount of the damages for an injury to a traction engine in a collision, it has been held that the owner was entitled to recover the reasonable cash value of the engine just before the injury less the reasonable cash value after the injury, or if the engine could be restored, then he was entitled to the reasonable cash value of making the repairs, together with the reasonable cash value of the use of the engine during the time it would reasonably take to repair the same.[2]

§ 1680 (1179d). Injuries to bicyclists at crossings.—The bicyclist approaching a crossing is subject to the same duty as any other traveler to look and listen before venturing upon the track. Where his view of the track is obstructed and his hearing dulled by other sounds he should not proceed across the track without having his bicycle under such control that he can stop and avoid accident if necessary.[3] It has been held

[99] Chesapeake &c. R. Co. v. Crews, 118 Tenn. 52, 99 S. W. 368.

[1] Cain v. Northern Pac. R. Co., 28 N. Dak. 471, 149 N. W. 678, 679, (citing text); Northern Pac. R. Co. v. Tracy, 191 Fed. 15.

[2] Davidson v. Chicago &c. R. Co., 98 Mo. App. 142, 71 S. W. 1069.

[3] Waddell v. New York Cent. &c. R. Co., 98 App. Div. (N. Y.) 343, 90 N. Y. S. 239 (reversed in 184 N. Y. 530, 76 N. E. 1111, on the ground that under the particular circumstances of the case the question of contributory negligence was for the jury, but the general proposition is not questioned). See also Cleveland &c. R. Co. v. Heine, 28 Ind. App. 163, 62 N. E. 455. In Avery v. New York &c. R. Co., 205 N. Y. 502, 99 N. E. 86, 42 L. R. A. (N. S.) 158, it was so held as matter of law and that an instruction that "it is the duty of the person

that a bicyclist crossing a series of tracks and required to be alert in looking for approaching trains from different directions, was not indisputably negligent in failing to notice a defect in the crossing into which he ran his wheel and was thrown and injured.[4] A bicyclist riding his wheel along a railroad right of way, between the tracks at a place other than a crossing, is a trespasser and is entitled to no greater degree of care from the railroad company than any other trespasser. In one case where a bicyclist was thus riding in an open space ten or twelve feet wide between the tracks, where persons did and could ride with safety, it was held that this circumstance did not show that he was in peril or make it the duty of the engineer of an approaching train to stop the train to avoid injuring him, on the theory that he might possibly fall or be thrown upon the tracks.[5]

§ 1681. **Collision with automobile.**—In a number of recent cases in which a railroad train or engine and an automobile came into collision the question has arisen as to the duty of each party, especially as to the duty of the traveler, and there is conflict in the views taken by the different courts. Some of the courts apply a stricter rule, or make a stricter application of the rule as to the care required of the traveler, in the case of the driver of an automobile, than they do in other

riding a bicycle upon a highway, in approaching a railroad crossing, to keep the bicycle under control and be prepared to stop," is correct. There may be cases in which he should stop and alight, but this is not always necessary as a matter of law. Cleveland &c. R. Co. v. Penketh, 27 Ind. App. 210, 215, 60 N. E. 1095. See also for cases in which he must stop and even dismount if necessary. Lau v. Lake Shore &c. R. Co., 120 Mich. 115, 79 N. W. 13; Passman v. West Jersey &c. R. Co., 68 N. J. L. 719, 54 Atl. 809, 96 Am. St. 573, 61 L. R. A. 609. But compare Louisville &c. R. Co. v. Stewart, 128 Ala. 313, 29 So. 562.

[4] Sonn v. Erie R. Co., 67 N. J. L. 350, 51 Atl. 1109, affirming 66 N. J. L. 428, 49 Atl. 458.

[5] Seaboard &c. R. Co. v. Vaughan, 104 Va. 113, 51 S. E. 452. See also Smith v. Detroit &c. R. Co., 167 Mich. 596, 133 N. W. 504. And see further for case in which a boy was held guilty of contributory negligence; Gehring v. Atlantic City R. Co., 75 N. J. L. 490, 68 Atl. 61, 14 L. R. A. (N. S.) 312.

cases.[6] These cases proceed on the theory that an automobile is more easily controlled than a horse, and can be stopped closer to a track in safety, and the operator of the automobile can make his observation more deliberately, conveniently, safely and surely than the driver of a horse.[7] But the better rule, supported by a greater number of cases, seems to be that there is no absolute distinction of this kind as matter of law and that the question of contributory negligence is ordinarily for the jury to determine under the circumstances as in other cases.[8] Cases of the former class hold that the traveler must

[6] New York &c. R. Co. v. Maidment, 168 Fed. 21, 21 L. R. A. (N. S.) 794; Brommer v. Pennsylvania Co., 179 Fed. 577, 29 L. R. A. (N. S.) 924; Northern Pac. Ry. Co. v. Tripp, 220 Fed. 286; Chase v. Central R. Co., 208 Mass. 137, 94 N. E. 377. See also Trumble v. Philadelphia &c. R. Co. (Del.), 89 Atl. 370; Ft. Wayne &c. Trac. Co. v. Schoeff, 56 Ind. App. 540, 105 N. E. 924.

[7] See first four cases cited in last preceding note. But this argument seems to beg the question and applies a stricter rule than is ordinarily applied even in case of a pedestrian. And if carried to its logical conclusion and freely applied this doctrine would result in the courts making arbitrary distinctions and deciding the question of contributory negligence as matter of law according to the character of the vehicle and motive power, ease of control, and the like. The true rule seems to be that, while these things are to be considered by the jury along with the other circumstances properly bearing upon the question, it is for the jury to say, unless but one reasonable inference can be drawn from the undisputed facts or evidence, whether the traveler exercised ordinary and reasonable care under the circumstances.

[8] Central Indiana Ry. Co. v. Wishard, 186 Ind. 262, 114 N. E. 970; Lochridge v. Minneapolis &c. R. Co., 161 Iowa 74, 140 N. W. 834; Roby v. Kansas &c. R. Co., 130 La. Ann. 880, 58 So. 696, 41L. R. A. (N. S.) 355; Walters v. Chicago &c. R. Co., 47 Mont. 501, 133 Pac. 357, 46 L. R. A. (N. S.) 402; Dickinson v. Erie R. Co., 81 N. J. L. 461, 81 Atl. 104, 37 L. R. A. (N. S.) 150; Shepard v. Norfolk &c R. Co., 166 N. Car. 539, 82 S. E. 872; Stone v. Northern Pac. R. Co., 29 N. Dak. 480, 151 N. W. 36; St. Louis &c. R. Co. v. Model Laundry, 42 Okla. 501, 141 Pac. 970; Bush v. Philadelphia &c. R. Co., 232 Pa. St. 327, 81 Atl. 409; Texas &c. R. Co. v. Hilgartner, (Tex. Civ. App.), 141 S. W. 1091, 1093; Adams v. Galveston &c. R. Co. (Tex. Civ. App.), 164 S. W. 853. See also Indiana Un. Trac. Co. v. Love, 180 Ind. 442, 99 N. E. 1005; Noakes v. New York &c. R. Co., 121 App. Div. 716, 106 N. Y. S. 522; Pendroy v. Great Northern Ry. Co., 17 N. Dak. 433, 117 N. W.

stop and look and listen as matter of law, while those of the latter class generally hold that there is no absolute and invariable rule of law requiring the traveler to stop as well as to look and listen. Some other decisions also require the traveler to stop, as matter of law, at least under certain circumstances.[9] Other automobile cases involving the application of familiar rules and principles are referred to in the note below.[10] The mere fact that one is driving an unregistered or unlicensed automobile is properly held in most states not to preclude recovery.[11] And the negligence of the driver is not imputed to a guest or passenger any more than it can be imputed to a guest or passenger in a different kind of vehicle under similar circumstances.[12]

531; Hauff v. South Dakota &c. R. Co., 34 S. Dak. 183, 147 N. W. 986. And compare also Sanders v. Pennsylvania R. Co., 225 Pa. 105, 73 Atl. 1010; LaBelle v. Rhode Island Co. (R. I.), 73 Atl. 306; Hull v. Seattle R. &c. Co., 60 Wash. 162, 110 Pac. 804.

[9] Trimble v. Philadelphia &c. R. Co. (Del.), 189 Atl. 370; Glick v. Cumberland &c. R. Co., 124 Md. 308, 92 Atl. 778; Campbell v. Canadian Northern R. Co., 9 Dominion L. 777, 23 West L. R. 156. See also Spencer v. New York &c. R. Co., 123 App. Div. 789, 108 N. Y. S. 245, affirmed in 197 N. Y. 507, 90 N. E. 1166.

[10] Tousley v. Pacific Elec. R. Co., 166 Cal. 457, 137 Pac. 31, (act is in emergency); Indiana Un. Trac. Co. v. Love, 180 Ind 442, 99 N. E. 1005 (same); Pritchard v. Atchison &c. Ry. Co., 99 Kans. 600, 162 Pac. 315; Seuft v. Western Md. R. Co., 246 Pa. St. 446, 92 Atl. 553 (same); Shepard v. Norfolk &c. R. Co., 169 N. Car. 239, 84 S. E. 277 (question of proximate cause where speed limit is exceeded is for jury); Houston Belt &c. R. Co. v. Rucker, (Tex.), 167 S. W. 301 (exceeding statutory limit held negligence per se).

[11] Birmingham R. &c. Co. v. Aetna &c. Co., 184 Ala. 601, 64 So. 45; Lockridge v. Minneapolis &c. R. Co., 161 Iowa 74, 140 N. W. 854; Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542, L. R. A. 1915D, 628 (citing Elliott Roads & Sts. § 1115, and many cases to this effect). See also Crossen v. Chicago Elec. R. Co., 158 Ill. App. 42. But in Massachusetts the contrary is squarely held. Chase v. New York &c. R. Co., 208 Mass. 137, 158, 94 N. E. 377; Dudly v. Northampton St. R. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561 (but it was originally so held in this case by a divided court).

[12] Tousley v. Pacific Elec. R. Co., 166 Cal. 457, 137 Pac. 31; Indiana Un. Trac. Co. v. Love, 180 Ind. 442, 99 N. E. 1005; Thomas v. Illinois

§ 1682 (1179e). Leaving objects on or near highway calculated to frighten horses.—A railroad company, like any other corporation or person, is liable for injuries caused by leaving on or near a public highway, objects, the natural tendency of which is to frighten horses of ordinary gentleness.[13] And it is not everywhere essential that the road should have been a legally traveled highway, for there is authority fixing this liability where the object calculated to cause fright was near a road which was not a legal highway, but had been used by the public to the knowledge of the railroad company and without its protest.[14] Actionable negligence by a railroad company may consist in leaving cars on or near a highway crossing in such a way as to frighten horses of ordinary gentleness, and this, whether the obstruction is in a traveled part of the road or not.[15] It has been held that the mere fact that a train was allowed to stand across a highway for more than two minutes in violation of a statute imposing a penalty for so doing, so that a traveler's horses, after he had been compelled to wait for the train to get out of the way, took fright when the train began to move, and were killed, did not entitle the owner to damages. The view taken by the court was that this statute being designed merely to prevent travelers being delayed at a crossing, it is clear that the injury was not the proximate result of the violation of the statute, but was collateral to it.[16] Railroad companies have been held liable for injuries caused by the

Cent. R. Co., 169 Iowa 337, 151 N. W. 387; Corley v. Atchison &c. R. Co., 90 Kans. 70, 133 Pac. 555, Ann. Cas. 1915B, 764.

[13] 1 Thomp. Neg. (2nd ed.) 1257 et seq.; White's Supp. §§ 1257, 1258, 1915-1917; 2 Elliott's Roads & Sts. (3rd ed.) § 794.

[14] Texas &c. R. Co. v. McManus, 15 Tex. Civ. App. 122, 38 S. W. 241.

[15] Missouri &c. R. Co. v. Jones, 13 Tex. Civ. App. 376, 35 S. W. 322; Selleck v. Lake Shore &c. R. Co., 93 Mich. 375, 53 N. W. 556, 18 L. R. A. 154; Baltimore &c. R. Co. v. Faith, 71 Ill. App. 59; Baltimore &c. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. 503. But see Atchison &c. R. Co. v. Morris, 64 Kans. 411, 67 Pac. 837, where it is held that railroad cars are not of such a terrifying nature that their presence in a street is per se dangerous.

[16] Hall v. Brown, 54 N. H. 495. But compare Central Indiana Ry. Co. v. Wishard, 186 Ind. 262, 114 N. E. 970.

fright of horses at such objects, for example, as the carcasses of animals killed by the cars and allowed to remain in the sight of passing horses beyond a time reasonably sufficient for their removal,[17] derricks used for unloading freight into the highway,[18] a pile of cinders left on the railroad right of way within the limits of the highway and partially hidden from view by weeds, until horses would be very close to it,[19] a handcar so placed as to assume an appearance calculated to frighten roadwise animals,[20] a lot of culvert pipes piled on the right of way in the highway,[21] a mail crane,[22] and even noxious odors from cars containing wild animals left near a crossing.[23] But, on the other hand there are many cases in which there has been held to be no liability for fright at an ordinary car or the like.[24]

§ 1683 (1179f). Horses frightened by the operation of handcars.—Generally speaking no liability will be attached to the

[17] Baxter v. Chicago &c. R. Co., 87 Iowa 488, 54 N. W. 350. See also Louisville &c. R. Co. v. Armstrong, 32 Ky. L. 252, 105 S. W. 473; Chicago &c. R. Co. v. Scranton, 95 Ill. App. 619 (but delay of two hours not unreasonable).

[18] Jones v. Housatonic R. Co., 107 Mass. 261.

[19] Illinois &c. R. Co. v. Griffin, 184 Ill. 9, 56 N. E. 337, affirming 84 Ill. App. 152.

[20] Sherman &c. R. Co. v. Bridges, 16 Tex. Civ. App. 64, 40 S. W. 536; Ohio &c. R. Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 64. See also Baltimore &c. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. 503; St. Louis &c. R. Co. v. Everett, 40 Tex. Civ. App. 285, 89 S. W. 457. But compare Webster v. Chicago &c. R. Co., 158 Fed. 769.

[21] Witham v. Bangor &c. R. Co., 96 Maine 326, 52 Atl. 764 (delay of four days in removing and placing pipe not unreasonable).

[22] Cleghorn v. Western R. Co., 134 Ala. 601, 33 So. 10, 60 L. R. A. 269. See also post, § 1803.

[23] Settlemeyer v. Southern R. Co., 91 S. Car. 147, 74 S. E. 137. So, a railroad company has been held liable where a defective electric bell continued to sound after a train had passed and a traveler attempting to cross was injured by reason of his horse becoming frightened at the noise. Louisville &c. R. Co. v. Comley, 173 Ky. 469, 191 S. W. 96, L. R. A. 1917C, 978.

[24] Hohman v. New York &c. R. Co., 90 N. Y. S. 882, affirmed in 184 N. Y. 591, 77 N. E. 1189; Cleveland &c. R. Co. v. Wynant, 100 Ind. 160, 165, 166; Gilbert v. Flint &c. R. Co., 51 Mich. 488, 16 N. W. 868; Everett v. Great Northern R. Co. (Minn.), 111 N. W. 281. But compare Ft. Worth &c. R. Co. v. Morris, 45 Tex. Civ. App. 596, 101 S. W. 1068. See also Burns v. Delaware &c. Co., 110 App. Div. 592, 90 N. Y. S. 509.

railroad company from the fact that the traveler's horses became frightened through the usual and necessary operation of the handcar, where the operatives proceeded with reasonable care and caution having due regard to the rights of the traveling public.[25] And where the view of the track is not obstructed and the traveler's eyesight is good, the failure of the operatives to signal or give notice of the approach of the handcar at the crossing will not alone charge the railroad company with negligence to one whose injury was caused by the fright of his horse at the car.[26] But a railroad company was held liable where its employes drove a handcar at great speed over a highway crossing when they saw the fright of plaintiff's horse, and made no effort to stop the car, where if they had done so, the plaintiff could have recovered control of his horse and escaped injury.[27]

§ 1684 (1179g). **Acts of intermeddlers.**—Where the railroad company has placed a car or other object where it will not obstruct the highway or tend to frighten passing horses, and the car or object is afterwards moved into the highway by intermeddlers, it has been held that the company is not liable for injuries caused thereby, unless it allowed the car or object to remain on or in near proximity to the highway for an unreasonable time.[28] But the company may be negligent in not properly looking after its cars and preventing such intermeddling when it knows, or ought to know, that it is likely to occur.

[25] Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436, 49 N. E. 834; Webster v. Chicago &c. R. Co., 158 Fed. 769 (not negligence to take hand car from track at crossing to allow approaching train to pass). But the company may be liable where there is negligence in the operation of the hand car, or by starting it suddenly with a jerk and making unusual and unnecessary noise, frightening the traveler's horse. Louisville &c. R. Co. v. Hulette, 171 Ky. 500, 188 S. W. 653.

[26] Chicago &c. R. Co. v. Vremeister, 112 Ill. App. 346. See also Clinebell v. Chicago &c. R. Co., 77 Nebr. 538, 110 N. W. 347; post, § 1803.

[27] Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436, 49 N. E. 834. See also Houston &c. R. Co. v. Beard, 42 Tex. Civ. App. 427, 93 S. W. 532; post, § 1803.

[28] Cleveland &c. R. Co. v. Wynant, 114 Ind. 525, 17 N. E. 118.

§ 1685 (1179h). **Closing without warning a train open at a crossing.**—In cases where trains are open at crossings to allow the use of the highway, it is the plain duty of those in charge of the train to give signals or timely warnings of an intention to connect the train, so that those using the street or highway will have an opportunity to get out of danger.[29] Thus, it was held that a railroad company was liable to a boy, free from contributory negligence, for injuries received while attempting to pass between parts of a freight train at a crossing, by the sudden backing of part of the train without previous warning, and it further appeared that the crossing had been blocked for an unreasonable time.[30] A South Carolina statute providing that if an engine or cars be at a standstill within less than one hundred rods of a highway crossing, the bell shall be rung or the whistle sounded for at least twenty seconds before the engine is moved and shall be kept ringing until the engine has crossed such highway, has been held to apply to a train standing across a highway so that a pedestrian, who was injured by catching his foot between the bumpers of the cars of a freight train, stopped across the highway and moved without the statutory warning, had an action against the company for damages.[31]

§ 1686 (1179i). **Travelers struck by trains on parallel tracks.**—A not unusual form of crossing accident is where a traveler crosses behind one train and is struck by an engine or train coming from an opposite direction on a parallel track. In most such cases, the accident could have been avoided had the traveler looked or listened before going forward, and recoveries have been generally defeated on the principle of contributory negli-

[29] Weber v. Atchison &c. R. Co., 54 Kans. 389. See also Golden v. Pennsylvania &c. R. Co., 187 Pa. St. 635, 41 Atl. 302; Schmitz v. St. Louis &c. R. Co., 46 Mo. App. 380; Ft. Worth &c. R. Co. v. Dennis (Tex.), 33 S. W. 884.

[30] Golden v. Pennsylvania &c. R. Co., 187 Pa. St. 635, 41 Atl. 302.

[31] Littlejohn v. Richmond &c. R. Co., 49 S. Car. 12, 26 S. E. 967. Under an Indiana statute it is held negligence per se to leave a car standing partly across a street. Central Indiana Ry. Co. v. Wishard, 186 Ind. 262, 114 N. E. 970. But compare Trask v. Boston &c. R. Co., 219 Mass. 410, 106 N. E. 1022; Mc-

gence for failure to observe these precautions.[32] But there are some cases which hold that persons so injured are not guilty of contributory negligence as a matter of law, and that the question is one for the jury, under the particular circumstances, although the traveler may have failed to continuously look or listen for the train which ran upon him,[33] or, having looked once, attempted to cross without giving a second look.[34] Judge Thompson, after an examination of a great number of cases, sums up his views on this branch of the law of negligence in these words: "A very numerous class of railway accidents has arisen from the fact that the traveler, attempting to cross behind one train where there are two or more parallel tracks, fails to look or see whether another train may not be coming on another track from the opposite direction, and gets in front of

Glauflin v. Boston &c. R. Co., 230 Mass. 431, 119 N. E. 955, L. R. A. 1918E, 790.

[32] See generally Holland v. Chicago &c. R. Co., 18 Fed. 243; Stowell v. Erie &c. R. Co., 98 Fed. 520; Ensley R. Co. v. Chewning, 93 Ala. 24, 9 So. 458; Quinn v. Chicago &c. R. Co., 162 Ind. 442, 70 N. E. 526; Allerton v. Boston &c. R. Co., 146 Mass. 241, 15 N. E. 621; Guta v. Lake Shore &c. R. Co., 81 Mich. 291, 45 N. W. 821; Duvall v. Michigan &c. R. Co., 105 Mich. 386, 63 N. W. 437; Butts v. St. Louis &c. R. Co., 98 Mo. 272, 11 S. W. 754; West Jersey R. Co. v. Ewan, 55 N. J. L. 574, 27 Atl. 1064; Meinrenken v. New York &c. R. Co., 81 App. Div. 132, 80 N. Y. S. 1074; Daniels v. Staten Island &c. R. Co., 125 N. Y. 407, 26 N. E. 466; Daily v. Richmond &c. R. Co., 106 N. Car. 301, 11 S. E. 320; Smith v. Philadelphia &c. R. Co., 160 Pa. St. 117, 28 Atl. 641; Derk v. Northern &c. R. Co., 164 Pa. St. 243, 30 Atl. 231; Hughes v. Delaware &c. Canal Co., 176 Pa. St. 254, 35 Atl. 190.

[33] Chicago &c. R. Co. v. Pearson, 82 Ill. App. 605; Indianapolis &c. R. Co. v. Neubacher, 16 Ind. App. 21, 43 N. E. 576, rehearing denied, 44 N. E. 669; Roberts v. Boston &c. R. Co., 69 N. H. 354, 45 Atl. 94; Laible v. New York &c. R. Co., 13 App. Div. 574, 43 N. Y. S. 1003; Kurt v. Lake Shore &c. R. Co., 194 N. Y. 598, 88 N. E. 1122; White v. New York &c. R. Co., 42 N. Y. St. 24, 16 N. Y. S. 788; Crone v. New York &c. R. Co., 48 N. Y. St. 409, 20 N. Y. S. 529; Lake Shore &c. R. Co. v. Ehlert, 19 Ohio C. C. 177, 10 Ohio C. D. 443; Brown v. Griffin, 71 Tex. 654, 9 S. W. 546; Daume v. Chicago &c. R. Co., 72 Wis. 523, 40 N. E. 394, 7 Am. St. 879. See also Schremms v. Pere Marquette R. Co., 145 Mich. 190, 108 N. W. 698; Hopson v. Kansas City &c. R. Co., 87 Miss. 789, 40 So. 872; Waterfield v. Wabash Ry. Co. (Mo.), 190 S. W. 981; ante, § 1662, 1677.

[34] Brown v. Adgarton, 58 Kans. 815, 49 Pac. 159.

the second train and is killed or injured by it. In these cases the circumstances tend to excuse the negligence of the traveler much more than when he is approaching a crossing having but a single track. The receding train obscures from his view the coming train, and the noise of the receding train prevents him from distinguishing the noise of the coming train. Nevertheless, the books show that, in a majority of accidents of this kind, the judges hold that the contributory negligence of the confused and bewildered traveler prevents any recovery of damages, as matter of law."[35] Another species of injury properly classified at this place, is where a traveler at a crossing leaves a position of safety at the side of the track and places himself between parallel tracks so close together that he is injured by contact with cars moving in opposite directions as they pass the place where he stands. The traveler has been held clearly negligent in such a case.[36] But the cases are not harmonious, and one case holds that a person has a right to assume that the space between railroad tracks is sufficient to allow him to stand midway of such space without risk of injury.[37]

[35] 2 Thomp. Neg. (2nd ed.) § 1679, citing Stowell v. Erie &c. R. Co., 98 Fed. 520; Holland v. Chicago &c. R. Co., 18 Fed. 243; Ensley R. Co. v. Chewning, 93 Ala. 24, 9 So. 458; Bjork v. Illinois &c. R. Co., 85 Ill. App. 269 (foot traveler attempted to cross several tracks on which trains were coming from opposite directions, and, in escaping from one, was injured by another, there being nothing to obstruct the view of either train,—no question for the jury); Allerton v. Boston &c. R. Co., 146 Mass. 241, 15 N. E. 621; Gebhard v. Detroit &c. R. Co., 79 Mich. 586, 44 N. W. 1045; Guta v. Lake Shore &c. R. Co., 81 Mich. 291, 45 N. W. 821; Butts v. St. Louis &c. R. Co., 98 Mo. 272, 11 S. W. 754; Duvall v. Michigan &c. R. Co., 105 Mich. 386, 63 N. W. 437; West Jersey R. Co. v. Ewan, 55 N. J. L. 574, 27 Atl. 1064; Purdy v. New York &c. R. Co., 87 Hun 97, 67 N. Y. St. 676, 33 N. Y. S. 952; Daniels v. Staten Island &c. R. Co., 125 N. Y. 407, 26 N. E. 466; Adams v. New York &c. R. Co., 49 N. Y. St. 854, 21 N. Y. S. 681; Daily v. Richmond &c. R. Co., 106 N. Car. 301, 11 S. E. 320; Kraus v. Pennsylvania R. Co., 139 Pa. St. 272, 20 Atl. 993; Schmidt v. Philadelphia R. Co., 149 Pa. St. 357, 24 Atl. 218; Smith v. Philadelphia &c. R. Co., 160 Pa. St. 117, 28 Atl. 641; Derk v. Northern &c. R. Co., 164 Pa. St. 243, 30 Atl. 231; Hughes v. Delaware &c. Canal Co., 176 Pa. St. 254, 35 Atl. 190; Hovenden v. Pennsylvania R. Co., 180 Pa. St. 244, 36 Atl. 731; Norfolk &c. R. Co. v. Wilson, 90 Va. 263, 18 S. E. 35.

[36] McCann v. Chicago &c. R. Co., 105 Fed. 480.

[37] Eichorn v. New Orleans &c.

§ 1687 (1179j). Traveler struck by train closely following another.—It is a matter of common knowledge that trains follow each other at varying intervals, and this knowledge makes it the duty of the traveler, stopped at a crossing by a passing train, to wait long enough after the train has passed to see whether another train is following before entering upon the crossing. The cases very generally ascribe contributory negligence to a traveler who neglects this precaution and as a result is struck by the following engine or train.[38] Thus it has been held that a person, attempting to cross a railroad track on a public highway, who was familiar with and relied on a rule of the company which prohibited trains from following one another within ten minutes, was chargeable with contributory negligence in going on the track without looking or listening for approaching trains, though the train which caused the injury was a "wild train," and followed the preceding one within one or two minutes.[39] But running detached cars closely behind others or running trains so close together as to render the statutory signal unavailing, may, under the circumstances, operate to mislead a traveler to some extent, and prevent him from being adjudged guilty of contributory negligence as a matter of law under particular circumstances.[40]

Light Co., 112 La. Ann. 236, 36 So. 335.

[38] Benson v. Chicago &c. R. Co., 41 Ill. App. 227; Baltimore &c. R. Co. v. Talmage, 15 Ind. App. 203, 43 N. E. 1019; Fletcher v. Fitchburg R. Co., 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743; Purdy v. New York &c. R. Co., 87 Hun 97, 33 N. Y. S. 952; Schmidt v. Philadelphia &c. R. Co., 149 Pa. St. 357, 24 Atl. 218; St. Louis &c. Ry. Co. v. Paine (Tex. Civ. App.), 188 S. W. 1033.

[39] Bush v. Union Pac. R. Co., 62 Kans. 709, 64 Pac. 624.

[40] See McGhee v. White, 66 Fed. 502; Chicago &c. R. Co. v. Boggs, 101 Ind. 522; Cleveland &c. R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985; Baker v. Kansas City &c. R. Co., 122 Mo. 533, 26 S. W. 20; Meroney v. Louisville &c. R. Co., 165 N. Car. 611, 81 S. E. 1019; Davidson v. Lake Shore &c. R. Co., 179 Pa. 227, 36 Atl. 291; International &c. R. Co. v. Sein, 11 Tex. Civ. App. 386, 33 S. W. 558; also, ante, §§ 1662, 1677.

CHAPTER LII.

DUTY TO FENCE AND INJURIES TO ANIMALS.

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§ 1695 (1180). Common-law rule.—At common law, as it existed in England and in a great number of states in this country, the owner of animals is bound, at his peril, to keep them confined on his own premises.[1] If he does not keep them so confined and they escape to the premises of others he may be held liable for the trespass.[2] No person is obliged, according to the common-law rule, to fence his premises against the animals of others but has a right to rely on others performing their duty by keeping their animals confined. Since this rule is applicable to all owners of property it follows that at common law railway companies are not bound to fence their tracks so as to prevent animals from entering thereon.[3] If animals escape from their owner's premise and find their way onto the right of way of a railway company and are injured the railway company is not liable at common law unless the injuries inflicted on the animals are the result of wantonness or willfulness on the part of the railway employes.[4] If the injuries sustained by the animals are

[1]Rust v. Low, 6 Mass. 90; Bostwick v. Minneapolis &c. Co., 2 N. Dak. 440, 51 N. W. 781, 49 Am. & Eng. R. Cas. 527, 12 Am. & Eng. Ency. of Law (2nd ed.), 1039, 1040, and authorities there cited. But as there shown on pages 1041, 1042, in a number of states this doctrine has not been adopted.

[2]Savannah &c. Co. v. Geiger, 21 Fla. 669. See also Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121, and note, 58 Am Rep. 697 and notes.

[3]Wabash R. Co. v. Gault, 116 Ill. App. 443; Williams v. New Albany &c. R. Co, 5 Ind. 111; Indianapolis &c. Co. v. Harter, 38 Ind. 557; Henry v. Dubuque &c. Co., 2 Iowa 288; Perkins v. Eastern &c. Co., 29 Maine 307, 50 Am. Dec. 589; Baltimore &c. Co. v. Lamborn, 12 Md. 257; Eames v. Salem &c. Co., 98 Mass. 560, 96 Am. Dec. 676, and note. Boston &c. Co. v. Briggs, 132 Mass. 24, 7 Am. & Eng. R. Cas. 541; Robinson v. Flint &c. Co., 79 Mich. 323, 44 N. W. 779, 19 Am. St. 174; Mangold v. St. Louis &c. R. Co., 116 Mo. App. 606, 92 S. W. 753 (citing text); Cornwall v. Sullivan &c. Co., 28 N. H. 161; Chapin v. Sullivan &c. Co., 39 N. H. 53, 75 Am. Dec. 207; Bostwick v. Minneapolis &c. Co., 2 N. Dak. 440, 51 N. W. 781, 49 Am. & Eng. R. Cas. 527; Pennsylvania Co. v. Riblet, 66 Pa. St. 164, 5 Am. Rep. 360; Tower v. Providence &c. Co., 2 R. I. 404; North Eastern &c. Co. v. Sineath, 8 Rich. (S. Car.) 185; Hurd v. Rutland &c. Co., 25 Vt. 116; Morse v. Rutland &c. Co., 27 Vt. 49; Stuckee v. Milwaukee &c. Co., 9 Wis. 202; Martin v. Chicago &c. R. Co., 15 Wyo. 493, 89 Pac. 1025.

[4]Denver &c. Co. v. Olsen, 4 Colo. 239; Atchison &c. Co. v. Betts, 10 Colo. 431, 15 Pac. 821, 31 Am. & Eng. R. R. Cas. 563; Indianapolis &c.

caused by mere negligence on the part of the company or its employes the company is not, ordinarily, liable where this rule obtains, although there are some authorities which hold that if the company is guilty of negligence even where the common-law rule is in force, it will be liable.[5] The weight of authority is to

Co. v. Harter, 38 Ind. 557; Jeffersonville &c. Co. v. Underhill, 48 Ind. 389; Pittsburgh &c. Co. v. Stuart, 71 Ind. 500; Central Branch &c. Co. v. Lea, 20 Kans. 353; Louisville &c. Co. v. Ballard, 2 Metc. (Ky.) 165; Perkins v. Eastern &c. Co., 29 Maine 307, 50 Am. Dec. 589; Maynard v. Boston &c. Co., 115 Mass. 458, 15 Am. Rep. 119; Darling v. Boston &c. Co., 121 Mass. 118; Williams v. Michigan &c. Co., 2 Mich. 259, 55 Am. Dec. 59; Woolson v. Northern &c. Co., 19 N. H. 267; Vandegrift v. Rediker, 22 N. J. L. 185, 51 Am. Dec. 262; Price v. New Jersey &c. Co., 32 N. J. L. 19; Halloran v. New York &c. Co., 2 E. D. Smith (N. Y.) 257; Spinner v. New York &c. Co., 67 N. Y. 153; Railroad Co. v. Skinner, 19 Pa. St. 298, 57 Am. Dec. 654; Drake v. Philadelphia &c. Co., 51 Pa. St. 240; Tower v. Providence &c. Co., 2 R. I. 404; International &c. Co. v. Cocke, 64 Tex. 151, 23 Am. & Eng. R. Cas. 226; Stucke v. Milwaukee &c. Co., 9 Wis. 202; Bennett v. Chicago &c. Co., 19 Wis. 145; Fisher v. Farmers' &c. Co., 21 Wis. 73. The rule is thus stated in the comparatively recent case of Moses v. Southern Pacific R. Co., 18 Ore. 385, 23 Pac. 498, 42 Am. & Eng. R. Cas. 555: "As the plaintiff is bound at common law to keep his cattle within his own enclosure, and is liable for all damages done by them when they stray upon the lands of others, he is the party in fault, and it results, if he suffers them to stray upon the track of a railroad, they are there without right, and as trespassers, through his wrongful conduct, and, if injured or killed by the negligence of the railroad or its agents, in the management of its train, he must abide the consequences, upon the ground that the defendant company owes no duty of care to trespassing cattle on their tracks, except not wantonly or wilfully to destroy them, and that, in permitting the cattle to be at large wrongfully or by his own fault, he has contributed to produce the injury of which he complains, and is precluded from a recovery. When such a state of facts exists, nothing but wilfulness on the part of the agents of the company, or, as the authorities sometimes put it, such negligence as would amount to wilfulness, would make the company liable in damages for the killing of cattle upon their tracks, so exposed by the fault of their owner." See also Campbell v. New York &c. R. Co., 50 Conn. 128; Birmingham &c. R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. 92; Jones v. Western &c. R. Co., 95 N. Car. 328.

[5]South &c. R. Co. v. Williams, 65 Ala. 74; Needham v. San Francisco &c. R. Co., 37 Cal. 409; McCoy v. California &c. R. Co., 40 Cal. 532, 6 Am. Rep. 623; Isbell v. New York &c. R. Co., 27 Conn. 393, 71 Am. Dec. 78; Rockford &c. R. Co. v. Irish, 72 Ill. 404; Kentucky &c. R. Co. v. Le-

the effect, however, that it is liable only for willfulness or gross negligence amounting to wantonness. Since such animals as find their way onto the premises of a railway company are wrongfully there, being trespassers, it follows that if they cause any injury to the trains of the railway company their owner will be liable for such injuries.[6] In a number of states in this country, however, the strict rule of the common law requiring the owner of animals to keep them confined has not been adopted.[7] The rigidity of the rule has been greatly relaxed in several jurisdictions and where it is the general custom to permit cattle and other animals to run at large on unineloscd lands it is held that an owner is guilty of no wrong in not keeping his animals confined.[8] The modification of the

bus, 14 Bush (Ky.) 518; Witherell v. Milwaukee &c. R. Co., 24 Minn. 410; Vicksburg &c. R. Co. v. Patton, 31 Miss. 156; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Gorman v. Pacific &c. R. Co., 26 Mo. 441, 72 Am. Dec. 220; Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729; Jackson v. Rutland &c. Co., 25 Vt. 150, 60 Am. Dec. 246; Trout v. Virginia &c. R. Co., 23 Grat. (Va.) 619.

[6]Housatonic &c. R. Co. v. Knowles, 30 Conn. 313; Sinram v. Pittsburgh &c. R. Co., 28 Ind. 244; Annapolis &c. R. Co. v. Baldwin, 60 Md. 88, 45 Am. Rep. 711; Hannibal &c. R. Co. v. Kenney, 41 Mo. 271; Railroad Co. v. Skinner, 19 Pa. St. 298, 57 Am. Dec. 654; Drake v. Philadelphia &c. Co., 51 Pa. St. 240; Child v. Hearn, L. R. 9 Exch. 176.

[7]Alabama &c. R. Co. v. Jones, 71 Ala. 487; Alabama &c. Co. v. McAlpine, 71 Ala. 545; Louisville &c. R. Co. v. Cochran, 105 Ala. 354, 16 So. 797; Little Rock &c. R. Co. v. Finley, 37 Ark. 562; Campbell v. New York &c. R. Co., 50 Conn. 128; Savannah &c. R. Co. v. Geiger, 21 Fla. 669, 29 Am. & Eng. R. Cas. 274; Evans v. Burlington &c. R. Co., 21 Iowa 374; Farmer v. Wilmington &c. R. Co., 88 N. Car. 564; Campbell v. Bridwell, 5 Ore. 311; Moses v. Southern Pacific R. Co., 18 Ore. 385, 23 Pac. 498, 8 L. R. A. 135, and note, 42 Am. & Eng. R. Cas. 555; Timm v. Northern &c. R. Co., 3 Wash. Ter. 299, 13 Pac. 415; Blaine v. Chesapeake &c. R. Co., 9 W. Va. 252.

[8]Kerwhaker v. Cleveland &c. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Central Ohio &c. R. Co. v. Lawrence, 13 Ohio St. 66. The reason for the modification of the rule is thus stated in Kerwhaker v. Cleveland &c. R. Co., 3 Ohio St. 172. "Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this state, and in accordance with their habits, understandings, and necessities. . . . Cattle, hogs, and all other kinds of live stock not known to be breachy

rule has not the effect, however, of requiring owners of premises to fence against animals running at large, in all jurisdictions. Since in many jurisdictions it is held that animals may lawfully be at large it necessarily results that if they enter upon uninclosed premises of third persons they are not neces-

and unruly and dangerous, have been allowed at all times and in all parts of the state to run at large and graze on the range of uncultivated and uninclosed lands. And this prevails not only throughout the country, but also in the villages and cities, except where it may be, to a limited extent, restrained by local municipal ordinances. For many years, in the early settled parts of the state, the people were unable, and at the present time in some parts of the state they are yet unable to clear and inclose more ground than that actually needed for cultivation, and there is not at this time inclosed pasture lands sufficient to confine one-half of the live stock in the state. Even a statutory enactment, imposing the severest criminal punishment for permitting these animals to run at large, could not be enforced without either slaughtering or driving a large portion of them from the state. It has been the habit of the people to inclose their grounds for the purpose of cultivation, and to fence against the animals running at large. And it has been only within a few years, and that only in the better improved parts of the state, that uncultivated pasture grounds have been inclosed. And this has not been done because the owners considered themselves required by law to confine their stock within inclosures, but for their own convenience and advantage. So that it has been the general custom of the people of this state, since its first settlement, to allow their cattle, hogs, horses, etc., to run at large and range upon the uninclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tort-feasors, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the state governments. The common understanding upon which the people of this state have acted since its first settlement has been that the owner of land was obliged to inclose it, with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large, and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and conditions of the people of this state, but inconsistent with the habits, the interests, necessities and understanding of the people." See also Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. ed. 618.

sarily trespassers and their owner is not liable for trespass in such cases. This modification of the common-law rule in some jurisdictions has this effect upon the duty of railway companies to animals upon their tracks: It makes them liable for injuries negligently inflicted where, as we have seen, under the ancient common-law rule they were liable only for injuries wantonly or willfully inflicted.[9] And in such cases the owner of animals is not guilty of contributory negligence in permitting his animals to run at large.[10] But where he allows them to run at large in the immediate vicinity of an uninclosed railroad he cannot, perhaps, be said to be exercising such a degree of care as would ordinarily be exercised by a prudent man and there are some authorities which deny his right to recover under such circumstances.[11]

§ 1696 (1181). **Statutory duty to fence.**—As we have seen, at common law no duty rested upon a railway company to fence its track and it was not liable to animals killed or injured upon its tracks merely because it failed to erect fences. And this is true even in many states in which the ancient common-law rule is not adopted or followed. There are some authorities, however, which seem to hold that a railway company is obliged to fence its track independent of statutory enactment,[12] but the

[9]Mobile &c. R. Co. v. Williams, 53 Ala. 595; Little Rock &c. Co. v. Finley, 37 Ark. 562, 11 Am. & Eng. R. Cas. 469; Williams v. Northern &c. R. Co., 3 Dak. 168, 14 N. W. 97, 11 Am. & Eng. R. Cas. 421; Savannah &c. R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697 and note; Georgia &c. R. Co. v. Neely, 56 Ga. 540; Smith v. Chicago &c. R. Co., 34 Iowa 506; Kuhn v. Chicago &c. R. Co., 42 Iowa 420; Louisville &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75, 58 Am. Dec. 647; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Gorman v. Pacific &c. R. Co., 26 Mo. 441, 72 Am. Dec. 220; Donovan v. Hannibal &c. R. Co., 89 Mo. 147, 1 S. W. 232; Jones v. Columbia &c. R. Co., 20 S. Car. 249.

[10]Rensselaer &c. R. Co., Matter of, 4 Paige (N. Y.) 553.

[11]North Pennsylvania &c. R. Co. v. Rehman, 49 Pa. St. 101, 88 Am. Dec. 491; Drake v. Philadelphia &c. R. Co., 51 Pa. St. 240. But see Central of Georgia R. Co. v. Martin, 150 Ala. 388, 43 So. 563; Jackson v. Sumpter Val. R. Co., 50 Ore. 455, 93 Pac. 356 (for jury).

[12]Trow v. Vermont &c. Co., 24 Vt. 487, 58 Am. Dec. 191 and note; Quimby v. Vermont &c. Co., 23 Vt. 387.

overwhelming weight of authority is that such duty exists only as a result of legislative enactments.[13] Although it is not bound to fence at common law, yet if a company fails to do so it may be held to a greater degree of care in the management of its trains than if its tracks were fenced.[14] There now exist in nearly all of the states statutes imposing the duty upon a railway company to fence both sides of its right of way at all points where inconvenience will not result to the public or to the company in the transaction of its business,[15] or the like. Such statutes are not construed so as to have a retroactive effect,[16] but they generally apply to roads already constructed at the time of their passage,[17] unless it is clear that they are intended only

[13] Campbell v. New York &c. Co., 50 Conn. 128, 13 Am. & Eng. R. R. Cas. 589; Wabash R. Co. v. Gaull, 116 Ill. App. 443; Illinois Cent. R. Co. v. Clogston, 98 Miss. 618, 54 So. 75; Clark v. Ohio &c. Co., 34 W. Va. 200, 12 S. E. 505, 45 Am. & Eng. R. Cas. 475; Blaine v. Chesapeake &c. Co., 9 W. Va. 252; Martin v. Chicago &c. R. Co., 15 Wyo. 493, 89 Pac. 1025.

[14] Macon &c. Co. v. Vaughn, 48 Ga. 464; Atlantic &c. Co. v. Burt, 49 Ga. 606; Joliet &c. Co. v. Jones, 20 Ill. 221; Fernon v. Dubuque &c. Co., 22 Iowa 528; Morss v. Boston &c. Co., 2 Cush. (Mass.) 636; Boston &c. Co. v. Briggs, 132 Mass. 24, 7 Am. & Eng. R. Cas. 541; Vicksburg &c. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; Memphis &c. Co. v. Orr, 43 Miss. 279; New Orleans &c. Co. v. Field, 46 Miss. 573; Gorman v. Pacific &c. Co., 26 Mo. 441, 72 Am. Dec. 220; Kerwhaker v. Cleveland &c. Co., 3 Ohio St. 172.

[15] Moses v. Southern Pacific Co., 18 Ore. 385, 23 Pac. 498, 8 L. R. A. 135, and note, 42 Am. & Eng. R. Cas. 555; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, 42 Am. & Eng. R. Cas. 580. Sometimes there is difficulty in determining which of two statutes applies when an animal is killed. See Frisch v. Chicago &c. R. Co., 95 Minn. 398, 104 N. W. 228; Chicago &c. R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908. The California statute, prior to the amendment of 1915, requiring railroad fences and making railroad companies liable for animals killed because of failure to fence, was held not intended for the benefit of owners of stock running at large, but only for those having some interest in adjoining land. Wills v. Southern Pac. Co., 31 Cal. App. 723, 161 Pac. 501.

[16] Girtman v. Central &c. Co., 1 Ga. 173; Stearns v. Old Colony &c. Co., 1 Allen (Mass.) 493. They apply only to animals killed after the passage of the law. Indianapolis &c. Co. v. Kercheval, 16 Ind. 84.

[17] Boston &c. Co. v. Briggs, 132 Mass. 24; Galena &c. Co. v. Crawford, 25 Ill. 529; Shurley v. New York &c. Co., 121 Pa. St. 511, 15 Atl. 567; Bulkley v. New York &c. R.

to be applicable to roads thereafter to be constructed.[18] These statutes usually apply to companies from the time they begin to run trains,[19] but in some states a specified time is given the company after the completion of its road in which to construct fences. And if injuries occur before the expiration of the time allowed the company in which to fence its track its liability will be governed by the principles of the common law,[20] but after the expiration of such time the liability will be governed by the provisions of the statute.[21] While the duty rests upon the company to fence its track there is some question as to whether the company can be made to perform that duty by an individual. Since the company is liable for all damages which result from its failure to perform its duty in regard to fencing the track it is argued that this is a sufficient remedy by aggrieved persons. The consequent liability for a failure to perform its duty to fence may be sufficient to compel the performance of

Co., 27 Conn. 479; Wilder v. Maine Cent. R. Co., 65 Maine 332, 20 Am. Rep. 698. Even though a foreign corporation, Chicago &c. R. Co. v. Fitzhugh, 82 Ark. 179, 100 S. W. 1149.

[18]Sawyer v. Vermont &c. Co., 105 Mass. 196; Baxter v. Boston &c. Co., 102 Mass. 383. Where the defendant purchased the railroad, franchise and assets of another company, and did not assume liability for torts of the grantor company, it was held that it was not liable for injury to animals and crops caused by the failure of the grantor company to fence. Porter v. Illinois So. R. Co., 116 Mo. App. 526, 92 S. W. 744. See also Lawson v. Illinois So. R. Co., 116 Mo. App. 690, 94 S. W. 807.

[19]Baltimore &c. Co. v. McClelan, 59 Ind. 440; Continental &c. Co. v. Ives, 30 Mich. 448; Comings v. Hannibal &c. Co., 48 Mo. 512; Silver v. Kansas City &c. Co., 78 Mo. 528, 19 Am. & Eng. R. Cas. 642, 47 Am. Rep. 118; Clark v. Vermont &c. Co., 28 Vt. 103; Holden v. Rutland &c. Co., 30 Vt. 297. See also Glandon v. Chicago &c. R. Co., 68 Iowa 457. The Missouri statute imposing double damages on railroad companies neglecting to fence is held to include interurban electric railroads. Riggs v. St. Francois County R. Co., 120 Mo. App. 335, 96 S. W. 707. See also in Illinois Hartzell v. Anton &c. Trac. Co., 263 Ill. 205, 104 N. E. 1080.

[20]Rockford &c. Co. v. Connell, 67 Ill. 216; Gilman &c. Co. v. Spencer, 76 Ill. 192; McCall v. Chamberlain, 13 Wis. 637. Six months' time is given in Illinois. St. Louis &c. R. Co. v. Smith, 216 Ill. 339, 74 N. E. 1063.

[21]Toledo &c. Co. v. Crane, 68 Ill. 355; Peoria &c. Co. v. Barton, 80 Ill. 72. See also Cincinnati &c. Co. v. Harris, 61 Ind. 290, where the time in which to construct a fence was fixed by agreement between the company and a land-owner conveying a right of way.

the duty, but there are cases in which resort has been had to the courts to compel the company to properly fence its track. It has been held that mandamus is a proper remedy to compel the performance of this duty.[22] In some of the statutes provision is made by which landowners may, after notice to a railway company and its refusal to construct a fence, build the fence and recover the cost from the railway company.[23] As to the liability of a company for its failure to fence its track the general rule is that where animals come upon the track by reason of there being no proper fence and are injured the company is liable irrespective of the manner in which it operates its trains.[24] Negligence in failing to fence is the gist of the action under such statutes and where it is shown that the animals entered upon the track where it was not properly fenced a prima facie

[22] People v. Rochester &c. Co., 76 N. Y. 294, 14 Hun 371; Ohio &c. Co. v. People, 121 Ill. 483, 13 N. E. 236, 30 Am. & Eng. R. Cas. 427. But see Columbus &c. R. Co. v. Watson, 26 Ind. 50.

[23] Welles v. Northern Central &c. Co., 150 Pa. St. 620, 25 Atl. 51. See also Toledo &c. R. Co. v. Siebens, 63 Ill. 217; Logansport &c. R. Co. v. Wray, 52 Ind. 578; Terre Haute &c. R. Co. v. Salmon, 161 Ind. 131, 67 N. E. 918; Terre Haute &c. R. Co. v. Earhart, 35 Ind. App. 56, 73 N. E. 711; Terre Haute &c. R. Co. v. Salisbury, 38 Ind. App. 100, 77 N. E. 1097; Vandalia R. Co. v. Kanarr, 38 Ind. App. 146, 77 N. E. 1135; Warner v. Baltimore &c. R. Co., 31 Ohio St. 265.

[24] Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585; Jacksonville &c. Co. v. Harris, 33 Fla. 217, 14 So. 726, 61 Am. & Eng. R. Cas. 379; Toledo &c. Co. v. Lavery, 71 Ill. 522; Mikesell v. Wabash R. Co., 134 Iowa 736, 112 N. W. 201; Keliher v. Connecticut &c. Co., 107 Mass. 411; McDonnell v. Pittsfield &c. Co., 115 Mass. 564; Hill v. Missouri &c. Co., 121 Mo. 477, 26 S. W. 576, 61 Am. & Eng. R. Cas. 412; Chicago &c. Co. v. James, 26 Nebr. 194, 41 N. W. 993; Hindman v. Oregon &c. Co., 17 Ore. 614, 22 Pac. 116, 38 Am. & Eng. R. Cas. 310; Jensen v. South Dakota &c. R. Co., 25 S. Dak. 506, 127 N. W. 650, 35 L. R. A. (N. S.) 1015, Ann. Cas. 1912C, 700; Blair v. Milwaukee &c. Co., 20 Wis. 254. See also St. Louis &c. R. Co. v. Scott, 84 Ark. 623, 104 S. W. 1103; Ellington v. Great Northern R. Co., 96 Minn. 176, 104 N. W. 827; Rio Grande &c. R. Co. v. Jarcia (Tex. Civ. App.), 117 S. W. 204. But compare Southwestern Ry. Co. v. Bailey (Tex. Civ. App.), 168 S. W. 406. And contributory negligence has been held no defence. Geerds v. Ann Arbor R. Co., 181 Mich. 12, 147 N. W. 505; Burnham v. Rutland R. Co., 88 Vt. 34, 90 Atl. 792. But compare Claus v. Chicago &c R Co, 136 Iowa 7, 111 N. W. 15.

case is made out,[25] and it has been held that a railway company is liable in damages because it fails to fence, thus rendering an abutting farm less valuable.[26] So, when a railway was built through a fenced pasture and the company failed to fence its track thus compelling the owner of the pasture to keep watch over his cattle to prevent them from destroying his other crops and from trespassing on the lands of others it was held that he was entitled to recover from the railway company reasonable compensation for his extra efforts necessitated in the care of his cattle.[27] Where the duty rests upon the company to fence its track the company must, as a general rule, erect the fences along the margin or border of the entire right of way.[28]

§ 1697 (1182). **Statutes rest upon police powers.**—The running of railway trains and locomotives is necessarily attended with many dangers. This results from the great force used, the large bodies placed in motion, and the rapidity with which trains are run. The object of a railway being the carrying of passengers and freight from place to place, and as the performance of such an object is necessarily attended with many dangers, it follows that every practicable safeguard should be used and every precaution taken to prevent injury to persons or property carried. One of the sources of danger to railway trains is from collis-

[25]Missouri &c. Co. v. Bradshaw, 33 Kans. 533, 6 Pac. 917; Atchison &c. R. Co. v. Paxton, 75 Kans. 197, 88 Pac. 1082; Missouri &c. Co. v. Baxter, 45 Kans. 520, 26 Pac. 49, 45 Am. & Eng. R. Cas. 471; Eaton v. Oregon &c. Co., 19 Ore. 391, 24 Pac. 415, 45 Am. & Eng. R. Cas. 481; Wadsworth v. Union &c. Co., 18 Colo. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. 309, 56 Am. & Eng. R. Cas. 145. See also Bischof v. Illinois So. R. Co., 232 Ill. 446, 83 N. E. 948; Chicago &c. R. Co. v. King, 76 Nebr. 591, 107 N. W. 981.

[26]Nelson v. Minneapolis &c. Co., 41 Minn. 131, 42 N. W. 788, 40 Am. & Eng. R. Cas. 234; Emmons v. Minneapolis &c. Co., 38 Minn. 215, 36 N. W. 340, 35 Am. & Eng. R. Cas. 126; St. Louis &c. R. Co. v. Ritz, 33 Kans. 404, 6 Pac. 533. But it is held otherwise where the statute specifies the liability as only for injury to cattle or the like. Mangold v. St. Louis &c. R. Co., 116 Mo. App. 606, 92 S. W. 753.

[27]Nelson v. St. Louis &c. Co., 49 Kans. 165, 30 Pac. 178.

[28]Ohio &c. R. Co. v. People, 121 Ill. 483, 13 N. E. 236; Gould v. Great Northern R. Co., 63 Minn. 37, 65 N. W. 125, 30 L. R. A. 590, 56 Am. St. 453.

ions with animals on the track. Such danger has been recognized by nearly all of our state legislatures and their statutory enactments are for the purpose of reducing this danger as much as possible. Where any particular kind of property is inherently dangerous, or the operation of certain property is necessarily dangerous, it is within the power of the state under what is called its police power to prescribe such regulations in the use of such property as will render consequent danger as small as possible. Since imposing upon the railway companies the duty of fencing their tracks is for the sole purpose of lessening the danger in running trains it is held that the enactment of such fencing statutes is a valid exercise of the police power and it is upon that power that such statutes rest.[29]

[29]Missouri Pacific R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463, 22 Am. & Eng. R. Cas. 557; Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585, 38 Am. & Eng. R. Cas. 267; Wadsworth v. Union Pacific Co., 18 Colo. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. 309, 56 Am. & Eng. R. Cas. 145; Campbell v. New York &c. Co., 50 Conn. 128, 13 Am. & Eng. R. Cas. 89; Indianapolis &c. Co. v. Kercheval, 16 Ind. 84; Toledo &c. Co. v. Fowler, 22 Ind. 316; Indianapolis &c. Co. v. Parker, 29 Ind. 471; Small v. Chicago &c. R. Co., 50 Iowa 338; Missouri &c. Co. v. Roads, 33 Kans. 640, 7 Pac. 213, 23 Am. & Eng. R. Cas. 165; Missouri &c. R. Co. v. Harrelson, 44 Kans. 253, 24 Pac. 465; Missouri &c. Co. v. Eckel, 49 Kans. 794, 31 Pac. 693. 56 Am. & Eng. R. Cas. 174; Wilder v. Maine &c. R. Co., 65 Maine 332, 20 Am. Rep. 698; Gorman v. Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Davis v. Hannibal &c. Co., 19 Mo. App. 425; Corwin v. New York &c. Co., 13 N. Y. 42; Illinois &c. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618, 56 Am. & Eng. R. Cas. 157; Thorpe v. Rutland Railroad Co., 27 Vt. 140, 62 Am. Dec. 625; Blair v. Milwaukee &c. Co., 20 Wis. 254 See also Atchison &c. R. Co. v. Mathews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. ed. 909; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702; Yazoo &c. R. Co. v. Harrington, 85 Miss. 366, 37 So. 1016; Sanger v. Chesapeake &c. R. Co., 102 Va. 86, 45 S. E. 750. In Sullivan v. Oregon &c. Co., 19 Ore. 319, 24 Pac. 408, 42 Am. & Eng. R. Cas. 625, it is said: "That the legislature, in the exercise of the police power of the state, may require all railroads to fence their track, and for neglect or failure to perform this duty render them liable for whatever injury is done, or for double the value of the stock killed, and that such legislation is not obnoxious to the clause of the constitution in question, has been frequently decided, and cannot be questioned. The danger attending the running of steam railway cars, and liability to serious in-

§ 1698 (1183). Constitutionality of statutes imposing duty to fence.—Legislative enactments imposing upon railway companies the duty to fence their tracks usually impose burdens in addition to the mere duty to fence. While, perhaps, the statutes of no two states are alike, among all the statutes of the different states will be found many provisions imposing different burdens upon the company. Besides the duty to fence will be found provisions rendering the company liable for double damages, for the plaintiff's attorney fee, changing the burden of proof, requiring signals, and imposing absolute liability. The question of the constitutionality of these statutes and their various provisions has been presented and decided in many cases, and some of the provisions have been held constitutional and some unconstitutional. A provision merely requiring the company to fence and rendering it liable for negligence in failing to do so is constitutional.[30] Such a provision is, as we have

jury or loss of life of its passengers by collisions with animals straying upon its tracks where allowed to roam at large, makes it a requirement of duty to exercise the utmost care, and to take every precaution to keep its track clear, so as to prevent accidents from such collisions. How can this be better done, and the track kept comparatively secure from stock going upon it, than by requiring the railroad company to fence its track, and in default thereof, to hold it liable for the value of the stock killed by such collision, when the plaintiff is not contributorily negligent? Such a precaution, where stock is allowed to run at large, is a police regulation, and as a security against the loss of life and property in the operation of dangerous machinery, is based upon the same principle, and finds its authority in the same power, which regulates the storage of gunpowder or other dangerous explosives. This being so, the legislature may require railroad companies to inclose their tracks with fences, and provide that they may be held liable for all stock killed, caused by their neglect to maintain such fences; and, if the act in question has imposed this duty on the defendant, and attached a liability for its neglect, it is a valid exercise of the police power, and not subject to the constitutional objection urged." See also Missouri &c. R. Co. v. State, 92 Ark. 1, 121 S. W. 930, 31 L. R. A. (N. S.) 861, and note citing numerous authorities to this effect. Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149.

[30]Ohio &c. R. Co. v. McClelland, 25 Ill. 140; Chicago &c. R. Co. v. Dumser, 109 Ill. 402; Small v. Chicago &c. R. Co., 50 Iowa 338; Kansas &c. R. Co. v. Mower, 16 Kans. 573; Missouri &c. R. Co. v. Harrelson, 44 Kans. 253, 24 Pac. 465, 45 Am. & Eng. R. Cas. 457; Louisville &c. R. Co. v. Belcher, 89 Ky. 193, 12 S. W. 195, 40 Am. & Eng. R. Cas.

seen, a valid exercise of the police power and on that ground its constitutionality is upheld.[31] Even where a statute provided that a railway company should be required to put in fences and cattle-guards when the landowner, through whose lands the right of way passed, demanded it, it was held not to be unconstitutional on the ground that it made the land-owner sole judge of the necessity of the fence.[32] Statutes frequently provide that a railway company killing stock shall be liable for double damages where the stock was killed because of the failure of the company to discharge its duty to fence. Such statutes are not unconstitutional on the ground that they deny to companies the

228; Pennsylvania R. Co. v. Riblet, 66 Pa. St. 164, 5 Am. Rep. 360; Railroad Co. v. Crider, 91 Tenn. 489, 19 S. W. 618; Thorpe v. Rutland &c. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Blair v. Milwaukee &c. R. Co., 20 Wis. 254; Schmidt v. Milwaukee &c. R. Co., 23 Wis. 186. See also authorities cited in Bernardi v. Northern Pac. R. Co., 18 Idaho 76, 108 Pac. 542, 27 L. R. A. (N. S.) 796n; and in note in 31 L. R. A. (N. S.) 861.

[31] Hayes v. Michigan &c. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410; Cairo &c. R. Co. v. Peoples, 92 Ill. 97, 34 Am. Rep. 112 and note; Wilder v. Maine &c. R. Co., 65 Maine 332, 20 Am. Rep. 698; Barnett v. Atlantic &c. R. Co., 68 Mo. 56, 30 Am. Rep. 773; Dacres v. Oregon &c. Navigation Co., 1 Wash. St. 525, 20 Pac. 601; ante, § 1697. "Authority for exacting it (the duty to fence) is found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. Under this power the state, or the municipality exercising a delegated authority, prescribes the manner in which buildings in cities shall be constructed, and the thickness and height of their walls; excluded the use of all inflammable materials, forbids the storage therein of powder, nitroglycerine and other explosive substances, and compels the removal of decayed vegetable and animal matter, which would otherwise infect the air and engender disease. In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to enclose their roads with fences, having gates at crossings, and cattle-guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential." Missouri &c. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463.

[32] Birmingham &c. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L. R. A. 263, 46 Am. St. 92, 56 Am. & Eng. R. Cas. 223. Contra, Owensboro &c. R. Co. v. Todd, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285, 45 Am. & Eng. R. Cas. 461.

equal protection of the laws or deprive them of their property without due process of law.[33] Double damages are imposed in the nature of a penalty for a failure to perform a statutory duty and it is held that the legislature may prescribe to what extent such damages may be awarded.[34] And a provision that the plaintiff may recover a reasonable attorney's fee in addition to the actual damage done has also been held constitutional in many jurisdictions.[35] In some of the states statutes have been passed imposing an absolute liability on railway companies for animals killed or injured on their tracks independent of negligence or failure to comply with the statute on the part of the company. Such statutes are unconstitutional for they violate the provision of the constitution against taking property without due process of law,[36] and a statute which provided that when

[33]Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585. See also Cairo &c. R. Co. v. Peoples, 92 Ill. 97, 34 Am. Rep. 112; Tredway v. Sioux City &c. R. Co., 43 Iowa 528; Hines v. Missouri Pac. R. Co., 86 Mo. 629.

[34]Day v. Woodworth, 13 How. (U. S.) 363, 14 L. ed. 181; Missouri Pacific Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585; Minneapolis & St. Louis R. Co. v. Emmons, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. ed. 769; Phillips v. Missouri &c. R. Co., 86 Mo. 540, 24 Am. & Eng. R. Cas. 368. But see ante, § 785.

[35]Peoria &c. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Indianapolis &c. R. Co. v. Buckles, 21 Ill. App. 181; Terre Haute &c. R. Co. v. Salmon, 161 Ind. 131, 67 N. E. 918; Terre Haute &c. R. Co. v. Salisbury, 38 Ind. App. 100, 77 N. E. 1097; Kansas Pacific &c. R. Co. v. Yanz, 16 Kans. 583; Perkins v. St. Louis &c. R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426, and note; Illinois Cent. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618. See also Kansas City R. Co. v. Anderson, 233 U. S. 325, 34 Sup. Ct. 599, 58 L. ed. 983. But compare Wilder v. Chicago &c. R. Co., 70 Mich. 382, 38 N. W. 289; Schut v. Chicago &c. Co., 70 Mich. 433, 38 N. W. 291; Rinear v. Grand Rapids &c. R. Co., 70 Mich. 620, 38 N. W. 599; Paddock v. Missouri Pac. R. Co., 155 Mo. 524, 56 S. W. 453. See post, § 1736.

[36]Zeigler v. South &c. R. Co., 58 Ala. 594; Memphis &c. Co. v. Lyon, 62 Ala. 71; Birmingham &c. R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L. R. A. 263, 46 Am. St. 92; Denver &c. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Denver &c. R. Co. v. Wheatley, 7 Colo. App. 284, 43 Pac. 450; Cateril v. Union &c. R. Co., 2 Idaho 540, 21 Pac. 416; Bielenberg v. Montana &c. R. Co., 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813, 38 Am. & Eng. R. Cas. 275; Thompson v. Northern &c. R. Co., 8 Mont. 279,

animals were killed on a railway track they should be appraised and their value thus determined should thereupon become due and payable was held unconstitutional in recent cases as denying the right of trial by jury.[37] So, where a statute provided that killing stock by a railway company should be a misdemeanor and subjected the officials of the roads to indictment unless the damages were paid within a certain time it was held to be unconstitutional.[38] A statute, which provided, however, that absolute liability could be escaped by the erection of a proper fence was upheld as constitutional.[39] Suits for injuries to animals usually fall within general statutes of limitation, but it has been held that a special statute or clause in the charter of a railway company providing that an action for injury to stock shall be brought within a particular time is constitutional.[40] And a statute which changes the rules of evidence by casting the burden of proof upon the defendant to relieve itself of the prima facie case arising from proof of the killing has also been held constitutional.[41]

§ 1699 (1184). **Kind of fence required.**—Since railway companies are required to fence their track it necessarily follows,

21 Pac. 25; Jensen v. Union &c. R. Co., 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724; Oregon &c. R. Co. v. Smalley, 1 Wash. 206, 23 Pac. 1008, 22 Am. St. 143, 42 Am. & Eng. R. Cas. 550; Dacres v. Oregon &c. R. Co., 1 Wash. 525, 20 Pac. 601. But see Illinois Cent. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618; Ft. Worth &c. R. Co. v. Swan, 97 Tex. 338, 78 S. W. 920. Where the statute also provides that it shall not apply where a railroad is securely fenced, the duty to fence is implied and the provision for absolute liability is held constitutional. Madison &c. R. Co. v. Whiteneck, 8 Ind. 217; Kansas &c. R. Co. v. Mower, 16 Kans. 573; Texas &c. R. Co. v. Childress, 64 Tex. 346.

[37] Dacres v. Oregon &c. R. Co., 1 Wash. 525, 20 Pac. 601; Graves v. Northern &c. R. Co., 5 Mont. 556, 6 Pac. 16, 51 Am. Rep. 81.

[38] State v. Divine, 98 N. Car. 778, 4 S. E. 477.

[39] Kansas &c. R. Co. v. Mower, 16 Kans. 573.

[40] O'Bannon v. Louisville &c. R. Co., 8 Bush. (Ky.) 348; Mortimer v. Louisville &c. R. Co., 10 Bush. (Ky.) 485; Lucas v. Kentucky &c. R. Co., 12 Ky. L. 652, 14 S. W. 965, 45 Am. & Eng. R. Cas. 520.

[41] Lucas v. Kentucky &c. R. Co., 12 Ky. L. 652, 14 S. W. 965, 45 Am. & Eng. R. Cas. 520. See also on the subject of this section, post, §§ 1729, 1735, 1736, and see Pecos Valley &c. R. Co. v. Cazier, 13 N. Mex. 131, 79 Pac. 714; Quackenbush v. Wisconsin &c. R. Co., 62 Wis. 411, 22 N. W. 519.

that, in order to make the performance of the duty to fence meet the objects which it was intended to accomplish, there must be some rule prescribing what kind of a fence shall be built. Some of the statutes imposing the duty to fence define what kind of a fence shall be deemed sufficient, and in such cases the company is bound to construct such a fence as that prescribed by the statute.[42] Where a railway fence statute is silent as to the kind of fence that shall be constructed it is held that a company is bound to construct such a fence as required by a general fence law,[43] or such a one as a good husbandman generally keeps in the vicinity where the fence is required.[44] Where no certain kind of fence is required by statute or general fence laws the kind of fence may be determined by agreement between the parties,[45]

[42] Chicago &c. R. Co. v. Umphenour, 69 Ill. 198; Lee v. Minneapolis &c. R. Co., 66 Iowa 131, 23 N. W. 299; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Chicago &c. R. Co. v. James, 26 Nebr. 194, 41 N. W. 993; Brown v. Milwaukee &c. R. Co., 21 Wis. 39, 91 Am. Dec. 456. See also Hax v. Quincy &c. R. Co., 123 Mo. App. 172, 100 S. W. 693; Boucher v. Wabash Ry. Co. (Mo. App.), 199 S. W. 742; Missouri &c. R. Co. v. Tolbert, 100 Tex. 483, 101 S. W. 206 (where out of repair or ineffective it is the same as no fence).

[43] Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Enright v. San Francisco &c. R. Co., 33 Cal. 230; King v. Chicago &c. R. Co., 79 Mo. 328; Halverson v. Minneapolis &c. R. Co., 32 Minn. 88, 19 N. W. 392, 19 Am. & Eng. R. Cas. 526.

[44] Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Ferris v. Van Buskirk, 18 Barb. (N. Y.) 397; Eames v. Salem &c. R. Co., 98 Mass. 560, 96 Am. Dec. 676, and note; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335. "The requirement is that the railroad company shall be liable if it fails to fence its road against live stock running at large. This means such a fence as is reasonably sufficient to prevent live stock from going upon the track. The term 'fence' has a signification and meaning well understood in the law, as well as in common parlance. It does not mean an impassable barrier, or such a structure as is absolutely insurmountable by any live stock, however breachy or vicious the animals may be. Farmers, or others, desiring to protect their lands and crops from the incursions of live stock, erect such fences as are reasonably sufficient for that purpose; and we think that where there is a requirement to erect fences, such as are usually understood to be sufficient must be held to have been in the mind of the legislature." Shellabarger v. Chicago &c. R. Co., 66 Iowa 18, 23 N. W. 158, 19 Am. & Eng. R. Cas. 527.

[45] Enright v. San Francisco &c. R. Co., 33 Cal. 230; Ellis v. London &c. R. Co., 2 H. & N. 424. That is, the owner of the stock cannot complain

and in some cases where the statute does not require a particular kind of fence such fences as are required as division fences between different land-owners are adopted as the standard.[46] Fences are not required to be such that they shall prove to be barriers under exceptional or unusual circumstances. If they are such as confine cattle or animals of ordinary disposition they will be deemed sufficient. If animals are breachy or become restive because of lack of food furnished them by the owner and get on the track and are injured because of such disposition to be breachy or because of such restiveness the company will not be held liable.[47] A bluff, embankment or hedge may be a sufficient fence if it is as effective to prevent the entry of animals as an artificial fence.[48] Fences may ordinarily be erected of any material used for fences. They may be erected of wire,[49] but as a wire fence, if a barbed one, is dangerous to animals, the company may be liable for injuries to animals caused by running against the fence.[50] If, however, it appears that wire fences such as that erected by the company are in general use in the vicinity we do not believe the company would be liable for injuries caused by animals running against such a fence unless there was some negligence on the part of the company.[51] Where the fence attempted to be erected by a railway company is such that it will cause injury to the lands of an adjoining proprietor its erection

if the fence is such as was agreed upon between him and the company.

[46]Corwin v. New York &c. R. Co., 13 N. Y. 42; Davidson v. Michigan &c. R. Co., 49 Mich. 428, 13 N. W. 804.

[47]Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Chicago &c. R. Co. v. Utley, 38 Ill. 410.

[48]Hilliard v. Chicago &c. R. Co., 37 Iowa 442. But not where there is free access at each end. Taylor v. Spokane &c. R. Co., 32 Wash. 450, 73 Pac. 499. See also Ft. Worth &c. R. Co. v. Swan, 97 Tex 338, 78 S. W. 920. It has been held a question for the jury to determine whether a pond is a sufficient barrier. Meier v. Northern Pac. R. Co., 51 Ore. 69, 93 Pac. 691.

[49]Halverson v. Minneapolis &c. R. Co., 32 Minn. 88, 19 N. W. 392, 19 Am. & Eng. R. Cas. 526. See also Bishop v. Gulf &c. R. Co. (Tex. Civ. App.) 75 S. W. 1086.

[50]Atlanta &c. R. Co. v. Hudson, 62 Ga. 679; Gould v. Bangor &c. R. Co., 82 Maine 122, 19 Atl. 84.

[51]Guilfoos v. New York &c. R. Co., 69 Hun 593, 23 N. Y. S. 925. See Perkins v. St. Louis &c. R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426 and note.

may be enjoined. Thus, where the company commenced to plant a row of willows along its right of way, expecting them to serve as a fence and as posts on which to nail boards, an adjoining land-owner was granted an injunction on showing that the roots of the willows would extend into his soil and destroy its usefulness.[52] When the company is required to fence, the fence must be reasonably sufficient to protect all domestic animals, and swine fall within the rule the same as larger animals.[53] But where the statute only requires a fence sufficient to turn stock, as is generally the case, the company is not required to fence against persons.[54] Evidence of a competent witness that the fence was such a fence as good husbandmen usually kept was held admissible in one case,[55] but in other cases expert or opinion evidence as to the sufficiency of a fence has been rejected.[56]

§ 1700 (1185). **Repair of fences—Casualties and trespassers.**—Where a railway company has performed its duty by the erection of proper fences along its right of way there still remains the additional obligation of using ordinary care in maintaining such fences or seeing that they are kept in proper repair.[57] The rea-

[52] Brock v. Connecticut &c. R. Co., 35 Vt. 373.

[53] Lee v. Minneapolis &c. R. Co., 66 Iowa 131, 23 N. W. 299, 20 Am. & Eng. R. Cas. 476; Missouri &c. R. Co. v. Roads, 33 Kans. 640, 7 Pac. 213, 23 Am. & Eng. R. Cas. 165. And sheep. Cotton v. Wiscasset &c. R. Co., 98 Maine 511, 57 Atl. 785. See also Missouri &c. R. Co. v. Baxter, 45 Kans. 520, 26 Pac. 49, 45 Am. & Eng. R. Cas. 471; Deal v. St. Louis &c. R. Co., 144 Mo. App. 684, 129 S. W. 50; Texas &c. R. Co. v. Corn, 102 Tex. 194, 114 S. W. 103. But where there was a law in a certain township against hogs running at large it seems that in such township a railway company was under no obligation to fence against them. Atchison &c. R. Co. v. Yates, 21 Kans. 613; Leebrick v. Republican Valley &c. R. Co., 41 Kans. 756, 21 Pac. 796.

[54] Lake Shore &c. R. Co. v. Liidke, 69 Ohio St. 384, 69 N. E. 653.

[55] Louisville &c. R. Co. v. Spain, 61 Ind. 460.

[56] Enright v. San Francisco &c. R. Co., 33 Cal. 230; Sowers v. Dukes, 8 Minn. 23; Green v. Hornellsville &c. R. Co., 24 App. Div. 434, 48 N. Y. S. 576; Concord R. Co. v. Greely, 23 N. H. 237; Smead v. Lake Shore &c. R. Co., 58 Mich. 200, 24 N. W. 761.

[57] Chicago &c. R. Co. v. Guertin, 115 Ill. 466, 4 N. E. 507, 24 Am. & Eng. R. Cas. 385; Michigan Cent. R. Co. v. Farrell, 52 Ind. App. 603, 99 N. E. 1026; Lemmon v. Chicago &c. R. Co., 32 Iowa 151; Henderson v. Chicago &c. R. Co., 43 Iowa 620; Miller v. Chicago &c. Co., 66 Iowa

son for this rule is apparent. If the company were not required to keep up its fences they would soon fall into decay so that they would not accomplish the object for which they were intended. Accidents and casualties may also happen which injure or destroy the usefulness of a fence. Whether a company is liable for injuries to stock caused by reason of its fences being out of repair must depend upon the degree of diligence exercised by the company in the discovery of the defect and repairing it after discovered. Having once erected such fences as the company is bound to erect it may assume that they will remain in repair for a reasonable length of time, and if injuries occur on account of defects within a reasonable time after the erection of the fence the company will not be liable unless it had actual notice of the defects or ought to have had notice thereof and a sufficient time had elapsed in which to make repairs.[58] And even where the company has no right to rely on the assumption that a fence will remain in repair a reasonable length of time it must have notice, either actual or constructive, of a defect and a reasonable time in which to repair it after notice before it can be held liable.[59]

546, 24 N. W. 36, 23 Am. & Eng. R. Cas. 235; Robinson v. Grand Trunk &c. R. Co., 32 Mich. 322; Stephenson v. Grand Trunk &c. R. Co., 34 Mich. 323; Estes v. Atlantic &c. R. Co., 63 Maine 308; Clardy v. St. Louis &c. R. Co., 73 Mo. 576, 7 Am. & Eng. R. Cas. 555; Chubbuck v. Hannibal &c. R. Co., 77 Mo. 591; Young v. Hannibal &c. R. Co., 82 Mo. 428; Pittsburgh &c. R. Co. v. Smith, 38 Ohio 410, 13 Am. & Eng. R. Cas. 579; Missouri &c. R. Co. v. Tolbert, 100 Tex. 483, 101 S. W. 206; Carey v. Chicago &c. R. Co., 61 Wis. 71, 20 N. W. 648, 20 Am. & Eng. R. Cas. 469. "The duty to maintain a legal fence is as urgent as the duty to erect one. The same reasons and policy apply to each." Congdon v. Central Vermont &c. R. Co., 56 Vt. 390, 48 Am. Rep. 793, 26 Am. & Eng. R. Cas. 460. See also Jones v. Nichols, 46 Ark. 207, 55 Am. Rep. 575; Hendrickson v. Philadelphia &c. R. Co., 68 N. J. L. 612, 54 Atl. 831; Chicago &c. R. Co. v. Bourne, 105 Ill. App. 27. Permitting a cattle-guard to be filled with snow and ice so as to furnish no obstruction to the passage of animals has been held a failure to maintain a proper and sufficient cattle-guard. Paul v. Chicago &c. R. Co., 120 Iowa 224, 94 N. W. 498. See also Bumpas v. Wabash R. Co., 103 Mo. App. 202, 77 S. W. 115.

[58] Illinois &c. R. Co. v. McKee, 43 Ill. 119; Illinois &c. R. Co. v. Dickerson, 27 Ill. 55, 79 Am. Dec. 394; Atchison &c. R. Co. v. Kavanaugh, 163 Mo. 54, 63 S. W. 374.

[59] Chicago &c. R. Co. v. Barrie, 55 Ill. 226; Chicago &c. R. Co. v. Umphenour, 69 Ill. 198; Chicago

But where the company has failed to erect any fence at all the rule requiring notice and a reasonable time in which to make repairs does not apply.[60] Notice of the defect need not be actual; notice will be presumed where the defect has existed for a sufficient length of time to charge the company with notice.[61] What

&c. R. Co. v. Saunders, 85 Ill. 288; Hilliard v. Chicago &c. R. Co., 37 Iowa 442; Davis v. Chicago &c. R. Co., 40 Iowa 292; Norris v. Androscoggin &c. R. Co., 39 Maine 273, 63 Am. Dec. 621; Robinson v. Grand Trunk &c. R. Co., 32 Mich. 322; Stephenson v. Grand Trunk &c. R. Co., 35 Mich. 323; Clardy v. St. Louis &c. R. Co., 73 Mo. 576, 7 Am. & Eng. R. Cas. 555; Brady v. Rensselaer &c. R. Co., 1 Hun (N. Y.) 378; Murray v. New York &c. R. Co., 4 Keyes (N. Y.) 274; Brown v. Milwaukee &c. R. Co., 21 Wis. 40. See also St. Louis &c. R. Co. v. Wilson, 116 Ark. 163, 171 S. W. 471; Dietrich v. Hannibal &c. R. Co., 89 Mo. App. 36. In Ohio where the statute imposed upon the company the duty of keeping the fence in repair it was held that the company could not escape liability by showing that it had no notice of the defects. Pittsburgh &c. R. Co. v. Smith, 38 Ohio St. 410, 13 Am. & Eng. R. Co. 579. And length of time may give constructive notice. Ft. Worth &c. R. Co. v. Hickox (Tex. Civ. App.), 103 S. W. 202. See also Morris v. Great Western R. Co., 13 Iowa 28, 110 N. W. 154.

[60] Hannibal &c. R. Co. v. Morris, 79 Mo. 367, 19 Am. & Eng. R. Cas. 666. The rule requiring a railway company to keep its fences in repair is thus stated in the case of Hannibal &c. R. Co. v. Rutledge, 78 Mo. 286, 19 Am. & Eng. R. Cas. 669: "It does not perform its duty to the public by merely erecting a fence. It must keep it up and in repair. It does not, however, become the absolute insurer of the fence. The fence is liable to many casualties, against which no reasonable care and vigilance could guard. A wind storm, a water freshet, a fire, breachy stock or trespassers might destroy it. In such a case it would be utterly unreasonable to hold the corporation liable for stock killed which entered through a defect thus occasioned. The law allows reasonable time to discover the defect and repair it. In other words, it holds the company to the exercise of due care and no more."

[61] Brentner v. Chicago &c. R. Co., 58 Iowa 625, 12 N. W. 615; Fritz v. Kansas City &c. R. Co., 61 Iowa 323, 16 N. W. 144, 13 Am. & Eng. R. Cas. 558; Morris v. Great Western R. Co., 133 Iowa 28, 110 N. W. 154; Wirstlin v. Chicago &c. R. Co., 124 Iowa 170, 99 N. W. 697; Jebb v. Chicago &c. R. Co., 67 Mich. 160, 34 N. W. 538, 54 Am. Rep. 805, 31 Am. & Eng. R. Cas. 532; Baltimore &c. R. Co. v. Schultz, 43 Ohio 270, 1 N. E. 324, 22 Am. & Eng. R. Cas. 579; Varco v. Chicago &c. R. Co., 30 Minn. 18, 13 N. W. 921, 11 Am. & Eng. R. Cas. 419; King v. Chicago &c. R. Co., 90

will be a sufficient length of time to charge the company with notice of the defect must depend on the circumstances of each case and is usually a question of fact for the jury.[62] It has been held that if a land-owner knows of the existence of a defect in a railway fence between the right of way and his land it is his duty to notify the company of the defect. If he fails to do so and his stock get upon the track because of such defect and are injured he will in some jurisdictions at least, be held guilty of such contributory negligence as will preclude a recovery.[63] And where a land-owner has agreed or assumed to maintain a fence along his land it is his duty to repair defects in the fence and he will be guilty of contributory negligence if he fails to do so.[64] After a company has notice of defects in its fences, whether actual or constructive, a reasonable time must elapse in which to make the repairs before the company can be held liable.[65] If, after knowledge, the company negligently delays in making the necessary repairs it may be held liable. The question of whether

Mo. 520, 3 S. W. 217. For cases in which the time was held insufficient to charge the company, see Goodrich v. Kansas City &c. R. Co., 152 Mo. 222, 53 S. W. 917; Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

[62] Evans v. St. Paul &c. Co., 30 Minn. 489, 16 N. W. 271; Wait v. Burlington &c. Co., 74 Iowa 207, 37 N. W. 159, 35 Am. & Eng. R. Cas. 194. See also Peet v. Chicago &c. R. Co., 88 Iowa 520, 55 N. W. 508. And compare Cole v. St. Louis &c. R. Co., 43 Tex. Civ. App. 419, 94 S. W. 1128.

[63] Carey v. Chicago &c. R. Co., 61 Wis. 71, 20 N. W. 648, 20 Am. & Eng. R. Cas. 469; Poler v. New York &c. R. Co., 16 N. Y. 476; Chicago &c. R. Co. v. Seirer, 60 Ill. 295. Compare Dunn v. Chicago &c. R. Co., 58 Iowa 674, 12 N. W. 734, 7 Am. & Eng. R. Cas. 573.

[64] Pittsburgh &c. R. Co. v. Heiskell, 38 Ohio St. 666, 13 Am. & Eng. R. Cas. 555. But see Dibblee v. Astoria &c. R. Co., 57 Ore. 428, 111 Pac. 242.

[65] Chicago &c. R. Co. v. Harris, 54 Ill. 528; Chicago &c. R. Co. v. Barrie, 55 Ill. 226; Toledo &c. R. Co. v. Cohen, 44 Ind. 444; Cleveland &c. R. Co. v. Brown, 45 Ind. 90; Perry v. Dubuque &c. R. Co., 36 Iowa 102; Henderson v. Chicago &c. R. Co., 43 Iowa 620; Crosby v. Detroit &c. R. Co., 58 Mich. 458, 25 N. W. 463, 23 Am. & Eng. R. Cas. 191; McDowell v. New York &c. R. Co., 37 Barb. (N. Y.) 195. Whether or not the company had sufficient time in which to make repairs is a matter of defense which it must set up. St. Louis &c. R. Co. v. Busby, 81 Mo. 43, 22 Am. & Eng. R. Cas. 589.

or not the company was negligent in making the repairs after the defects were discovered is ordinarily one to be submitted to and determined by the jury.[66] Where the defects are caused by casualties or by trespassers the rule above given still prevails, that is, the company can not be held responsible until it is shown that it had, or ought to have had, knowledge of the defects and a reasonable time in which to repair them.[67] The bur-

[66]Chicago &c. R. Co. v. Saunders, 85 Ill. 288; McDowell v. New York &c. R. Co., 37 Barb. (N. Y.) 195; Indianapolis &c. R. Co. v. Hall, 88 Ill. 368. In the case of Crosby v. Detroit &c. R. Co., 58 Mich. 458, 25 N. W. 463, 23 Am. & Eng. R. Cas. 191, section men going along a track on a pleasant day, just before sundown, discovered a gap in the fence along the right of way. No steps were taken to repair it that evening, but it was repaired early the next morning. In the meantime plaintiff's animal got on the track through this gap and was injured. There was evidence tending to show that the gap could have been repaired the evening before the injury, and the court submitted the question of negligence in using diligence in making the repair to the jury. On appeal this was held to be no error, the court saying, inter alia: "A railroad corporation should be held to the same vigilance and activity in keeping a fence in repair as good business men engaged in any calling or industry where fences are required would naturally exercise in the prudent care of their own property liable to be injured or destroyed by the breaking or burning of a fence. And the question whether an ordinarily prudent farmer, having crops inclosed from animals running outside, discovering such a break in his fence as this, at the time of the day these trackmen found this gap, would not at once have set about repairing it, is, in my view of the law, a fair question to submit to a jury, if it is not absolutely certain that he would do so. I think no fair, unbiased panel of twelve men would answer such a question in the negative. And even if there is a fair chance of difference among candid, unprejudiced men upon any question of this kind, then it cannot be taken by a court away from the jury. And a disregard of the same degree of care in saving the property of others from injury by its action than an ordinarily prudent man would exercise in protecting his own property, is negligence in this corporation, as it would be in an individual."

[67]Great Western &c. R. Co. v. Helm, 27 Ill. 198, 81 Am. Dec. 226; Chicago &c. R. Co. v. Barrie, 55 Ill. 226; Chicago &c. R. Co. v. Saunders, 85 Ill. 288; Indianapolis &c. R. Co. v. Hall, 88 Ill. 368; Norris v. Androscoggin &c. R. Co., 39 Maine 273, 63 Am. Dec. 621; Case v. St. Louis &c. R. Co., 75 Mo. 668; Walthers v. Missouri &c. Co., 78 Mo. 617; Fitterling v. Missouri Pacific Co., 79 Mo. 504; Peery v. Quincy &c. R. Co., 122 Mo. App. 177, 99 S. W. 14; Spinner v. New York &c. R. Co., 67 N. Y. 153;

den of showing that a company had knowledge of defects in its fences is on the plaintiff.[68] When it becomes necessary for the company to repair a defective fence it must furnish the material; it has no right to take timber or poles from adjoining lands.[69]

§ 1701 (1186).—Transfer of duty to fence.—The general rule is that where a duty is imposed upon a property owner by statute he can not escape liability for a failure to properly perform that duty by employing a third person to do it. Applying this rule to a railroad company, where the railway company is under a statutory obligation to fence its track it cannot escape liability on account of its track not being properly fenced by claiming that it has employed a third person to perform that duty.[70] If the company employs a third person to erect the fence it is still charged with seeing that the fence is a sufficient one and if injuries occur because of the insufficiency of the fence the company will be liable.[71] The duty of fencing rests upon the company owning the road and that duty continues, in the absence of statutory en-

Brown v. Milwaukee &c. R. Co., 21 Wis. 39, 91 Am. Dec. 456. See also St. Louis &c. R. Co. v. Wilson, 116 Ark. 163, 171 S. W. 471; Perrault v. Minneapolis &c. R. Co., 117 Wis. 520, 94 N. W. 348. The company is not required to resort to extraordinary means, such as maintaining a patrol, to insure that fences will not be broken and that they will be repaired at once if broken. Jesus Maria Rancho v. Southern Pac. Co., 36 Cal. App. 375, 172 Pac. 183.

[68]Comstock v. Des Moines &c. R. Co., 32 Iowa 376; New Orleans &c. R. Co. v. Enochs, 42 Miss. 603; Toledo &c. Co. v. Cohen, 44 Ind. 444; Aylesworth v. Chicago &c. R. Co., 30 Iowa 459; Perry v. Dubuque &c. R. Co., 36 Iowa 102. But see Busby v. St. Louis &c. R. Co., 81 Mo. 43.

[69]Carey v. Milwaukee &c. R. Co., 61 Wis. 71, 20 N. W. 648, 20 Am. & Eng. R. Cas. 469. See also as to liability where company is negligent in making repair, Baltimore &c. R. Co. v. Zollman, 40 Ind. App. 233, 80 N. E. 40.

[70] Silver v. Kansas City &c. R. Co., 78 Mo. 528, 47 Am. Rep. 118, 19 Am. & Eng. R. Cas. 642; Ryder v. Thomas, 13 Hun (N. Y.) 296; Shepard v. Buffalo &c. R. Co., 35 N. Y. 641; McCafferty v. Spuyton &c. R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Hole v. Sittingbourne &c. R. Co., 6 Hurl. & N. 488. See also New Albany &c. R. Co. v. Tilton, 12 Ind. 73, 74 Am. Dec. 195; Indianapolis &c. R. Co. v. Thomas, 84 Ind. 194; Missouri &c. R. Co. v. Armstrong (Tex. Civ. App.), 99 S. W. 431.

[71] Illinois &c. R. Co. v. Swearingen, 47 Ill. 206; Norris v. Androscoggin &c. R. Co., 39 Maine 273, 63 Am. Dec. 621; Gill v. Atlantic &c. R. Co., 27 Ohio St. 240.

actments exempting it from liability, even in cases where the trains are run by contractors in the work of construction,[72] or, as a general rule, by other persons operating the road with the consent of the owner.[73]

§ 1702 (1187). **Fence erected by land-owner.**—It frequently happens that where a railway company does not erect fences along its right of way they are erected by the adjoining proprietor of lands. Often the land-owner erects fences by virtue of an agreement between himself and the railway company,[74] but there are a great number of cases in which fences have been voluntarily erected by the land-owner. In some states, as we have heretofore seen,[75] where the company refuses to erect the fence, the adjoining land-owner may do so and recover the cost from the railway company. Where, without any agreement between an adjoining land-owner and the railway company, such land-owner erects a fence between his lands and the right of way the company is not necessarily exempted from liability for non-performance of its statutory duty and may be held liable for stock killed or injured which got on the track where the company had so failed ot erect the fence.[76] But if it appears that the fences erected by the adjoining land-owners, although erected without any

[72] Houston &c. R. Co. v. Meador, 50 Tex. 77; Chicago &c. R. Co. v. McCarthy, 20 Ill. 385; Huey v. Indianapolis &c. R. Co., 45 Ind. 320.

[73] Indianapolis &c. R. Co. v. Solomon, 23 Ind. 534; Kansas City &c. R. Co. v. Ewing, 23 Kans. 273; Wyman v. Penobscot &c. R. Co., 46 Maine 162; Fort Wayne &c. R. Co. v. Hinebaugh, 43 Ind. 354. Operators also are generally liable. Illinois Cent. R. Co. v. Kanouse, 79 Ill. 272, 89 Am. Dec. 307; Davis v. Central R. Co., 75 Ga. 645; Ohio &c. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561; Cincinnati &c. R. Co. v. McDougall, 108 Ind. 179, 8 N. E. 571; Missouri Pac. R. Co. v. Ricketts, 45 Kans. 617, 26 Pac. 50; Gould v. Bangor &c. R. Co., 82 Maine 122, 19 Atl. 84. See also as to lessee, St. Louis &c. R. Co. v. Hale, 82 Ark. 175, 100 S. W. 1148; Barbee v. Southern Pac. Co., 9 Cal. App. 457, 99 Pac. 541.

[74] Post, § 1703.

[75] Ante, § 1696.

[76] Louisville &c. R. Co. v. White, 94 Ind. 257, 20 Am. & Eng. R. Cas. 449; Jeffersonville &c. R. Co. v. Sullivan, 38 Ind. 262; Fort Wayne &c. R. Co. v. Mussetter, 48 Ind. 286. But see where the landowner made a change in a crossing himself. Weaver v. Chicago &c. R. Co., 146 Iowa 149, 124 N. W. 1088.

agreement, were sufficient, or in other words, were as good fences as the company could have been required to erect in the performance of its statutory duty then it is not liable as for a failure to erect and maintain a fence.[77]

§ 1703 (1188). Agreement to fence.—Agreements to fence are often made between adjoining land-owners and railway companies. Such contracts have been held valid notwithstanding a statutory duty rests upon a railway company to see that its track is securely fenced.[78] Where the owner of lands adjoining the right of way of a railway company agrees with the company to construct and maintain proper fences between his lands and the railway company's right of way the track will be regarded as fenced as to such owner and if his stock get upon the track by reason of his failure to perform his agreement to fence and are injured the railway company is not liable,[79] unless it appear that

[77] Jeffersonville &c. R. Co. v. Sullivan, 38 Ind. 262. In Hovorka v. Minneapolis &c. R. Co., 31 Minn. 221, 17 N. W. 376, 13 Am. & Eng. R. Cas. 605, it was said: "Where the owner of the adjoining lands builds the fence, the railroad company may, with his assent, or acquiescence, adopt it. In the absence of any agreement it will still be its duty to maintain it in good condition and to restore it if removed by the owner. But so long as it remains and is kept in good condition, no matter by whom, so that domestic animals do not get upon the track by reason of any defect in it, the company is not liable as for failure to perform the duty to fence imposed on it by the statute. The statute duty is discharged, though performed for the company by a mere volunteer."

[78] Jackson v Rutland &c. R. Co., 25 Vt. 150, 60 Am. Dec. 246.

[79] Terre Haute &c. R. Co. v. Smith, 16 Ind. 102; Evansville &c. R. Co. v. Mosier, 101 Ind. 597; Ells v. Pacific &c. R. Co., 48 Mo. 231; Busby v. St. Louis &c. R. Co., 81 Mo. 43; Pittsburgh &c. R. Co. v. Heiskell, 38 Ohio St. 666, 13 Am. & Eng. R. Cas. 555. In the case of Bond v. Evansville &c. R. Co., 100 Ind. 301, 23 Am. & Eng. R. Cas. 200, it is said: "It has long been held by this court that where a person, through whose land a railroad is constructed, agrees to build and maintain fences along the right of way, the road will be regarded as fenced as to him, and that if he fails to build and maintain such fences, and his animals pass to the track and are killed, he cannot recover from the company on the ground that it has not fenced the track as required by statute." But see Shepard v. Buffalo &c. R. Co., 35 N. Y. 641. See generally Ton-

the injuries were willfully and wantonly inflicted.[80] Such a contract to fence, is not binding, however, on third persons unless they hold under such owner or are in privity with him[81] and as to such persons the company is bound to fence. Contracts to fence may be oral or written or even implied.[82] Where they are oral they are usually binding only between the parties by whom they were made,[83] and where they are written they are charges which run with the land and bind subsequent grantees of the original parties.[84] A land-owner's contract to maintain a fence between

awanda R. Co. v. Munger, 5 Denio (N. Y.) 255, 49 Am. Dec. 239; Wilder v. Maine Cent. R. Co., 65 Maine 332, 20 Am. Rep. 698; Whittier v. Chicago &c. R. Co., 24 Minn. 394; Jackson v. Rutland &c. R. Co., 25 Vt. 150, 60 Am. Dec. 246; Tower v. Providence &c. R. Co., 2 R. I. 404.

[80] Cincinnati &c. R. Co. v. Waterson, 4 Ohio St. 424.

[81] Cincinnati &c. R. Co. v. Ridge, 54 Ind. 39; Bond v. Terre Haute &c. R. Co., 100 Ind. 301; Wabash R. Co. v. Williamson, 104 Ind. 154, 3 N. E. 814, 23 Am. & Eng. R. Cas. 203; Gilman v. European &c. R. Co., 60 Maine 235; Silver v. Kansas City &c. R. Co., 78 Mo. 528, 47 Am. Rep. 118; Rinehart v. Kansas City &c. R. Co., 204 Mo. 269, 102 S. W. 958; Hamilton v. Missouri &c. R. Co., 87 Mo. 85. See also Corry v. Great Western R. Co., 7 Q. B. Div. 322; Warren v. Keokuk &c. R. Co., 41 Iowa 484.

[82] Bond v. Terre Haute &c. R. Co., 100 Ind. 301. See also Arkansas Midland R. Co. v. Whitley, 54 Ark. 199, 15 S. W. 465, 11 L. R. A. 621 and note.

[83] Wilder v. Maine &c. R. Co., 65 Maine 332, 20 Am. Rep. 698; St. Louis &c. R. Co. v. Todd, 36 Ill. 409; Day v. New York &c. R. Co., 53 Barb. (N. Y.) 250; Vandergrift v. Delaware R. Co., 2 Hous. (Del.) 287; Kentucky &c. R. Co. v. Kenney, 82 Ky. 154, 20 Am. & Eng. R. Cas. 458.

[84] Lynch v. Baltimore &c. R. Co., 240 Ill. 567, 88 N. E. 1034; Satterly v. Erie R. Co., 113 App. Div. 462, 99 N. Y. S. 309; Easter v. Little Miami &c. R. Co., 14 Ohio St. 48; Gill v. Atlantic &c. R. Co., 27 Ohio St. 240; Cook v. Milwaukee &c. R. Co., 36 Wis. 45. See also Varner v. St. Louis &c. R. Co., 55 Iowa 677. But compare Vandegrift v. Delaware &c. R. Co., 2 Houst. (Del.) 289; Hawkins v. St. Louis &c. Ry. Co. (Mo. App.), 202 S. W. 1060 (statutory requirement is not wholly for benefit of landowner, but is a police regulation for benefit of public, so that agreement with landowner dispensing with statutory fence is binding only on him and not on his successor in title). In Kentucky &c. R. Co. v. Kenney, 82 Ky. 154, 20 Am. & Eng. R. Cas. 458, the court said: "It is equally certain, however, that a written agreement, such as this deed embraces, showing an intention to charge the land

his lands and a railway right of way is binding on his tenant and the tenant cannot recover for stock injured on the railway tracks.[85] The remedy for a failure to erect a fence according to agreement is an action for breach of contract and not for tort.[86] Such agreements not being binding on third persons who are entitled to recover for stock injured or killed on a railway track not properly fenced, it has been held that if such injuries were caused by the failure of the adjoining land-owner to erect fences according to agreement and the company has been compelled to respond in damages it has its remedy against the land-owner therefor.[87] Agreements to fence are often made in which the company instead of the adjoining owner agrees to maintain the fence. Companies often take such an obligation upon themselves in consideration of a grant of right of way across an owner's lands. Where a railway company obtains a right of way through a farm, and in consideration of the grant of such right of way agrees to erect and maintain secure fences it is bound to pay for animals killed or injured by its trains in cases where the animals come upon the track through the fault of the company in failing to erect fences according to the terms of its contract.[88] Such

by the covenant, which in its very nature inheres in the land and contains mutual promises connected with the grant as a part of it, runs with the land, and is enforceable by and against subsequent grantees." Midland R. Co. v. Fisher, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604 and note, 21 Am. St. 789.

[85] St. Louis &c. R. Co. v. Washburn, 97 Ill. 253; Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295. See also Ells v. Pacific R. Co., 48 Mo. 231; Cincinnati &c. R. Co. v. Waterson, 4 Ohio St. 425; Indianapolis &c. R. Co. v. Petty, 25 Ind. 413. Contra Corry v. Great Western R. Co., L. R. 7 Q. B. D. 322, 2 Am. & Eng. R. Cas. 612. In Howard v. Maysville &c. R. Co., 24 Ky. L. 1051, 70 S. W. 631, the tenant recovered where the company failed to perform its agreement with the landowner to fence.

[86] Chicago &c. R. Co. v. Barnes, 116 Ind. 126, 18 N. E. 459. Equity will not rescind such a contract on the ground that its breach can be adequately compensated for in damages. Stringer v. Keokuk &c. R. Co., 59 Iowa 277, 13 N. W. 308, 11 Am. & Eng. R. Cas. 608.

[87] Warren v. Kansas &c. R. Co., 41 Iowa 484.

[88] Conger v. Chicago &c. R. Co., 15 Ill. 366; Chicago &c. R. Co. v. Ward, 16 Ill. 522; Chicago &c. R. Co. v. Barnes, 116 Ind. 126, 18 N. E. 459; Fernow v. Dubuque &c. R. Co., 22 Iowa 528; Smith v. Chicago

agreements when recited in the condemnation proceedings or the instrument by which the railway company obtains its rights are charges which run with the land and are binding upon the company even after the land-owner has conveyed to subsequent grantees.[89] If the company fails to perform an agreement to fence, and animals are killed by reason thereof, the measure of damages is not what it would cost to erect the fence, but the value of the animals killed or injured or other damage done.[90] Or, in other words, the company will be liable for all damages which proximately flow from its failure to perform its contract duty.

§ 1704 (1189). **Waiver of duty to fence.**—In the preceding section we have seen that an adjoining owner of lands may contract to construct and maintain fences himself, and if he fails to do so and his stock are injured on account of such failure, he cannot recover. Since the owner is permitted to contract for the construction of the fence by himself, and since his right to recover in such cases depends upon whether or not he has performed his duty, it would seem to follow on principle that an owner could agree with a company that no fence at all should be erected along his lands or that he should waive the performance of the duty imposed upon the railway company to see that its track is securely fenced. Such is the rule, for it is firmly established that the owner of adjoining lands may waive the building of a fence and thus cut off his right to recover if his animals are injured,[91] unless they are injured intentionally or

&c. R. Co., 38 Iowa 518; Donald v. St. Louis &c. R. Co., 44 Iowa 157; Raridon v. Central Iowa &c. R. Co., 65 Iowa 640, 22 N. W. 909, 19 Am. & Eng. R. Cas. 615; Hull v. Chicago &c. R. Co., 65 Iowa 713, 22 N. W. 940, 20 Am. & Eng. R. Cas. 341; Poler v. New York &c. R. Co., 16 N. Y. 476. See also Evans v. Southern R. Co., 133 Ala. 482, 32 So. 138. Its liability in such case is the same as in those cases where the duty to fence is statutory. Gulf &c. R. Co. v. Washington, 49 Fed. 347.

[89] Huston v. Cincinnati &c. R. Co., 21 Ohio St. 235.

[90] Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 24 Am. & Eng. R. Cas. 641, 5 N. E. 404; Chicago &c. R. Co. v. Barnes, 116 Ind. 126, 18 N. E. 459.

[91] Manwell v. Burlington &c. R. Co., 80 Iowa 662, 45 N. W. 568;

neligently.[92] Such waiver of the duty to fence results from an agreement on the part of the adjoining owner to maintain the fences himself,[93] or there may be an express contract in which the duty is clearly and specifically waived. The waiver of the duty to fence, however, is valid, so far as exempting the railway company from liability for animals injured is concerned, only between the company and the land-owner and his privies. Third persons to whom the duty to fence is owing are not bound by such a waiver although their stock enter the track where the erection of a fence was waived.[94]

§ 1705 (1190). To whom duty to fence is owing.—Statutes requiring railway companies to erect and maintain fences along their rights of way, rest, as we have heretofore seen,[95] upon the police power of the state. The exercise of the police power of the state by the enactment of police regulations is for the benfit of the whole public as a general rule. And since statutes imposing the duty to fence upon railway companies rest upon the police power it follows that they are for the benefit of the general public, and to this effect is the almost unanimous weight of judicial authority,[96] although the extent to which this doctrine is carried

Hurd v. Rutland &c. R. Co., 25 Vt. 116.

92 Jackson v. Rutland &c. R. Co., 25 Vt. 150, 60 Am. Dec. 246; Tyson v. Keokuk &c. R. Co., 43 Iowa 207; Enright v. San Francisco &c. R. Co., 33 Cal. 230; Cornwall v. Sullivan &c. R. Co., 28 N. H. 161. Where there is such a waiver it is held that the parties stand as at common law. Tower v. Providence &c. R. Co., 2 R. I. 404.

93 Indianapolis &c. R. Co. v. Petty, 25 Ind. 413; Eames v. Worcester &c. R. Co., 105 Mass. 193; Tombs v. Rochester &c. R. Co., 18 Barb. (N. Y.) 583.

94 See authorities cited in note 81, 87; Cincinnati &c. R. Co. v. Ridge, 54 Ind. 39; Hawkins v. St. Louis &c. Ry. Co. (Mo. App.), 202 S. W. 1060.

95 Ante, § 1697.

96 Indianapolis &c. R. Co. v. Townsend, 10 Ind. 38; New Albany &c. R. Co. v. Maiden, 12 Ind. 10; Vandalia R. Co. v. Walker, 45 Ind. App. 702, 91 N. E. 607; Indianapolis &c. R. Co. v. Guard, 24 Ind. 222, 87 Am. Dec. 327; Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Sherman v. Anderson, 27 Kans. 333, 41 Am. Rep. 414; Duncan v. St. Louis &c. R. Co., 91 Mo. 67, 8 S. W. 835; Kaes v. Missouri Pacific. R. Co., 6 Mo. App. 397; Oyler v. Quincy &c. R. Co., 113 Mo. App. 375, 88 S. W. 162; Walsh

may depend upon the language and purpose of the particular statute.[97] Such statutes are not intended merely for the protection of the adjoining land-owners unless it clearly and unmistakably appears from the language used that it was the intention of the legislature to protect only such owners.[98] Where the animals are unlawfully on the adjoining premises from which they escape to the company's track, there is some conflict in the authorities as to whether or not the company is liable to the owner of such animals. The weight of authority is to the effect that the company may be liable in such cases,[99] and this we believe to be

v. Virginia &c. R. Co., 8 Nev. 110; Ludtke v. Lake Shore &c. R. Co., 24 Ohio Cir. Ct. R. 120; St. Louis &c. R. Co. v. Williams, 31 Okla. 450, 122 Pac. 152; Texas &c. R. Co. v. Langham (Tex. Civ. App.), 95 S. W. 686; Curry v. Chicago &c. R. Co., 43 Wis. 665; McCall v. Chamberlain, 13 Wis. 637; Laude v. Chicago &c. R. Co., 33 Wis. 640; Fawcett v. York &c. R. Co., 16 Q. B. 610. The rule is thus stated in Missouri &c. R. Co. v. Roads, 33 Kans. 640, 7 Pac. 213, 23 Am. & Eng. R. Cas. 165: "Upon this question the general rule appears to be that where a statute requiring railroads to fence their tracks is a general police regulation, intended to protect domestic animals generally, and also for the safety of persons and property passing over the road, and is not designed merely for the benefit of the adjoining landowner, that the railroad company is held to be under a general obligation to the public, and is liable for animals injured and killed on its unfenced track, even though they were unlawfully upon the land from which they passed onto the railroad track."

[97] See Hynes v. San Francisco &c. R. Co., 65 Cal. 316, 4 Pac. 28; Bischof v. Illinois Cent. R. Co., 137 Ill. App. 33; Russell v. Maine Cent. R. Co., 100 Maine 406, 61 Atl. 899; Mangold v. St. Louis &c. R. Co., 116 Mo. App. 606, 92 S. W. 753; Walsh v. Virginia &c. R. Co., 8 Nev. 110; Delphia v. Rutland R. Co., 76 Vt. 84, 56 Atl. 279.

[98] Conway v. Canada &c. R. Co., 7 Ont. R. (Q. B. Div.) 673, 19 Am. & Eng. R. Cas. 650. Company held liable only to adjoining land-owner in Byrnes v. Boston &c. R. Co., 181 Mass. 322, 63 N. E. 897, and Russell v. Maine Cent. R. Co., 100 Maine 406, 61 Atl. 899. And compare Menut v. Boston &c. R. Co., 207 Mass. 12, 92 N. E. 1032, 30 L. R. A. (N. S.) 1196. See also Wills v. Southern Pac. Co., 31 Cal. App. 723, 161 Pac. 501; Houston &c. R. Co. v. Hollingsworth, 29 Tex. Civ. App. 306, 68 S. W. 724.

[99] Pittsburgh &c. R. Co. v. Allen, 40 Ohio St. 206, 19 Am. & Eng. R. Cas. 657; Purdy v. New York &c. R. Co., 61 N. Y. 353; Nashville &c. R. Co. v. Peacock, 25 Ala. 229; Missouri &c. R. Co. v. Roads, 33 Kans. 640, 7 Pac. 213.

the correct rule although there are some authorities which hold that the company is not liable.[1] Where the animals are on the adjoining premise by consent of the owner of such premises there is no question as to the liability of the company.[2] And on the ground that a railway company cannot contract with another for the performance of a statutory duty imposed upon it and thus escape liability it is held liable to third persons whose stock get upon its track because of the failure of an adjoining owner to fulfill his agreement to fence.[3] Some statutes imposing upon the railway companies the duty to fence make the company liable for all injuries which are occasioned by reason of the failure to fence, while others limit the liability to animals and some, according to their language to particular species of animals. As to the liability, however, the general rule is that the statute is applicable to every kind of animal and this has been held to be so even though the statute designates a particular species of animal.[4] Thus the term "cattle" in a railway fence statute has been held to include horses, mules, sheep and swine,[5] and the term "cattle and horses" to include mules and asses.[6] The company is

[1] McDonnell v. Pittsfield &c. R. Co., 115 Mass. 564; Walsh v. Virginia City &c. R. Co., 8 Nev. 110; Towns v. Cheshire R. Co., 21 N. H. 363; Cornwall v. Sullivan R. Co., 28 N. H. 161; Pittsburgh &c. R. Co. v. Methven, 21 Ohio St. 586; Bemis v. Connecticut &c. R. Co., 42 Vt. 375, 1 Am. Rep. 339; Buxton v. Northeastern R. Co., L. R. 3 Q. B. 549.

[2] St. Louis &c. R. Co. v. Dudgeon, 28 Kans. 283; Sawyer v. Vermont &c. R. Co., 105 Mass. 196.

[3] Ante, § 1704; Pittsburgh &c. R. Co. v. Allen, 40 Ohio St. 206, 19 Am. & Eng. R. Cas. 657.

[4] Halverson v. Minneapolis &c. R. Co., 32 Minn. 88, 19 N. W. 392, 19 Am. & Eng. R. Cas. 526; Missouri &c. R. Co. v. Baxter, 45 Kans. 520, 26 Pac. 49; Watier v. Chicago &c. R. Co., 31 Minn. 91, 16 N. W. 537. The statute applies to a "crazy" horse—one not possessed of even "horse sense." Liston v. Central &c. R. Co., 70 Iowa 714, 29 N. W. 445, 26 Am. & Eng. R. Cas. 593.

[5] Lee v. Minneapolis &c. R. Co., 66 Iowa 131, 23 N. W. 299, 20 Am. & Eng. R. Cas. 476; Louisville &c. R. Co. v. Ballard, 2 Met. (Ky.) 177; Henderson v. Wabash &c. R. Co., 81 Mo. 606; Randall v. Richmond &c. R. Co., 104 N. Car. 410, 10 S. E. 691; Child v. Hearn, L. R. 9 Exch. 176; McAlpin v. Grand Trunk R. Co., 38 U. C. Q. B. 446.

[6] Toledo &c. R. Co. v. Cole, 50 Ill. 184; Ohio &c. R. Co. v. Brubaker, 47 Ill. 462. A fencing statute has no application, however, to horses harnessed to a wagon. Co-

not bound to fence against dogs for they are animals that a fence does not ordinarily restrain.[7] But if a dog is on the track and the company negligently kill it, the company may be liable.[8] The same degree of diligence, however, is not, it seems, required as in the case of other animals.[9] The tendency of the modern

hoon v. Chicago &c. R. Co., 90 Iowa 169, 57 N. W. 727, 61 Am. & Eng. R. Cas. 364. But it has been held that cattle yoked to a cart and in charge of a driver were within the provisions of a fencing statute. Randall v. Richmond &c. R. Co., 104 N. Car. 410, 10 S. E. 691. See also as to other animals notes in 39 L. R. A. (N. S.) 271, and 24 L. R. A. (N. S.) 858.

[7] Bay City &c. R. Co. v. Austin, 21 Mich. 390. See also Moore v. Charlotte &c. R. Co., 136 N. Car. 554, 67 L. R. A. 470, 48 S. E. 822. And compare Cincinnati &c R. Co. v. Ford, 139 Tenn. 291, 202 S. W. 72. Nor a goose. Nashville &c. R. Co. v. Davis (Tenn.), 78 S. W. 1050. But it has been held that a railroad company is bound to give warning signals when its train approaches turkeys feeding on and along the track. Lewis v. Norfolk &c. R. Co., 163 N. Car. 33, 79 S. E. 283, 47 L. R. A. (N. S.) 1125.

[8] Wilson v. Wilmington &c. R. Co., 10 Rich. L. (S. Car.) 52; St. Louis &c. R. Co. v. Hauks, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383; Fink v. Evans, 95 Tenn. 413, 32 S. W. 307; St. Louis &c. R. Co. v. Stanfield, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659 and note (citing text). But compare Jemison v. Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476; Strong v. Georgia &c. R. Co., 118 Ga. 515, 45 S. E. 366.

[9] In the case of Jones v. Bond, 40 Fed. 281, 40 Am. & Eng. R. Cas. 192, it was said: "I have, within my judicial experience, tried quite a number of cases for injuries to persons and property against railroad companies and receivers, from alleged carelessness and negligence on the part of employes operating railroad trains, and have read the opinions of the courts in many cases, but this is the first dog case that has been brought to my attention, and, therefore, I am at a loss to know what rule to apply. I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any others. He can mount an embankment, or escape from dangerous places, where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required on the part of those operating a train that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered

decisions is to make the statutes as broad as possible and to embrace all animals which are likely to be injured or to cause injury. The reason for requiring fences against animals is found in the fact that they are not possessed of intelligence sufficient to enable them to avoid injury. If animals were able to recognize the danger necessarily incurred in going upon a railway track there would be no need for fence laws and we would not find them on our statute books. On a somewhat similar reason is based the duty of a railway company to fence its track against children. Where a child non sui juris gets upon a railway track because it was not properly fenced and is injured, the company, it has been held, is liable upon the ground that it is as much the duty of the company to fence against such children as against animals,[10] but this is a doctrine that should be very carefully

with other circumstances at the time and place." See also Moore v. Charlotte &c. R. Co., 136 N. Car. 554, 48 S. E. 822, 67 L. R. A. 470. See Fink v. Evans, 95 Tenn. 413, 32 S. W. 307; Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. 754 (allowing recovery for dog).

[10] Hayes v. Michigan Central R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410, 15 Am. & Eng. R. Cas. 394; Union Pacific R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434, 60 Am. & Eng. R. Cas. 1; Marcott v. Marquette &c. R. Co., 49 Mich. 99, 13 N. W. 374, 8 Am. & Eng. R. Cas. 306; Keyser v. Chicago &c. R. Co., 66 Mich. 390, 33 N. W. 67, 31 Am. & Eng. R. Cas. 399; Nickolson v. Northern Pac. R. Co., 80 Minn. 508, 83 N. W. 454; Isabel v. Hannibal &c. R. Co., 60 Mo. 475; Chicago &c. R. Co. v. Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522; Stuettgen v. Wisconsin &c. R. Co., 80 Wis. 498, 50 N. W. 407; Singleton v. Eastern &c. R. Co., 7 Conn. B. (N. S.) 287. See also Williams v. Great Western R. Co., L. R. 9 Exch. 157; Baltimore &c. R. Co. v. Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. ed. 447. "The object of the statute requiring the company to fence its tracks was to prevent injury from passing trains to persons and animals coming upon and using the same, and when an injury occurs without fault of the plaintiff to either in consequence of the negligence of the company to maintain the required fence, it must be held such negligence as will authorize a remedy. The child in this case was too young to know or understand anything of the danger or consequences of going upon the track before a passing train, and, of course, no wrong, fault, or negligence could properly be attributable to him in going where he did,

limited and applied.[11] The duty to fence, at all events, extends only to injuries which the child may receive on the premises of the railroad company. Its duty does not extend to fencing children from the premises of others.[12]

or in doing what he did. The statute requires the defendant to fence its road with a good fence, four and one-half feet high. It seems to me that it can not be successfully contended that such a fence would not have been a very formidable obstruction to the child's going upon the defendant's right of way. It may have been sufficient to prevent his going there entirely, and, if so, evidence of the negligence of the company to place the fence there was competent and material." Keyser v. Chicago &c. R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405, 19 Am. & Eng. R. Cas. 91. The rule does not apply to children of age sufficient to exercise discretion as to their own safety. Nolan v. New York &c. R. Co., 53 Conn. 461, 4 Atl. 106, 25 Am. & Eng. R. Cas. 342. See Fitzgerald v. St. Paul &c. R. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212 and note, 8 Am. & Eng. R. Cas. 310, where a doctrine contrary to that stated in the text is laid down and enforced.

[11] Bischof v. Illinois So. Ry. Co. 232 Ill. 446, 83 N. E. 948, 950 (citing text) and see also Nixon v. Montana &c. Ry. Co., 50 Mont. 95, 145 Pac. 8. Such statutes are not intended for the protection of adults voluntarily upon the tracks for their own convenience. Schreiner v. Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75. See also Menut v. Boston &c. R. Co., 207 Mass. 12, 92 N. E. 1032, 30 L. R. A. (N. S.) 1196, and note citing additional cases. And, under some of them at least, their protection does not extend to a trespassing child though too young to be guilty of contributory negligence. Baltimore &c. R. Co. v. Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. 252; Casista v. Boston &c. R. Co., 69 N. H. 649, 45 Atl. 712; Lake Shore &c. R. Co. v. Ludke, 69 Ohio St. 384, 69 N. E. 653; New York &c. R. Co. v. Price, 159 Fed. 330, 16 L. R. A. (N. S.) 1103 (following this as Massachusetts doctrine although questioning it). See also Kapernaros v. Boston &c. R. Co., 115 Maine 467, 99 Atl. 441; Nixon v. Montana &c. Ry. Co., 50 Mont. 95, 145 Pac. 8. Others are broad enough to include such a child. Mattes v. Great Northern R. Co., 100 Minn. 34, 110 N. W. 98; Rosse v. St. Paul &c. R. Co., 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. 472 and note, citing the apparently conflicting cases on both sides. Also note in 16 L. R. A. (N. S.) 1103.

[12] Morrissey v. Providence &c. R. Co., 15 R. I. 271, 3 Atl. 10; O'Donnell v. Providence &c. R. Co., 6 R. I. 211. And the failure to fence when the basis of the action must be a proximate cause of the injury complained of. Fezler

§ 1706 (1191). Injuries to passengers resulting from neglect of duty to fence.—Very frequently collisions with animals on the tracks of a railway train result disastrously both to the trains and persons on it. Trains are often thrown from the track, property destroyed and persons seriously injured. Where a railway company is engaged in carrying passengers the duty rests upon it to use the highest practicable degree of care for their safety, and as one of the safeguards for the protection of passengers on a train consists in keeping animals off the track and avoiding collisions, and since the duty to fence the right of way rests upon the police power, being a duty which the company owes to the public,[13] it is justly held that the duty to fence applies to passengers and they are entitled to a performance of that duty. That this duty is owing to passengers is declared in many cases.[14]

v. Willmar, &c. R. Co., 85 Minn. 252, 88 N. W. 746; Wickham v. Chicago &c. R. Co., 95 Wis. 23, 69 N. W. 982; Paquin v. Wisconsin Cent. R. Co., 99 Minn. 170, 108 N. W. 882.

[13] "The law imposed upon the appellant the duty of fencing its road for the safety and protection of the public." Cincinnati &c. R. Co. v. Hildreth, 77 Ind. 504; Jeffersonville &c. R. Co. v. Dunlap, 112 Ind. 93, 13 N. E. 403 and cases cited. Compare also Conway v. Monidah Trust, 47 Mont. 269, 132 Pac. 26.

[14] Atchison &c. R. Co. v. Elder, 159 Ill. 173, 36 N. E. 565; Fleming v. St. Paul &c. R. Co., 27 Minn. 111, 6 N. W. 448; Barnett v. Atlantic &c. Co., 68 Mo. 56, 30 Am. Rep. 773; Briggs v. St. Louis &c. R. Co., 111 Mo. 168, 20 S. W. 32; Brown v. New York &c. Co., 34 N. Y. 404; Tracy v. Troy &c. R. Co., 38 N. Y. 433, 98 Am. Dec. 54; Jones v. Seligman, 81 N. Y. 191; Pittsburgh &c. R. Co. v. Allen, 40 Ohio St. 206, 19 Am. & Eng. R. Cas. 657; Sullivan v. Philadelphia &c. R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Gulf &c. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345; Blair v. Milwaukee &c. Co., 20 Wis. 254. See Ditchett v. Spuyten-Duyvil &c. R. Co., 67 N. Y. 425. In a recent case, Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 20 S. W. 597, it was said: "It is apparent to those who operate railroads that roaming cattle are a constant menace to the safety of an unguarded track. The railway's obligation to every one whom it undertakes to carry in the relation of a passenger, is, that it will take every reasonable precaution to avert injury to his person, whether from collision with cattle or from other danger which it has reason to apprehend. The omission of any reasonable precaution to effect that end is negligence. Arkansas &c. R. Co. v.

Where an animal got on the track and was struck by a train and was knocked off the track to one side, but so near the track that a train subsequently passing struck it and was derailed, thereby causing plaintiff's injury, it was held that the company was liable.[15]

§ 1707 (1192). Injuries to employes resulting from neglect of duty to fence.—The duty imposed upon a railway company to fence its track is held by some of the cases to be one owing to the employes[16] of the company, as well as to passengers, adjoining land-owners and the general public. Where animals come upon the track because of the failure of the company to discharge its duty to maintain proper fences to keep stock off the track, and injury results to an employe because of a collision with such animal, the company will, according to the weight of authority, be liable for such injury.[17] But where there is neither

Canman, 52 Ark. 517, 13 S. W. 280.. This obligation requires of the employes in charge of trains faithful watchfulness, to prevent accidents by collision with cattle; and it requires the company to keep a clear right of way, to afford them the facility of performing that duty. If these or other precautions are insufficient to guard against the danger, and a fence will render the track safe from the intrusion of cattle, the company's obligation demands the more effective precaution. If the want of a proper fence makes the railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent land-owner or the owner of cattle to fence the track. Buxton v. North Eastern R. Co., L. R. 3 Q. B. 549; Lackawanna &c. R. Co. v. Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168; Gulf &c. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345; Cornwall v. Sullivan R. Co., 28 N. H. 161, 169."

[15] Mexican &c. R. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 279, 47 Am. St. 103. This case, however, rests more on the negligence of the company in permitting the animal to remain in dangerous proximity to the track than on its failure to fence.

[16] There is conflict of authority upon the question of liability to employes, and there is reason for holding that in the absence of a specific statute there is no liability, but the weight of authority is that there is a general liability. Post. § 1826. See also Terre Haute &c. R. Co. v. Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. 44 and note.

[17] Quackinbush v. Wisconsin &c. R. Co., 62 Wis. 411, 22 N. W. 519; Dickson v. Omaha &c. R. Co., 124

a common law nor a statutory duty resting upon a railway com-

Mo. 140, 27 S. W. 476, 25 L. R. A. 320 and note, 46 Am. St. 429, 59 Am. & Eng. R. Cas. 305. The recent case of Atchison &c. R. Co. v. Reesman, 60 Fed. 370, is one of the best reasoned cases, declaring the doctrine that there is a liability. In that case many cases are reviewed and cited. But see Carper v. Norfolk &c. R. Co., 78 Fed. 94, 35 L. R. A. 135, construing Virginia statute, with which, however, compare Sanger v. Chesapeake &c. R. Co., 102 Va. 86, 45 S. E. 750, construing such statute as amended. See Eames v. Texas &c. R. Co., 63 Tex. 660, 22 Am. & Eng. R. Cas. 540. A clear statement of the rule is found in the recent case of Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, 42 Am. & Eng. R. Cas. 580. That statement is as follows: "A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid, and the road-bed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plair common law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them, and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of the case, that it was the duty of a railroad company to fence its track, to guard against such danger. But, whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an un qualified duty; and for a violation thereof, causing injury the railroad company incurs responsibility." The court cited the following authorities, Corwin v. New York &c. R. Co., 13 N. Y. 42; Jetter v. Hudson &c. R. Co., 2 Keyes (N. Y.) 154; Staats v. New York &c. R. Co., 3 Keyes (N. Y.) 196; Brown v. New York &c. R. Co., 34 N. Y. 404; Shepard v. Buffalo &c. R. Co., 35 N. Y. 641; Purdy v. New York &c. R. Co., 61 N. Y. 353; Jones v. Seligman, 81 N. Y. 190, 3 Am. & Eng. R. Cas. 236; Graham v. Delaware &c. Canal Co., 46 Hun (N. Y.) 386. See also Sands v. Linch, 122 Ark. 93, 182 S. W. 561, L. R. A.

pany to fence its track it has been held that it is not liable for the death of an engineer caused by his train colliding with an animal on the track.[18] In a suit by an employe for damages on account of injuries received because the track was not properly fenced, the sufficiency of the fence, negligence in failing to maintain it, and other questions affecting the company's liability are governed by substantially the same rules respecting negligence and the like as other cases between employer and employe.[19] Some of the authorities place the liability of the company on the ground that the company as master owes the duty to the employe as servant to furnish him a safe place to work, and that the law of master and servant applies to such cases.[20] The rule that the employe assumes the risks of the service applies to such cases, at least where there is no statute changing the rule. Thus, where an employe took service with a railway company, knowing that its track was not fenced and he was afterward killed in a collision with an animal on the track, it was held that his death was caused by a risk of the service which he had assumed and that there could be no recovery.[21] But it has been held that where the accident was caused by a defect in the fence the employe cannot

1916E, 204; Texas &c. R. Co. v. Langham (Tex. Civ. App.), 95 S. W. 686. But compare Bischof v. Illinois So. R. Co., 137 Ill. App. 33. In the decision from which we just quoted the case of Langlois v. Buffalo &c. R. Co., 19 Barb. (N. Y.) 364, was overruled.

[18] Cowan v. Union Pacific R. Co., 35 Fed. 43.

[19] Wabash &c. R. Co. v. Brown, 2 Bradw. (Ill.) 516; Dewey v. Chicago &c. R. Co., 31 Iowa 373.

[20] See Dickson v. Omaha &c. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320 and note, 46 Am. St. R. 429, 59 Am. & Eng. R. Cas. 305; Alexander v. Great Northern R. Co., 51 Mont. 565, 154 Pac. 914, L. R. A. 1918E, 852, 855 (holding that there is no absolute duty to maintain fence independent of statute, but there is a duty to furnish a safe working place and it is negligence not to maintain a fence where due care requires it because of the presence of cattle permitted to run at large in the state and running at large in the neighborhood). But there are other recent cases which hold that under the particular statute involved there was no liability to employes to fence and that there is no such liability at common law. See Nielsen v. Chicago &c. R. Co., 187 Fed. 393; Gill v. Louisville &c. R. Co., 165 Fed. 438; Snyder v. Pa. R. Co., 205 Pa. St. 619, 55 Atl. 778.

[21] Sweeney v. Central Pacific R. Co., 57 Cal. 15, 8 Am. & Eng. R.

be held to have assumed such a risk although he knew that cattle had been seen on the track before, unless he had knowledge of the defect itself.[22]

§ 1708 (1193). Places allowed to remain unfenced—Highways and crossings.—Although the duty rests upon railway companies to securely fence their tracks, there are certain parts of the track which the company is under no obligation to fence. There are certain parts of the track which must necessarily be used by the public and to fence these parts would prevent their use by the public,[23] so that where the track must be used by the public for crossings and the like the company is excused from fencing.[24] When a public highway crosses a railway and the crossing is used by the public the company is not bound to fence its track at such point, and if animals are injured on the crossing the company is not liable unless guilty of negligence or willfulness.[25]

Cas. 151; Nielsen v. Chicago &c. R. Co., 187 Fed. 393; Tillotson v. Texas &c. R. Co., 44 La. Ann. 95, 10 So. 400; Fleming v. St. Paul &c. R. Co., 27 Minn. 111, 6 N. W. 448.

[22] Magee v. North Pacific R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. 69.

[23] In Atchison &c. R. Co. v. Shaft, 33 Kans. 521, 6 Pac. 908, it was said: "The great weight of authority, however, is that railroad companies are not absolved from complying with the express terms of the statutes requiring them to inclose their roads with good and lawful fences, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad companies rendering it improper for them not to fence their roads." The court cited the following authorities: Tracy v. Troy &c. R. Co., 38 N. Y. 433, 98 Am. Dec. 54; Toledo &c. R. Co. v. Chapin, 66 Ill. 504; White Water Valley R. Co. v. Quick, 30 Ind. 384; Cleveland &c. R. Co. v. Crossley, 36 Ind. 370; Latty v. Burlington &c. R. Co., 38 Iowa 250; Mundhenk v. Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656; Flint &c. R. Co. v. Lull, 28 Mich. 510; Bradley v. Buffalo &c. R. Co., 34 N. Y. 427; Cleveland &c. R. Co. v. McConnell, 26 Ohio St. 57; Railroad Co. v. Newbrander, 40 Ohio St. 15.

[24] The statutes imposing the duty to fence are construed so as not to lead to absurdity and injustice. Gallagher v. New York &c. R. Co., 57 Conn. 442, 18 Atl. 786, 5 L. R. A. 737 and note, 40 Am. & Eng. R. Cas. 197.

[25] Ohio &c. R. Co. v. Rowland, 50 Ind. 349; Indiana &c. R. Co. v. Quick, 109 Ind. 295, 9 N. E. 788, 925; Bechdolt v. Grand Rapids &c.

Although a statute imposing the duty to fence may not in express terms except highways, the court, from the necessities of the case, will give the statute such a construction as to exempt the company from the duty to fence at a public crossing.[26] The question of whether or not a crossing is a public crossing is generally determined by the use to which it is put, and not by the manner in which the crossing may have been acquired.[27] If the crossing is used by the public as a public highway the company is excused from fencing, and it is immaterial whether the right to cross was acquired by condemnation, prescription, dedication or otherwise.[28] Where a railroad is built longitudinally along and in the street the company is not bound to fence. The construction of a fence in such a case would prevent the use of the highway by the public, and on that ground its erection is ex-

R. Co., 113 Ind. 343, 15 N. E. 686, 35 Am. & Eng. R. Cas. 168; Soward v. Chicago &c. R. Co., 33 Iowa 386; Long v. Central Iowa R. Co., 64 Iowa 657, 21 N. W. 122; Blanford v. Minneapolis &c. R. Co., 71 Iowa 310, 32 N. W. 357, 60 Am. Rep. 795; Atchison &c. R. Co. v. Holt, 29 Kans. 149; Flint &c. R. Co. v. Lull, 28 Mich. 510; Cox v. Minneapolis &c. R. Co., 41 Minn. 101, 42 N. W. 924, 38 Am. & Eng. R. Cas. 287; McPheeters v. Hannibal &c. R. Co., 45 Mo. 22; Iba v. Hannibal &c. R. Co., 45 Mo. 469; Berry v. St. Louis &c. R. Co., 124 Mo. App. 436, 101 S. W. 714; International &c. R. Co. v. Cocke, 64 Tex. 151; Gulf &c. R. Co. v. Simpson, 41 Tex. Civ. App. 125, 91 S. W. 874; Hurd v. Rutland &c. R. Co., 25 Vt. 116; Blair v. Milwaukee &c. R. Co., 20 Wis. 254. Where the animal goes through a defective fence and thence over a cattle-guard onto a public crossing where it is killed the company is liable. Kansas &c. R. Co. v. Burge, 40 Kans. 734, 736, 19 Pac. 791, 21 Pac. 589, 40 Am. & Eng. R. Cas. 181. It has also been held that streets which have been dedicated, though not yet opened, need not be fenced. Long v. Central Iowa R. Co., 64 Iowa 657, 21 N. W. 122; Meyer v. North Missouri R. Co., 35 Mo. 352. But see Iola Elec. R. Co. v. Jackson, 70 Kans. 791, 79 Pac. 662.

[26] Gallagher v. New York &c. R. Co., 57 Conn. 442, 18 Atl. 786, 5 L. R. A. 737 and note, 40 Am. & Eng. R. Cas. 197. See also Illinois Cent. R. Co. v. Davidson, 225 Ill. 618, 80 N. E. 250.

[27] Atchison &c. R. Co. v. Griffis, 28 Kans. 539, 13 Am. & Eng. R. Cas. 532. See also Smith v. St. Louis &c. R. Co., 125 Mo. App. 15, 102 S. W. 593.

[28] Luckie v. Chicago &c. R. Co., 76 Mo. 639; Jenkins v. Chicago &c. R. Co., 27 Mo. App. 578; Dow v. Kansas City So. R. Co., 116 Mo. App. 555, 92 S. W. 744. See also Sikes v. St. Louis &c. R. Co., 127 Mo. App. 326, 105 S. W. 700.

cused.[29] But where a railway right of way runs parallel to a highway, the erection of a fence is required,[30] unless its erection would destroy the use of the highway as such. And the company is required to erect a fence in such cases although the entire width of the right of way cannot be enclosed and part of it has to be thrown into the highway.[31] But where one railway track runs parallel with another railway track only fifty feet away it is not required to erect a fence between the two tracks.[32] If a highway which crosses a railway right of way has been vacated or abandoned the company is bound to fence.[33] But it seems if the abandonment has been recent and there has been no order of vacation the erection of a fence is not required.[34] Where private crossings are constructed across the right of way the railway company is usually bound to fence at such crossing or to erect gates and bars sufficient to serve as a fence,[35] unless the land-owner has requested that the fence be left open.[36] In some

[29] Rippe v. Chicago &c. R. Co., 42 Minn. 34, 43 N. W. 652, 5 L. R. A. 864, 40 Am. & Eng. R. Cas. 231. But compare Brown v. Quincy &c. R. Co., 127 Mo. App. 614, 106 S. W. 551.

[30] Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Andre v. Chicago &c. R. Co., 30 Iowa 107; Rozzelle v. Hannibal &c. R. Co., 79 Mo. 349; Rutledge v. Hannibal &c. R. Co., 78 Mo. 286; Patton v. West End &c. R. Co., 14 Mo. App. 589; Dabbs v. Kansas City &c. Ry. Co. (Mo. App.), 202 S. W. 276; Sanger v. Chesapeake &c. R. Co., 102 Va. 86, 45 S. E. 750, 752 (citing text). But see Lee v. Brooklyn Heights R. Co., 97 App. Div. 111, 89 N. Y. S. 652.

[31] Jeffersonville &c. R. Co. v. Sweeney, 32 Ind. 430; Wabash R. Co. v. Forshee, 77 Ind. 158; Louisville &c. R. Co. v. Shanklin, 94 Ind. 297; Evansville &c. R. Co. v. Tipton, 109 Ind. 197; Lake Erie R. Co. v. Rooker, 13 Ind. App. 600, 41 N. E. 470; Emmerson v. St. Louis &c. R. Co., 35 Mo. App. 621.

[32] Gallagher v. New York &c. R. Co., 57 Conn. 442, 18 Atl. 786, 5 L. R. A. 737 and note, 40 Am. & Eng. R. Cas. 197.

[33] Jeffersonville &c. R. Co. v. O'Connor, 37 Ind. 95; Louisville &c. R. Co. v. Shanklin, 94 Ind. 297.

[34] Indiana &c. R. Co. v. Gapen, 10 Ind. 292.

[35] Omaha &c. R. Co. v. Severin, 30 Nebr. 318, 46 N. W. 842, 45 Am. & Eng. R. Cas. 122; McKinley v. Chicago &c. R. Co., 47 Iowa 76; Mackey v. Central &c. R. Co., 54 Iowa 540, 6 N. W. 723; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Pittsburgh &c. R. Co. v. Cunnington, 39 Ohio St. 327.

[36] Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295; Tyson v. Kansas &c. R. Co., 43 Iowa 207; Bellefon-

states the matter of private crossings and the erection of fences and gates and bars is regulated by statute, and where such is the case the provisions of the statute must govern.[37]

§ 1709 (1194). **Fences at depot and station grounds.**—Railroad companies are not required to fence their tracks at their depots and about their station grounds. Where passengers and freight are received and discharged, public convenience requires that there should be unobstructed access to the buildings and tracks, and, therefore, fences are not required.[38] The company not being required to maintain fences at such places it follows that it will not be liable for stock there injured unless it was

taine &c. R. Co. v. Suman, 29 Ind. 40.

[37] In Indiana the owner must construct, keep up and take care of gates and bars at private crossings. Louisville &c. R. Co. v. Etzler, 119 Ind. 39, 21 N. E. 466, 40 Am. & Eng. R. Cas. 205; Hunt v. Lake Shore &c. R. Co., 112 Ind. 69, 13 N. E. 263; Pennsylvania Co. v. Spaulding, 112 Ind. 47, 13 N. E. 268, 35 Am. & Eng. R. Cas. 184; Evansville &c. R. Co. v. Mosier, 114 Ind. 447, 17 N. E. 109. See also Knight v. Southern Pac. Co., 52 Utah 42, 172 Pac. 689 (company not bound to construct wing fences or cattle guards at private crossings under Utah statute).

[38] Chicago &c. R. Co. v. Campbell, 34 Colo. 380, 83 Pac. 138; Galena &c. R. Co. v. Griffin, 31 Ill. 303; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Louisville &c. R. Co. v. Hall, 9 Ind. 245; Bechdolt v. Grand Rapids &c. R. Co., 113 Ind. 343, 15 N. E. 686, 35 Am. & Eng. R. Cas. 168; Schneir v. Chicago &c. R. Co., 40 Iowa 337; Smith v. Chicago &c. R. Co., 60 Iowa 512, 15 N. W. 303; Johnson v. Chicago &c. R. Co., 75 Iowa 157, 39 N. W. 242; Atchison &c. R. Co. v. Shaft, 33 Kans. 521, 6 Pac. 908; Prickett v. Atchison &c. R. Co., 33 Kans. 748, 7 Pac. 611; McGrath v. Detroit &c. R. Co., 57 Mich. 555, 24 N. W. 854; Rinear v. Grand Rapids &c. R. Co., 70 Mich. 620, 38 N. W. 599, 35 Am. & Eng. R. Cas. 166; Flagg v. Chicago &c. R. Co., 96 Mich. 30, 55 N. W. 444, 21 L. R. A. 835; Schneekloth v. Chicago &c. R. Co., 108 Mich. 1, 65 N. W. 663; Kobe v. Northern Pacific R. Co., 36 Minn. 518, 32 N. W. 783; Schooling v. St. Louis &c. R. Co., 75 Mo. 518; Acord v. St. Louis &c. R. Co., 113 Mo. App. 84, 87 S. W. 537, 541 (citing text); McGuire v. St. Louis &c. R. Co., 113 Mo. App. 79, 87 S. W. 564; Wilmot v. Oregon R. Co., 48 Ore. 494, 87 Pac. 528, 120 Am. St. 840, 7 L. R. A. (N. S.) 202 and note (citing text); Roberts v. Salt Lake &c. Ry. Co. (Utah), 176 Pac. 856, 858 (citing text); Mills &c. Co. v. Chicago &c. R. Co., 94 Wis. 336, 68 N. W. 996.

guilty of willfulness or negligence.[39] A number of recent decisions as to when a fence is or is not required will be found in the note below,[40] in addition to those reviewed in this and following sections. The exception applies to passenger stations,[41] freight depots,[42] and the space used for the convenience of the company in switching its cars and making up trains and supply-

[39] Bechdolt v. Grand Rapids &c. R. Co., 113 Ind. 343, 15 N. E. 686; Moses v. Southern Pacific R. Co., 18 Ore. 385, 23 Pac. 498, 8 L. R. A. 135, and note, 42 Am. & Eng. R. Cas. 555; Indiana &c. R. Co. v. Quick, 109 Ind. 295, 9 N. E. 788, 925; Indiana &c. R. Co. v. Sawyer, 109 Ind. 342, 10 N. E. 105.

[40] Places required to be fenced: Union Pac. R. Co. v. Knowlton, 43 Nebr. 751, 62 N. W. 203; Chicago &c. R. Co. v. Hand, 113 Ill. App. 144; Dailey v. Chicago &c. R. Co., 121 Iowa 254, 96 N. W. 778; Mattes v. Great Northern R. Co., 95 Minn. 386, 104 N. W. 234; Smith v. St. Louis &c. R. Co., 111 Mo. App. 410, 85 S. W. 972; Foster v. Kansas City &c. R. Co., 112 Mo. App. 67, 87 S. W. 57. Places not required to be fenced: Schneekloth v. Chicago &c. R. Co., 108 Mich. 1, 65 N. W. 663; Katzinaki v. Grand Trunk R. Co., 141 Mich. 75, 104 N. W. 409; Acord v. St. Louis &c. R. Co., 113 Mo. App. 84, 87 S. W. 537; Hilleman v. Gray's Point &c. R. Co., 99 Mo. App. 271, 73 S. W. 220; Gulf &c. R. Co. v. Ellis, 85 Miss. 586, 38 So. 210. See also Chicago &c. R. Co. v. Sevcek, 72 Nebr. 793, 101 N. W. 981 (modified in 101 N. W. 639); Fowbel v. Wabash R. Co., 125 Iowa 215, 100 N. W. 1121. The subject is considered and recent cases are cited and reviewed in the notes in Ann. Cas. 1912D, 626 and 7 L. R. A. (N. S.) 202.

[41] Chicago &c. R. Co. v. Clonch, 2 Kans. App. 728, 43 Pac. 1140. "Depot or station grounds are a place where passengers get on and off the cars, and where goods are loaded and unloaded and all grounds necessary or convenient and actually used for these purposes." Fowler v. Farmers' &c. Trust Co., 21 Wis. 78. See also Butler v. Aurora &c. R. Co., 250 Ill. 47, 95 N. E. 44 (platform and cinder path). But compare Chicago &c. R. Co. v. Ness, 56 Ind. App. 285, 105 N. E. 250.

[42] McGrath v. Detroit &c. R. Co., 57 Mich. 555, 24 N. W. 854, 22 Am. & Eng. R. Cas. 574. This is so even where the depot is outside an incorporated city or town. Miller v. Chicago &c. R. Co., 18 Wyo. 209, 105 Pac. 908, Ann. Cas. 1912D, 626, and cases there cited in opinion and note. Three hundred feet from a highway crossing the track was unfenced. On the other side of the crossing there was a depot. It was held that the road should have been fenced beyond the crossing although freight was occasionally received and discharged there. Moser v. St. Paul &c. R. Co., 42 Minn. 480, 44 N. W. 530. See also Anderson v. Stewart, 76 Wis. 43, 44 N. W. 1091; Peyton v. Chicago &c. R. Co., 70 Iowa 522, 30 N. W. 877.

ing its engines with fuel and water.[43] The exemption of switch grounds is founded on the danger to employes which would necessarily result were the tracks fenced. The safety of the employes at points where they almost continually pass up and down the track in the performance of their duties is far more important than would be the safety afforded to animals and property from the erection of fences at such tracks.[44] So, it is justly held that

[43] Davis v. Burlington &c. R. Co., 26 Iowa 549; Swearingen v. Missouri &c. R. Co., 64 Mo. 73; Blair v. Milwaukee &c. R. Co., 20 Wis. 254, Flint &c. R. Co. v. Lull, 28 Mich. 510. See also Denver &c. R. Co. v. Siminoe, 65 Colo. 73, 173 Pac. 541. In Peters v. Stewart, 72 Wis. 133, 39 N. W. 380, it is said: "It appears, in effect, from the undisputed evidence, that at the side of the main track, and opposite the side-track mentioned, there were at the time in question, a water-tank for replenishing engines, and another building, within which there was a telegraph office with telegraphic instruments, a ticket-office, and a place for eating and sleeping, and which building was occupied by the company's station men and agent, who operated the telegraph, sold tickets for the company to passengers, operated the switch and tank and handled baggage and freight; that there was a platform between the building and the track; that trains were in the habit of stopping there, and receiving and discharging passengers and freight. True, the accommodations were quite limited, but, under the decisions of this court, we must hold that this station building was a depot, and that the railroad grounds in connection therewith were 'depot grounds' within the meaning of the statute." There is some difference of opinion as to just how far this may extend. See Wilmot v. Oregon &c. R. &c. Co., 48 Ore. 494, 87 Pac. 528, 7 L. R. A. (N. S.) 203 and note reviewing cases, some of which conflict with others, as to whether it may extend beyond switch points or limits at all.

[44] See Cincinnati &c. R. Co. v. Jones, 111 Ind. 259, 12 N. E. 113, 31 Am. & Eng. R. Cas. 491; Cox v. Atchison &c. R. Co., 128 Mo. 362, 31 S. W. 3. In Pennsylvania Co. v. Mitchell, 124 Ind. 473, 24 N. E. 1065, the court declared the rule as follows: "It is abundantly settled that a railroad company is not liable for injuries to animals that enter upon its track at places, where, to, maintain fences, would interfere with the discharge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, nor at any place where fences and connecting cattle-guards would make the running and handling of trains, or the necessary and proper switching of cars, more hazardous to its employes." Text is quoted with approval as to exemption of switch grounds and endangering employes in Rabidon v. Chicago &c. R. Co., 115 Mich. 390, 73 N. W. 386, 387, 39 L. R. A. 405. See also Baltimore &c. R. Co. v. Dickey, 43 Ind. App. 509, 87 N. E. 1047; International &c. R. Co. v. Schram (Tex.), 138 S. W. 195.

the company is not bound to place fences or cattle-guards where they would materially interfere with the transaction of its business and performance of its duty to the public or endanger its employes.[45] The general rule, however, in most instances, is that some public interest must intervene[46] rendering the construction and maintenance of fences inconvenient and dangerous or their erection will not be excused. A mere private convenience of the company,[47] or increased cost of constructing a fence is not sufficient to relieve the company from its duty to fence. A point remote from a depot, where freight is occasionally received, does not fall within the rule of exemption.[48] Where it is impossible to

[45] Lake Erie &c. R. Co. v. Kneadle, 94 Ind. 454; Evansville &c. R. Co. v. Willis, 93 Ind. 507; Baltimore &c. R. Co. v. Dickey, 43 Ind. App. 509, 87 N. E. 1047; Gerren v. Hannibal &c. R. Co., 60 Mo. 405; Acord v. St Louis &c. R Co., 113 Mo. App. 84, 87 S. W. 537, 541; Gilpin v. Missouri &c. R. Co., 197 Mo. 319, 94 S. W. 869; Burnham v. Chicago &c. R. Co., 83 Nebr. 183, 119 N. W. 235, 237 (quoting text).

[46] Toledo &c. R. Co. v. Chapin, 66 Ill. 504; Mundhenk v. Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656; Flint &c. R. Co. v. Lull, 28 Mich. 510; Greeley v. St. Paul &c. R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16; Kobe v. Northern Pacific R. Co., 36 Minn. 518, 32 N. W. 783; Hurt v. St. Paul &c. R. Co., 39 Minn. 485, 40 N. W. 613; Bradley v. Buffalo &c. R. Co., 34 N. Y. 427. In International &c. R. Co. v. Cocke, 64 Tex. 151, 23 Am. & Eng. R. Cas. 226, the court said: "The general terms of our statute imposing a liability on railway companies for injuries done to animals, unless their railways are fenced, do not apply to such places as public necessity or convenience require should be left unfenced, such as the streets of a city or town, depot, and contiguous grounds, the crossings of highways, and other like places." See also International &c. R. Co. v. Dunham, 68 Tex. 231, 2 Am. St. 484.

[47] Bellefontaine &c. R. Co. v. Reed, 33 Ind. 476; Comstock v. Des Moines &c. R. Co., 32 Iowa 376; Hurt v. St. Paul &c. R. Co., 39 Minn. 485, 40 N. W. 613; Morris v. St. Louis &c. R. Co., 58 Mo. 78; Acord v. St. Louis &c. R. Co., 113 Mo. App. 84, 87 S. W. 537 (citing text); Edie v. Kansas &c. R. Co., 133 Mo. App. 9, 112 S. W. 993; Green v. Kansas &c. R. Co., 142 Mo. App. 67, 125 S. W. 865; Tracy v. Troy &c. Co., 38 N. Y. 433, 98 Am. Dec. 54.

[48] Jaeger v. Chicago &c. R. Co., 75 Wis. 130, 43 N. W. 732, 40 Am. & Eng. R. Cas. 194; Dinwoodie v. Chicago &c. R. Co., 70 Wis. 160, 35 N. W. 296; Smith v. Chicago &c. R. Co., 60 Iowa 512, 15 N. W. 303; Little v. Butler County R. Co., 139 Mo. App. 50, 120 S. W. 695. Neither do switches and side tracks which are remote from and constitute no part of the depot yard. Chicago &c. R.

fence both sides of the track the railway company will not be required to do so,[49] and where a fence would interfere with the business of an adjoining owner of a saw-mill, hay-press or other business, it has been held that its erection will not be required.[50] It is held that the question as to whether the place at which an animal is killed or injured is reasonably necessary for depot purposes, may be for the jury,[51] but where only one conclusion can be drawn it is a question for the court.[52]

§ 1710 (1195). Fences in cities, towns and vilages.—Where a railway track passes through a city, town, or village, the company is usually bound to fence the same as at other places,[53] unless it

Co. v. Hans, 111 Ill. 114. The question as to what is a station or the like in this connection is considered in a number of Missouri cases. See Moore v. St. Louis &c. R. Co., 117 Mo. App. 384, 93 S. W. 869, and cases there cited. See also and compare Stewart v. Pennsylvania R. Co., 2 Ind. App. 142, 28 N. E. 211, 50 Am. St. 231, and Michigan cases cited in the first note to this section.

[49] Indiana &c. R. Co. v. Leak, 89 Ind. 596.

[50] Indianapolis &c. R. Co. v. Kinney, 8 Ind. 402; Ohio &c. R. Co. v. Rowland, 51 Ind. 285; Cincinnati &c. R. Co. v. Wood, 82 Ind. 593.

[51] Grosse v. Chicago &c. R. Co., 91 Wis. 482, 65 N. W. 185, and cases cited. See also Acord v. St. Louis &c. R. Co., 113 Mo. App. 84, 87 S. W. 537, 544 (citing text); Wilmot v. Oregon &c. R. Co., 48 Ore. 494, 87 Pac. 528, 7 L. R. A. (N. S.) 203, 120 Am. St. 840 (citing text), and note citing additional cases; Roberts v. Salt Lake &c. Ry. Co. (Utah), 176 Pac. 856; Pennsylvania Co. v. Lindley, 2 Ind. App. 111, 28 N. E. 106; Baltimore &c. R. Co. v. Dickey, 43 Ind. App. 509, 87 N. E. 1047.

[52] See Bird v. Michigan Cent. R. Co., 145 Mich. 706, 108 N. W. 1100; Grosse v. Chicago &c. R. Co., 91 Wis. 482, 65 N. W. 185; also Acord v. St. Louis &c. R. Co., 113 Mo. App. 84, 87 S. W. 537, 544; Louisville &c. R. Co. v. Worley, 107 Ind. 120, 123, 7 N. E. 215; Jeffersonville &c. R. Co. v. Peters, 1 Ind. App. 69, 27 N. E. 299; Pennsylvania Co. v. Lindley, 2 Ind. App. 111, 112, 113, 114, 28 N. E. 106; Stewart v. Pennsylvania R. Co., 2 Ind. App. 142, 145, 28 N. E. 211, 50 Am. St. 231; McGratte v. Detroit &c. R. Co., 57 Mich. 559, 24 N. W. 854; Wilmot v. Oregon R. Co., 48 Ore. 494, 87 Pac. 528, 120 Am. St. 840, 7 L. R. A. (N. S.) 202 (citing text); Mills &c. Co. v. Chicago &c. R. Co., 94 Wis. 336, 68 N. W. 996, 997.

[53] Coyle v. Chicago &c. R. Co., 62 Iowa 518, 77 N. W. 771; Union &c. R. Co. v. Dyche, 28 Kans. 200; Ells v. Pacific R. Co., 48 Mo. 231; Flint &c. R. Co. v. Lull, 25 Mich. 510; Greely v. St. Paul &c. R. Co., 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179, 19 Am. & Eng. R. Cas. 559; La Paul v. Truesdale, 44 Minn. 275, 46 N. W. 363, 45 Am. & Eng. R. Cas.

is exempted by statute[54] or the convenience of the public[55] requires that the track should not be fenced. But companies are often relieved from such duty in such localities either because the statute exempts them or does not apply by reason of the public inconvenience. It is not necessary that there should be an incorporated town; all that is necessary is that lots be regularly laid out and that the track be crossed by streets and alleys open to the public.[56] In many of the states in which statutes imposing the duty to fence are in force the statute itself in express terms exempts the company from the duty to fence in cities, towns and villages,[57] even where no such exemption is created by the statute the courts have created one, and it is now well settled that a railway company is not bound to fence its track in a city, town or village where the maintenance of a fence would interfere either with the rights of the public or the railway company in the discharge of its business and duties to the public.[58] Where the

468; Bradley v. Buffalo &c. R. Co., 34 N. Y. 427; Tracy v. Troy &c. R. Co., 38 N. Y. 433, 98 Am. Dec. 54; Cleveland &c. R. Co. v. McConnell, 26 Ohio St. 57; Nashville &c. R. Co. v. Hughes, 94 Tenn. 450, 29 S. W. 723. In Toledo &c. Co. v. Cupp, 9 Ind. App. 244, 36 N. E. 445, the rule is thus stated: "The fact that appellant's railroad passed through an addition to a city, which was laid out, platted and divided into streets and alleys, did not, of itself, absolve the railroad company from the duty of securely fencing its track; for wherever a railroad company can build and maintain a fence to inclose its track without interfering with the rights of the public, or with the free use of private property or of its own property, then it is bound to maintain the fence, whether it be in the country, in a village, in a town, or in a city. Ohio &c. R. Co. v. Rowland, 50 Ind. 349; Wabash R. Co. v. Forshee, 77 Ind. 158; Wabash R. Co. v. Tretts, 96 Ind. 450; Ohio &c. R. Co. v. Neady, 5 Ind. App. 328, 32 N. E. 213."

[54] Meyer v. North Missouri &c. R. Co., 35 Mo. 352; Elliott v. Hannibal &c. R. Co., 66 Mo. 683; Toledo &c. R. Co. v. Spangler, 71 Ill. 568; Illinois &c. R. Co. v. Bull, 72 Ill. 537. See Gibson v. Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927; Chicago &c. R. Co. v. Hogan, 30 Nebr. 686, 46 N. W. 1015.

[55] Parker v. Rensselaer &c. R. Co., 16 Barb. (N. Y.) 315; Crawford v. New York Central R. Co., 18 Hun (N. Y.) 108; Towns v. Cheshire R. Co., 21 N. H. 363; Peoria &c. R. Co. v. Barton, 80 Ill. 72.

[56] Gerren v. Hannibal &c. R. Co., 60 Mo. 405; Toledo &c. R. Co. v. Spangler, 71 Ill. 568; Illinois &c. Co. v. Williams, 27 Ill. 48.

[57] Note, 54 in § 1710 supra.

[58] Morris v. St. Louis R. Co., 58 Mo. 78; Atchison &c. R. Co. v. Shaft, 33 Kans. 521, 6 Pac. 908.

track extends along a street the company is not bound to fence,[59] neither is it required to fence at street crossings.[60] The test for determining whether a fence should be constructed in a city, town or village is whether or not the erection of a fence would interfere with the rights of the public or the discharge of the duties of the company. Where the track is crossed by streets or alleys at frequent intervals, such as streets and alleys between blocks and lots of ordinary size, no fence is required,[61] but where the lots of land are very large and the streets cross at wide intervals fences must be erected.[62] And where streets or platted grounds end at the right of way of a railway company it is bound to fence;[63] so it is at the edge or boundary of the city, town or village.[64]

§ 1711 (1196). **Fences at embankments.**—A railway company is ordinarily required to fence its track even at embankments. The test is whether or not the embankment is as effectual a barrier against the entry of animals as a fence would be if erected. Where there is an embankment, bluff or other natural object which furnishes a security against the entry of animals as efficient as a fence the company will not be required to maintain a fence.[65] But where the embankment will not prevent the entry

[59] Edwards v. Hannibal &c. R. Co., 66 Mo. 567; Rhea v. St. Louis &c. R. Co., 84 Mo. 345; Kobe v. Northern Pacific R. Co., 36 Minn. 518, 32 N. W. 783. See also Indianapolis &c. R. Co. v. Warner, 35 Ind. 516; Rippe v. Chicago &c. R. Co., 42 Minn. 34, 43 N. W. 652, 5 L. R. A. 864.

[60] St. Louis &c. R. Co. v. Francis, 58 Ind. 389; Wabash &c. R. Co. v. Forshee, 77 Ind. 158.

[61] Pittsburgh &c. R. Co. v. Laufman, 78 Ind. 319.

[62] Coyle v. Chicago &c. R. Co., 62 Iowa 518, 17 N. W. 771; Wymore v. Hannibal &c. R. Co., 79 Mo. 247, 13 Am. & Eng. R. Cas. 523; Ells v. Pacific R. Co., 48 Mo. 231; International &c. R. Co. v. Dunham, 68 Tex. 231, 4 S. W. 472; Elliott v. Hannibal &c. R. Co., 66 Mo. 683. "There are places within a corporated town where the railroad may fence, as where there are no streets or alleys, and the public travel would not be interrupted by such fence." Young v. Hannibal &c. R. Co., 79 Mo. 336.

[63] Kirkland v. Missouri Pacific R. Co., 82 Mo. 466; La Paul v. Truesdale, 44 Minn. 275, 46 N. W. 363.

[64] Kirkland v. Missouri &c. R. Co., 82 Mo. 466; McCormick v. St. Louis &c. R. Co., 20 Mo. App. 640; Nashville &c. R. Co. v. Hughes, 94 Tenn. 450, 29 S. W. 723.

[65] Hilliard v. Chicago &c. R. Co.,

of animals the erection of a fence will not be excused.[66] Proof that animals habitually or frequently went over an embankment onto the railway company's tracks has been held conclusive evidence that it is not sufficient.[67] So, it has been held that an embankment, on which the track of a railway company is laid, erected in the bed of a canal must be protected by proper fences.[68] And the road must be fenced, where it is erected on the tow-path of an abandoned canal.[69] It has also been held that where a railway company has a bridge so near a public highway that animals may get onto the bridge from the highway the company is bound to take some steps to prevent animals from getting onto the bridge.[70]

§ 1712 (1197). **Fences at oblique approaches to highways.**— Where a railway crosses a highway at an oblique angle more or less difficulty exists in locating wing fences and cattle-guards so as to protect animals from injury at such places. To permit the wing fences at such places to be erected at right angles to the track would cause a part of the right of way without the limits of the highway to be thrown open or the highway to be obstructed, and a sort of pocket or trap would result into which animals might be caught and driven on the track and injured. The rule is that at such crossings the company must construct its cattle-guards and erect its wing fences on the margin of the highway so that the highway is not encroached upon, and all of the right of way not in the highway is fenced and protected. If

37 Iowa 442; ante, § 1699. Where a horse entered upon the railway track upon snow which had drifted against the company's fence and was killed it was held that the company was not liable since it was under no obligation to remove such snow-drifts. Patten v. Chicago &c. R. Co., 75 Iowa 459, 39 N. W. 708.

66 Toledo &c. R. Co. v. Sweeney, 41 Ill. 226; Shepard v. Buffalo &c. R. Co., 35 N. Y. 641.

67 Toledo &c. R. Co. v. Sweeney, 41 Ill. 226; Veerhusen v. Chicago &c. R. Co., 53 Wis. 689, 11 N. W. 433.

68 White Water &c. R. Co. v. Quick, 31 Ind. 127. See Schermerhorn v. Hudson River &c. R. Co., 38 N. Y. 103, where it was held that the railway company was not bound to fence its track, erected in and over a river.

69 White Water &c. R. Co. v. Quick, 30 Ind. 384.

70 Cincinnati &c. R. Co. v. Jones, 111 Ind. 259, 12 N. E. 113, 31 Am. & Eng. R. Cas. 491.

the company erects the fences back from the highway so as to form a pocket it may be liable for animals killed at such place on the ground that it has not properly fenced its tracks.[71] If a fence or cattle-guard is not placed on the margin of the highway where it is practicable to do so, and an animal is injured on the track between the margin of the highway and the point where the road is fenced, the company will be liable.[72]

§ 1713 (1198). Cattle-guards. — "Cattle-guards," or "cattle-pits" as they are sometimes termed, are structures erected under or across the tracks of a railway company to prevent animals from going from adjacent lands or tracks into and upon inclosed lands or tracks.[73] Their erection is rendered necessary by reason of the fact that it would be impossible to maintain fences across the tracks.[74] Trains must run over tracks, and a barrier against animals must be of such a nature that it will not obstruct trains. The points at which a railway company must maintain

[71] Andre v. Chicago &c. R. Co., 30 Iowa 107; Ft. Wayne &c. R. Co. v. Herbold, 99 Ind. 91; Jeffersonville &c. R. Co. v. Morgan, 38 Ind. 190.

[72] Indianapolis &c. R. Co. v. Bonnell, 42 Ind. 539; Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Coleman v. Flint &c. R. Co., 64 Mich. 160, 31 N. W. 47; Hamilton v. Missouri Pacific &c. R. Co., 87 Mo. 85; Ehret v. Kansas City &c. R. Co., 20 Mo. App. 251; White v. Utica &c. R. Co., 15 Hun (N. Y.) 333. See also Soward v. Chicago &c. R. Co., 30 Iowa 551; Iola Elec. R. Co. v. Jackson, 70 Kans. 791, 79 Pac. 662; Union Pac. R. Co. v. Harris, 28 Kans. 206. Where the company has erected its cattle-guard as near the highway as could conveniently be done it will not be liable. Indianapolis &c. R. Co. v. Irish, 26 Ind. 268.

[73] Heskett v. Wabash &c. R. Co., 61 Iowa 467, 16 N. W. 525, 13 Am. & Eng. R. Cas. 549; Missouri &c. R. Co. v. Morrow, 32 Kans. 217, 4 Pac. 87. In the latter case it was said: "Proper cattle-guards are such as will prevent cattle from passing along the right of way of the railway company into an improved or fenced field."

[74] In the case of Pennsylvania &c. R. Co. v. Spaulding, 112 Ind. 47, 13 N. E. 268, the court, in speaking of a statutory provision requiring a railway company to erect cattle-guards, said: "The reason of that requirement is that, at such open and public crossings there is no other way of preventing the ingress of animals to portions of the railroad not so crossed by the public." See also Stewart v. Grand Rapids &c. R. Co., 147 Mich. 48, 110 N. W. 126.

cattle-guards are pretty clearly settled. The general rule is that wherever a railway company is under an obligation to fence its tracks it is bound to maintain cattle-guards at the boundary line between the fenced and unfenced parts of its tracks.[75] In some states the duty to maintain cattle-guards is imposed by statute in express terms.[76] Some authorities seem to hold that the company is not under any obligation to maintain cattle-guards unless that obligation is imposed by statute, contract or prescription,[77] but the great weight of authority is to the effect that if a fence is required cattle-guards are also required.[78] And under statutes imposing the duty to fence companies are bound to erect and maintain cattle-guards, for cattle-guards are regarded as part of a secure fence.[79] In cities, towns and villages and other places

[75] Missouri &c. R. Co. v. Ricketts, 45 Kans. 617, 26 Pac. 50, 45 Am. & Eng. R. Cas. 485. See also Toledo &c. R. Co. v. Franklin, 53 Ill. App. 632; Pittsburgh &c. R. Co. v. Eby, 55 Ind. 567; Ft. Wayne &c. R. Co. v. Herbold, 99 Ind. 91; Atchison &c. R. Co. v. Shaft, 33 Kans. 521, 6 Pac. 908; Stewart v. Grand Rapids &c. R. Co., 147 Mich. 48, 110 N. W. 126. The duty cannot be so delegated to a contractor as to relieve the company from liability. Houston &c. R. Co. v. Meador, 50 Tex. 77. "It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters and leaves improved or fenced land, whether such railroad company owns the railroad, or is simply operating it under a lease." Missouri &c. R. Co. v. Morrow, 32 Kans. 217, 4 Pac. 87.

[76] Mundhenk v. Central &c. R. Co., 57 Iowa 718, 11 N. W. 656, 11 Am. & Eng. R. Cas. 463; Corwin v. New York &c. R. Co., 13 N. Y. 42; Brady v. Rensselaer &c. R. Co., 1 Hun (N. Y.) 378. In McGhee v. Guyn, 98 Ky. 209, 32 S. W. 915, the court said: "It is well settled that a neglect on the part of the company to erect suitable cattle-guards at public crossings, and keep them in repair, when a statute so requires, renders it liable for injuries to cattle escaping from a highway upon its track by reason of such defect."

[77] Ward v. Paducah &c. R. Co., 4 Fed. 862.

[78] Pittsburgh &c. R. Co. v. Eby, 55 Ind. 567; Louisville &c. R. Co. v. Spain, 61 Ind. 460; Dunnigan v. Chicago &c. R. Co., 18 Wis. 28, 86 Am. Dec. 741; Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Grand Rapids &c. R. Co. v. Jones, 81 Ind. 523; Texas &c. R. Co. v. Young, 60 Tex. 201, 13 Am. & Eng. R. Cas. 544.

[79] New Albany &c. R. Co. v. Pace, 13 Ind. 411; Indianapolis &c. R. Co. v. Irish, 26 Ind. 268; Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Smith v. Chicago &c. R. Co., 38 Iowa 518; Mackie v. Central &c. R. Co., 54 Iowa 540, 6 N. W. 723; Towns v. Cheshire R. Co., 21 N. H. 363; Nelson v. Vermont &c. R. Co., 26 Vt.

where the company is excused from fencing because of public necessity or the inconvenience or danger to the employes of the company in the performance of their duties the company is not ordinarily bound to maintain cattle-guards.[80] But the company is bound to erect them at the margin of highways,[81] and at the edge of a town or a depot ground where the company's fence commences.[82] The true test, it seems to us, for determining

717, 62 Am. Dec. 614; Wait v. Bennington &c. R. Co., 61 Vt. 268, 17 Atl. 284. Cattle-guards, however, are not such a part of the fence as to authorize a person whose cattle are injured by reason of a defective cattle-guard to recover double damages as in the case of a defective fence. Moriarty v. Central Iowa R. Co., 64 Iowa 696, 21 N. W. 143, 20 Am. & Eng. R. Cas. 438. In the case of Atchison &c. R. Co. v. Shaft, 33 Kans. 521, 6 Pac. 908, 19 Am. & Eng. R. Cas. 529, it was said: "Under the statute railroads must be 'enclosed'; in the language of the statute, they must be 'enclosed with a good and lawful fence, to prevent such animals from being on such road.' . . . Building fences along the sides of the railroad is not alone sufficient. The railroads must be 'enclosed,' as aforesaid, with fences or other barriers, and whenever for that purpose cattle-guards are necessary at the crossings of public highways or other public places, cattle-guards must be put in." The court cited the following authorities: Union Pacific R. Co. v. Harris, 28 Kans. 206; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Pittsburgh &c. R. Co. v. Eby, 55 Ind. 567; Mundhenk v. Central Iowa R. Co., 57 Iowa 718, 11 N. W. 656, 11 Am. & Eng. R. Cas. 463; Missouri &c. R. Co. v. Manson, 31 Kans. 337, 2 Pac. 800; Missouri &c. R. Co. v. Morrow, 32 Kans. 217, 4 Pac. 87; Flint &c. R. Co. v. Lull, 28 Mich. 510; Bradley v. Buffalo &c. R. Co., 34 N. Y. 427; Tracy v. Troy &c. R. Co., 38 N. Y. 433, 98 Am. Dec. 54; Cleveland &c. R. Co. v. Newbrander, 40 Ohio St. 15, 11 Am. & Eng. R. Cas. 480.

[80] Parker v. Rensselaer &c. R. Co., 16 Barb. (N. Y.) 315; Vanderkar v. Rensselaer &c. R. Co., 13 Barb. (N. Y.) 390. See also Gilpin v. Missouri &c. R. Co., 197 Mo. 319, 94 S. W. 869 (not required where it would endanger employes); Stern v. Michigan Cent. R. Co., 76 Mich. 591, 43 N. W. 557; Cleveland &c. R. Co. v. Newbrander, 40 Ohio St. 15.

[81] White Water R. Co. v. Bridgett, 94 Ind. 216, 20 Am. & Eng. R. Cas. 443. If an intervening space is left between the edge of the highway and the cattle-guard and an animal is there injured, the company is liable. Louisville &c. R. Co. v. Porter, 97 Ind. 267, 20 Am. & Eng. R. Cas. 446.

[82] Missouri &c. R. Co. v. Manson, 31 Kans. 337, 2 Pac. 800, 13 Am. & Eng. R. Cas. 540; Mundhenk v. Central &c. R. Co., 57 Iowa 718, 11 N. W. 656; Stewart v. Grand Rapids &c. R. Co., 147 Mich. 48, 110 N. W. 126. Where the erection of cattle-guards would not obstruct the company's business, but would be a safe-

whether a cattle-guard should be erected at any particular point is whether the company is bound to fence at that point. Wherever the company's track emerges from ground which the company is bound to fence and passes onto the ground which the company is not bound to fence there should be a cattle-guard placed on the dividing line.[83] At private crossings the company is under no obligation to maintain cattle-guards,[84] unless the duty is imposed by statute,[85] or they are actually used by the public.[86]

guard, they should be constructed, even in a town or village. Brace v. New York &c. R. Co., 27 N. Y. 269; Toledo &c. R. Co. v. Owen, 43 Ind. 405. A railway company is not guilty of negligence in constructing and maintaining a cattle-guard at a point where station grounds end and whence the company is bound to fence its tracks. Fuller v. Lake Shore &c. R. Co., 108 Mich. 690, 66 N. W. 593.

[83] Missouri &c. R. Co. v. Morrow, 32 Kans. 217, 4 Pac. 87, 19 Am. & Eng. R. Cas. 630. See also Cleveland &c. R. Co. v. Newbrander, 40 Ohio St. 15; Illinois Cent. R. Co. v. Davidson, 225 Ill. 618, 80 N. E. 250 (citing text).

[84] Bond v. Evansville &c. R. Co., 100 Ind. 301, 23 Am. & Eng. R. Cas. 200; Pennsylvania R. Co. v. Spaulding, 112 Ind. 47, 13 N. E. 268; Bartlett v. Dubuque &c. R. Co., 20 Iowa 188; Greeley v. St. Paul &c. R. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16; Sather v. Chicago &c. R. Co., 40 Minn. 91, 41 N. W. 458, 38 Am. & Eng. R. Cas. 283; Fitterling v. Missouri &c. R. Co., 79 Mo. 504; Dent v. St. Louis &c. R. Co., 83 Mo. 496; Omaha &c. R. Co. v. Severin, 30 Nebr. 318, 46 N. W. 842, 45 Am. & Eng. R. Cas. 122; Brooks v. New York &c. R. Co., 13 Barb. (N. Y.) 594; Cook v. Milwaukee &c. R. Co., 36 Wis. 45. And it is no defense to an action for killing an animal at a private crossing to show that cattle-guards were there erected unless they were erected in compliance with a statutory requirement. Pennsylvania R. Co. v. Spaulding, 112 Ind. 47, 13 N. E. 268.

[85] See Trout v. Virginia &c. R. Co., 23 Grat. (Va.) 619; Chapin v. Sullivan &c. R. Co., 39 N. H. 564, 75 Am. Dec. 237; Birmingham &c. R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. 92, 27 L. R. A. 268.

[86] Where they are actually used by the public, although there may be no duty to fence as to the landowner for whose convenience they are maintained, there may be a duty to fence or put in cattle-guards as to others. Evansville &c. R. Co. v. Mosier, 101 Ind. 597; Indiana Cent. R. Co. v. Leamon, 18 Ind. 173; Pittsburgh &c. R. Co. v. Cunningham, 39 Ohio St. 327; McKinley v. Chicago &c. R. Co., 47 Iowa 76; Jenkins v. Chicago &c. R. Co., 27 Mo. App. 578. In Texas the company is required to maintain cattle-guard at crossings made for the convenience of the landowner. Texas &c. R. Co. v. Sproles, 47 Tex. Civ. App. 294, 105 S. W. 521.

§ 1714 (1198a). Cattle-guards—Sufficiency.—In determining what is a sufficient cattle-guard the weight of authority is perhaps to the effect that the question is one for the jury,[87] but it seems to us on principle, although not according to the weight of authority, that if a company maintains such cattle-guards as are in general use by first-class railroads it has performed its duty,[88] and if cattle get over such a guard and are injured the company is not liable unless guilty of willfulness or negligence. In a recent case it is held that, under a statute requiring the company to construct suitable and safe cattle-guards, the fact that a cattle-guard does not prevent stock from passing over it is not conclusive that it is unsuitable or unsafe.[89] In another case, however, the same court held that while this is true, and that all that is required is that the cattle-guard should be made as suitable and safe as practicable, yet the question is usually for the jury and it is error to instruct that it is sufficient if the guard is similar to those used by other first-class railroads.[90] The company must use care to see that its cattle-guards are in proper repair[91] and to remove materials such as snow and ice which fill them up and thus impair their usefulness.[92] But where a snow-

[87] Railroad Co. v. Newbrander, 40 Ohio St. 15; Swartout v. New York &c. R. Co., 7 Hun (N. Y.) 571; Chicago &c. R. Co. v. Farrelly, 3 Ill. App. 60; Stewart v. Bloomington &c. R. Co., 180 Ill. App. 608.

[88] Midland Val. R. Co. v. Bryant, 37 Okla. 206, 131 Pac. 678. The mere fact that an animal runs or jumps over a cattle-guard is not sufficient to establish that it was defective. Barnhart v. Chicago &c. R. Co., 97 Iowa 654, 66 N. W. 902; Timins v. Chicago &c. R. Co., 72 Iowa 94, 33 N. W. 379.

[89] St. Louis &c. R. Co. v. Busick, 74 Ark. 589, 86 S. W. 674.

[90] Choctaw &c. R. Co. v. Goset, 70 Ark. 427, 68 S. W. 879. See also Seaboard Air Line R. Co. v. Wright, 148 Ala. 27, 41 So. 461; Pennsylvania Co. v. Newby, 164 Ind. 109, 72 N. E. 1043; Nashville &c. R. Co. v. Russell, 129 Ky. 14, 110 S. W. 317, 318 (citing text); Johnston v. Detroit &c. R. Co., 139 Mich. 287, 102 N. W. 744; Yazoo &c. R. Co. v. Harrington, 85 Miss. 366, 37 So. 1016.

[91] Chicago &c. R. Co. v. Reid, 24 Ill. 144; Stewart v. Quincy &c. R. Co., 142 Mo. App. 332, 126 S. W. 1003; Houston &c. R. Co. v. White (Tex. Civ. App.), 120 S. W. 947; Texas Cent. R. Co. v. Jenkins (Tex. Civ. App.), 120 S. W. 948. See also Atlanta &c. R. Co. v. Brown, 158 Ala. 607, 48 So. 73, and other cases cited in note in 36 L. R. A. (N. S.) 998.

[92] Martin v. Atchison &c. R. Co., 92 Kans. 595, 141 Pac. 599, L. R. A. 1915B, 134; Hance v. Cayuga &c. R.

storm has been so great as to render it impossible for the company to even clear its tracks for the passage of trains it is not bound to clear its cattle-guards of snow.[93] And whether it has been negligent in not so doing depends upon the circumstances of the particular case and is usually a question for the jury.[94]

§ 1715 (1199). **Wing fences.**—What are known as wing fences are fences extending from the cattle-guards to and connecting with the fences erected along the margin of the right of way. Wherever the company is bound to fence, and has erected a cattle-guard it is bound to erect wing fences at such a point,[95] for a wing fence is regarded as part of a secure fence,[96] and is necessary to render the track "securely fenced in."[97] The duty rests

Co., 26 N. Y. 428; Dunnigan v. Chicago &c. Co., 18 Wis. 28, 86 Am. Dec. 741. See also Indiana &c. R. Co. v. Drum, 21 Ill. App. 331; Grahlman v. Chicago &c. R. Co., 78 Iowa 564, 43 N. W. 529; Paul v. Chicago &c. R. Co., 120 Iowa 224, 94 N. W. 498. But compare Blais v. Minneapolis &c. R. Co., 34 Minn. 57, 24 N. W. 558, 57 Am. R. 36. And not to negligently allow them to be filled with dirt and cinders so as to permit animals to cross. Lake Erie &c. R. Co. v. Voliva, 53 Ind. App. 170, 101 N. E. 338; Geerds v. Ann Arbor &c. R. Co., 181 Mich. 12, 147 N. W. 505; McCullough v. Wabash R. Co., 160 Mo. App. 342, 142 S. W. 357. See also note in 36 L. R. A. (N. S.) 998, 1000, citing additional cases.

[93] See Wait v. Bennington &c. R. Co., 61 Vt. 268, 17 Atl. 284; Stacey v. Winona &c. R. Co., 42 Minn. 158, 43 N. W. 905, 40 Am. & Eng. R. Cas. 217.

[94] Martin v. Atchison &c. R. Co., 92 Kans. 595, 141 Pac. 599, L. R. A. 1915B, 134; Yates v. Chicago &c. R. Co., 115 Minn. 496, 132 N. W. 994, 36 L. R. A. (N. S.) 997.

[95] Union &c. R. Co. v. Harris, 28 Kans. 206; Iola Elec. R. Co. v. Jackson, 70 Kans. 791, 79 Pac. 662. See Brassfield v. Patton, 32 Mo. App. 572. But at private crossings wing fences are not required. Missouri &c. R. Co. v. Fitterling, 79 Mo. 594, 20 Am. & Eng. R. Cas. 454.

[96] Edwards v. Kansas City &c. R. Co., 74 Mo. 117; Jeffersonville &c. R. Co. v. Avery, 31 Ind. 277.

[97] In the case of Louisville &c. R. Co. v. Thomas, 106 Ind. 10, 5 N. E. 198, it was said: "There were no fences on either side of the cattle-guard, leading from it to the east and west fences on the north and south sides of appellant's railroad track. If there had been such wing fences leading out from the cattle-guard, and connecting with the east and west fences on each side of the railroad track, it could have been correctly said that such track, at the point where appellee's mare entered thereon, was, in the language of the statute, 'securely fenced in.' In that event the eastward journey of the mare on, along and over appellant's railroad track, would have termi-

upon the company to protect its track for the full width of its right of way, and this duty must be discharged by the erection of proper cattle-guards and wing fences.[98] Wing fences must be placed along the margin of the highway. If they are erected at an improper distance from the margin and animals are killed within such distance the company will be liable.[99]

§ 1716 (1200). Gates and bars.—At private crossings, as we have before seen, railway companies are often bound to fence their tracks. But at such places a permanent and immovable fence cannot be maintained, for such a fence would prevent the crossing from being used. At such points openings are usually left in the fence and gates or bars erected through which the adjoining owners may pass, and at such places the railway company is usually bound to erect gates, bars or other appliances which will prevent the entry of animals and yet enable adjoining owners to pass over the right of way.[1] The company must also exercise

nated of necessity at the cattle-guard, and she would have gone no further, except in retracing her previous steps. As it was, in the absence of such wing fences leading out from the cattle-guard and connecting it, one on each side with the east and west fences, it cannot be said with legal accuracy that, at the point where appellee's mare entered upon appellant's railroad track, such track was then and there 'securely fenced in.'"

[98] Missouri &c. R. Co. v. Manson, 31 Kans. 337, 2 Pac. 800, 13 Am. & Eng. R. Cas. 540. See also Kansas City &c. R. Co. v. Spencer, 72 Miss. 491, 17 So. 168.

[99] Louisville &c. R. Co. v. Porter, 97 Ind. 267, 20 Am. & Eng. R. Cas. 446.

[1] Chicago &c. R. Co. v. Harris, 54 Ill. 528; Mackie v. Central &c. R. Co., 54 Iowa 540, 6 N. W. 723; Payne v. Kansas City &c. R. Co., 72 Iowa 214, 33 N. W. 633; Estes v. Atlantic &c. R. Co., 63 Maine 308; Pittsburgh &c. R. Co. v. Cunningham, 39 Ohio St. 327, 13 Am. & Eng. R. Cas. 529; Hurd v. Rutland &c. R. Co., 25 Vt. 116. See also Poler v. New York Cent. R. Co., 16 N. Y. 476; Brown v. Oregon &c. R. Co., 20 Idaho 364, 118 Pac. 768; Indianapolis &c. Trac. Co. v. Smith, 42 Ind. App. 605, 86 N. E. 498 (interurban railroad subject to same obligations in this respect as steam railroads); Tremont &c. R. Co. v. Pounder, 36 Nebr. 247, 54 N. W. 509. The company may erect gates at places other than public crossings where their erection is deemed advisable. Detroit &c. R. Co. v. Hayt, 55 Mich. 347, 21 N. W. 367, 911. The company is not bound to put in cattle-guards or wing fences at private crossings under the Utah statute. Knight v. Southern Pac. Co., 52 Utah 42, 172 Pac. 689.

due care to see that gates and bars which it erects are kept in proper repair.[2] As a general rule it is the duty of the company to exercise care to keep gates and bars erected in fences along its right of way closed,[3] and to see that such gates are provided with proper fastenings for keeping them closed.[4] Where such gates are left open by the agents, servants or customers of the railway company the railway company will generally be liable for injuries to animals which come upon the track through such open gates.[5] And the company will generally be liable where the gates are left open by third persons or strangers if the company knows that they are open or they have been open for such a length of time as to charge the company with notice,[6] but not

[2] Illinois &c. R. Co. v. Arnold, 47 Ill. 173; Chicago &c. R. Co. v. Harris, 54 Ill. 528; Hammond v. Chicago &c. R. Co., 43 Iowa 168; Mackie v. Central &c. R. Co., 54 Iowa 540, 6 N. W. 723; Waldron v. Portland &c. R. Co., 35 Maine 422. See also Adams v. Atchison &c. R. Co., 46 Kans. 161, 26 Pac. 439; Binicker v. Hannibal &c. R. Co., 83 Mo. 660; Lake Erie &c. R. Co. v. Beam, 60 Ill. App. 68. The company must take notice of the tendency of the material out of which gates or bars are constructed to decay and act accordingly. Hovorka v. Minneapolis &c. R. Co., 34 Minn. 281, 25 N. W. 595. And proof is admissible that gates or bars were repaired after an accident. Page v. Great Western &c. R. Co., 24 L. T. R. 585.

[3] Chicago &c. R. Co. v. Harris, 54 Ill. 528. See Savage v. Chicago &c. R. Co., 31 Minn. 419, 18 N. W. 272, 13 Am. & Eng. R. Cas. 566; Simmons v. Poughkeepsie &c. R. Co., 2 App. Div. 117, 37 N. Y. S. 532; International &c. R. Co. v. Russell, 48 Tex. Civ. App. 155, 106 S. W. 438; Wabash R. Co. v. Perbex, 57 Ill. App. 62; Wait v. Burlington &c. R. Co., 74 Iowa 207, 37 N. W. 159. But see Adams v. Atchison &c. R. Co., 46 Kans. 161, 26 Pac. 439.

[4] Payne v. Kansas City &c. R. Co., 72 Iowa 214, 33 N. W. 633, 35 Am. & Eng. R. Cas. 113; Vernon v. Grand Trunk &c. R. Co., 2 Mont. (Can.) S. C. 181. See also Roberts v. Chicago &c. R. Co., 119 Mo. App. 290, 94 S. W. 838.

[5] Toledo &c. R. Co. v. Nelson, 77 Ill. 160; Chapman v. New York &c. R. Co., 33 N. Y. 369, 88 Am. Dec. 392; Spinner v. New York &c. R. Co., 67 N. Y. 153; Cleveland &c. R. Co. v. Swift, 42 Ind. 119; Brady v. Rensselaer &c. R. Co., 3 Thomp. & C. (N. Y.) 537. See Lemon v. Chicago &c. R. Co., 59 Mich. 618, 26 N. W. 791; Chicago &c. R. Co. v. Ramsey (Ind. App.), 78 N. E. 669, 670, 79 N. E. 1065 (quoting text). See also Missouri &c. R. Co. v. Armstrong (Tex. Civ. App.), 99 S. W. 431; High v. Southern Pac. Co., 49 Ore. 98, 88 Pac. 961, 962 (citing text).

[6] Bartlett v. Dubuque &c. R. Co., 20 Iowa 188; Illinois &c. R. Co. v. Arnold, 47 Ill. 173; Chicago &c. R. Co. v. Magee, 60 Ill. 529; Chicago &c.

otherwise.[7] The company is entitled to a reasonable time in which to learn that gates and bars are open or out of repair, and it will not be liable until it has had reasonable opportunity to close the gate or bars or make repairs.[8] Where gates are left open by the adjoining owner for whose benefit they were erected, or by his servants, the company is not liable to him.[9] But if the

R. Co. v. Saunders, 85 Ill. 288; Indianapolis &c. R. Co. v. Hall, 88 Ill. 368; Henderson v. Chicago &c. R. Co., 48 Iowa 216; Davenport v. Chicago &c. R. Co., 76 Wis. 399, 45 N. W. 215.

[7] Koenigs v. Chicago &c. R. Co., 98 Iowa 569, 65 N. W. 314; Plummer v. Atchison &c. R. Co., 86 Kans. 744, 121 Pac. 906; Sylvester v. Grand Rapids &c. Co., 169 Mich. 340, 135 N. W. 337; Ridenore v. Wabash &c. R. Co., 81 Mo. 227; Kavanaugh v. Atchison &c. R. Co., 163 Mo. 64, 63 S. W. 374; Box v. Atchison &c. R. Co., 58 Mo. App. 359; Perry v. Quincy &c. R. Co., 122 Mo. App. 177, 99 S. W. 14; St. Louis &c. R. Co. v. Williams, 31 Okla. 450, 122 Pac. 152; Texas &c. R. Co. v. Glenn, 8 Tex. App. 301, 30 S. W. 845; Reid v. San Pedro &c. R. Co., 39 Utah 617, 118 Pac. 1009.

[8] In Jacksonville &c. R. Co. v. Harris, 33 Fla. 217, 14 So. 726, 39 Am. St. 127, the court, in speaking of the duty of a railway company to keep gates and bars closed and in repair, referred to the doctrine that a company had a reasonable time in which to discover and repair defects in fences, and held that the same doctrine was properly applicable to the case of open or defective gates and bars, saying: "A somewhat similar doctrine is applicable where bars or gates at a crossing are left open without the company's consent or fault." The court cited a great number of cases, among which were the following: Rutledge v. Hannibal &c. R. Co., 78 Mo. 286; Chicago &c. R. Co. v. Saunders, 85 Ill. 288; Indianapolis &c. R. Co. v. Truitt, 24 Ind. 162; Henderson v. Chicago &c. R. Co., 39 Iowa 220; Lemon v. Chicago &c. R. Co., 59 Mich. 618, 26 N. W. 791; Munch v. New York &c. R. Co., 29 Barb. (N. Y.) 647; Goddard v. Chicago &c. R. Co., 54 Wis. 548, 11 N. W. 593.

[9] Wallace v. Oregon Short Line R. Co., 16 Idaho 103, 100 Pac. 904, 906 (quoting text); Chicago &c. R. Co. v. Seirer, 60 Ill. 295; Bond v. Evansville &c. R. Co., 100 Ind. 301, 23 Am. & Eng. R. Cas. 200; Henderson v. Chicago &c. R. Co., 48 Iowa 216; Rouse v. Osborne, 3 Kans. App. 139, 42 Pac. 843; Waldron v. Portland &c. R. Co., 35 Maine 422; Eames v. Boston &c. R. Co., 14 Allen (Mass.) 151; Hook v. Worcester &c. R. Co., 58 N. H. 251; Richardson v. Chicago &c. R. Co., 56 Wis. 347, 14 N. W. 176. The person for whose benefit the gates are erected assumes the increased risk caused by having gates instead of fences. Evansville &c. R. Co. v. Mosier, 101 Ind. 597, 35 Am. & Eng. R. Cas. 196. See also Tombs v. Rochester &c. R. Co., 18 Barb. (N. Y.) 583; Henderson v. Chicago &c. R. Co., 43 Iowa 620; Harrington v. Chicago &c. R. Co., 71 Mo. 384.

animals belong to a third person, it has been held that the company may be liable to such person notwithstanding the gates were left open by the adjoining owner.[10] Where gates or bars are erected by land-owners for their own convenience at places along the right of way where the company is not bound to fence it is under no obligation to keep such gates closed.[11]

§ 1717 (1201). **Place of entry of animals on railway track.**— In suits for damages on account of injuries to animals on railway tracks the place where the animals came upon the track is nearly always a controlling element in determining the liability of the company. The general rule is that if the animals came upon the track at a place where the company was excused from fencing there can be no liability unless the injuries were wilfully or negligently inflicted.[12] The condition of the fence at the actual place of entry is the test for determining the company's liability.[13] If

[10] Laude v. Chicago &c. R. Co., 33 Wis. 640.

[11] Indianapolis &c. R. Co. v. Adkins, 23 Ind. 340; Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295; Koutz v. Toledo &c. R. Co., 54 Ind. 515. See also Claus v. Chicago &c. R. Co., 136 Iowa 7, 111 N. W. 15; Missouri &c. R. Co. v. Davis, 54 Tex. Civ. App. 516, 118 S. W. 234; International &c. R. Co. v. Russell, 48 Tex. Civ. App. 155, 106 S. W. 438. So, under the Indiana statute, the abutting owner on an interurban railroad is required to maintain and keep closed gates at a private crossing, and the company is not liable for cattle getting in through such open gate and being injured without negligence on the part of the company. Terre Haute &c. Trac Co. v. Combs (Ind. App.), 118 N. E. 976. But if the employes of the railroad company negligently leave a gate open at a private crossing and animals enter there and are killed on the track the company is liable. Baltimore &c. R. Co. v. Zollman, 40 Ind. App. 23, 80 N. E. 40.

[12] Great Western &c. R. Co. v. Morthland, 30 Ill. 451; Illinois &c. R. Co. v. Bull, 72 Ill. 537; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Indianapolis &c. R. Co. v. Warner, 35 Ind. 515; Chicago &c. R. Co. v. Ramsey, 168 Ind. 390, 81 N. E. 79, 120 Am. St. 379; Jeffersonville &c. R. Co. v. Huber, 42 Ind. 173; Louisville &c. R. Co. v. Harrigan, 94 Ind. 245; Davis v. Burlington &c. R. Co., 26 Iowa 549; Schneir v. Chicago &c. R. Co., 40 Iowa 337; Weir v. St. Louis &c. R. Co., 48 Mo. 558; Snider v. St. Louis &c. R. Co., 73 Mo. 465, 7 Am. & Eng. R. Cas. 558; Asher v. St. Louis &c. R. Co., 79 Mo. 432; Bremmer v. Green Bay &c. R. Co., 61 Wis. 114, 20 N. W. 687, 19 Am. & Eng. R. Cas. 575.

[13] Wabash &c. R. Co. v. Brown, 2 Bradw. (Ill.) 516; Chicago &c. R. Co. v. Farrelly, 3 Bradw. (Ill.) 60; Toledo &c. R. Co. v. Howell, 38

the animals entered at a place where a fence was required and are injured at a point where no fence is required, the company may be liable,[14] but if the animals entered at a point where a fence was not required, and were injured at a point where no fence was required, or even where one was required there is generally no liability, in the absence of wilfulness or negligence.[15] Yet where the animal entered upon the track at a highway or other place where a fence is not required and is chased along the track onto ground that should be fenced or properly guarded by cattle-guards, but is not, and the injury is caused because it is not, the company may be liable.[16] In the absence of wilfulness or negligence the material question is, was the track fenced at the point where the animal came upon it, for the negligence of the company in not fencing and thus keeping the animal out is regarded as the cause of the injury and it is on such negligence

Ind. 447; Jeffersonville &c. R. Co. v. Lyon, 72 Ind. 107; Wabash &c. R. Co. v. Tretts, 96 Ind. 450; Indiana &c. R. Co. v. Quick, 109 Ind. 295, 9 N. E. 788, 925; Yeager v. Chicago &c. R. Co., 1 Mo. App. 434; Smith v. Missouri Pacific R. Co., 29 Mo. App. 65; Smith v. St. Louis &c. R. Co., 111 Mo. App. 410, 85 S. W. 972; Creson v. Missouri &c. R. Co., 152 Mo. App. 197, 133 S. W. 57; Coryell v. Hannibal &c. R. Co., 82 Mo. 441; Chicago &c. R. Co. v. Sevcek, 72 Nebr. 793, 101 N. W. 981; Louterstein v. Galveston &c. R. Co. (Tex. Civ. App.), 144 S. W. 310.

[14] Toledo &c. R. Co. v. Howell, 38 Ind. 447; Alsop v. Ohio &c. R. Co., 19 Ill. App. 292; Snider v. St. Louis &c. R. Co., 73 Mo. 465. And the company will be liable where stock entered at a place requiring a fence, although they afterward wandered along and off the track and again entered it at a place where no fence was required. Jeffersonville &c. R. Co. v. Lyon, 72 Ind. 107; Atchison &c. R. Co. v. Cash, 27 Kans. 587.

[15] Great Western &c. R. Co. v. Morthland, 30 Ill. 451; Atchison &c. R. Co. v. Cash, 27 Kans. 587; Redmond v. Missouri &c. R. Co., 104 Mo. App. 651, 77 S. W. 768; Eaton v. Oregon &c. R. Co., 19 Ore. 371, 24 Pac. 413; Bennett v. Chicago &c. R. Co., 19 Wis. 145. See also Chicago &c. R. Co. v. Blair, 75 Ill. App. 659; Duggan v. Peoria &c. R. Co., 42 Ill. App. 536; Ward v. St. Louis &c. R. Co., 91 Mo. 168, 3 S. W. 481; Eaton v. McNeill, 31 Ore. 128, 49 Pac. 875.

[16] Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Jantzen v. Wabash &c. R. Co., 83 Mo. 171. Compare, however, Chicago &c. R. Co. v. Ramsey, 168 Ind. 390, 81 N. E. 79, 120 Am. St. 379 (where an entry was at a place required to be fenced, but the animal crossed private land and again entered through a private gate).

that a recovery is predicated.[17] In some jurisdictions the presumption is indulged, in the absence of anything to the contrary, where there is no fence or an insufficient fence at the place of the injury that the animal entered at that point,[18] but in some other jurisdictions no such presumption is indulged.[19]

§ 1718 (1202). Determining places where fences are required —Questions of law and fact.—There are, as we have seen, certain places where railway companies are not bound to fence their tracks. Whether a company is under an obligation to fence its tracks at any particular point is, if the facts are undisputed, generally a question of law for the court.[20] Thus, where a company is excused from fencing at highway crossings, depot grounds or station grounds, it is a question for the court whether the company was bound to fence at those points.[21] Often, however,

[17] Alsop v. Ohio &c. R. Co., 19 Bradw. (Ill.) 292; Cox v. Minneapolis &c. R. Co., 41 Minn. 101, 42 N. W. 924, 38 Am. & Eng. R. Cas. 287; See Cecil v. Pacific &c. R. Co., 47 Mo. 246; Moore v. Wabash &c. R. Co., 81 Mo. 499; Foster v. St. Louis &c. R. Co., 90 Mo. 116, 2 S. W. 138; Kirkpatrick v. Illinois &c. R. Co., 120 Mo. App. 416, 96 S. W. 1036; Sullivan v. Oregon &c. R. Co., 19 Ore. 319, 24 Pac. 408, 42 Am. & Eng. R. Cas. 625. In the case of Wabash &c. R. Co. v. Tretts, 96 Ind. 450, it was said: "The place of entry is the material question in cases of this character. If animals enter at a place where the railroad company is bound to fence, the company is liable, although they were killed at a point where the company was under no duty to fence." In Acord v. St. Louis &c. R. Co., 113 Mo. App. 84, 87 S. W. 537, 542, 543, it is said: "The point at which the animal enters upon the right of way determines the liability or non-liability of the railroad. . . . In the absence of evidence to the contrary, the law presumes that it came upon the road where it was killed."

[18] Johnson v. Chicago &c. R. Co., 27 Mo. App. 379; Jantzen v. Wabash &c. R. Co., 83 Mo. 171, and Missouri Case cited in last note, supra; also see Eaton v. Oregon R. &c. Co., 19 Ore. 371, 24 Pac. 413; Mobile &c. R. Co. v. Tiernan, 102 Tenn. 704, 52 S. W. 179.

[19] Bremmer v. Green Bay &c. R. Co., 61 Wis. 114, 20 N. W. 687.

[20] Illinois &c. R. Co. v. Whalen, 42 Ill. 396; Chicago &c. R. Co. v. Engle, 76 Ill. 317; Bird v. Michigan Cent. R. Co., 145 Mich. 706, 108 N. W. 1100; St. Louis &c. Co. v. Brown, 32 Okla. 483, 122 Pac. 136; Wilmot v. Oregon .R. Co., 48 Ore. 494, 87 Pac. 528, 120 Am. St. 840, 7 L. R. A. (N. S.) 202 (citing text); St. Louis &c. Ry. Co. v. Smith, 137 Pac. 714, 715 (citing text). See Rinear v. Grand Rapids &c. R. Co., 70 Mich. 620, 38 N. W. 599.

[21] See ante, § 1709; note. We mean, of course, where there is no

the question resolves itself into one of fact, or of mixed law and fact. While it is purely a question of law whether or not a railway company shall fence at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is usually a question of fact whether a certain point constitutes part of the depot grounds[22] or whether the erection of a fence at any particular place would interfere with the company's employes in the performance of their duties.[23] Thus, it has been held for the jury to determine whether a company is excused from putting in cattle-guards at a particular point, on the ground that their erection would interfere with the employes of the company in the performance of their duties.[24]

§ 1719 (1203). **Injuries to animals on highway.**—Ordinarily where animals unlawfully at large are injured on highways a railway company is not liable unless the injuries were wilfully or wantonly inflicted.[25] Some of the authorities, however, hold

question as to its being such a place. See also Toledo &c. R. Co. v. Cory, 39 Ind. 218, where it was said: "It was for the court to tell the jury whether under the law the appellant was required to fence the road at the point where the cattle entered upon the track, but it was a question of fact, to be determined by the jury from the testimony of witnesses, whether the railroad had fenced its track in such a manner as to prevent cattle from entering thereon."

22 Rhines v. Chicago &c. R. Co., 75 Iowa 597, 39 N. W. 912; McDonough v. Milwaukee &c. R. Co., 73 Wis. 223, 40 N. W. 806; Grosse v. Chicago &c. R. Co., 91 Wis. 482, 65 N. W. 185; Acord v. St. Louis &c. R. Co., 113 Mo. App. 84, 87 S. W. 537, 544. See also ante, § 1709.

23 Cleveland &c. R. Co. v. DeBolt, 10 Ind. App. 174, 37 N. E. 737; Bean v. St. Louis &c. R. Co., 20 Mo. App. 641. See also Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. ed. 447; LeMaster v. Butler County R. Co. (Mo. App.), 190 S. W. 38; ante, § 1709.

24 Chicago &c. R. Co. v. Modesitt, 124 Ind. 212, 24 N. E. 986. The court in that case said: "It was for the jury to determine, from the facts established by the evidence, whether the company was excused from putting in a cattle-guard for the reason that it would make it dangerous to use the track."

25 Wabash &c. R. Co. v. Nice, 99 Ind. 152; Hanna v. Terre Haute &c. R. Co., 119 Ind. 316, 21 N. E. 903; Comstock v. Des Moines &c. R. Co., 32 Iowa 376; McDonnell v. Pittsfield &c. R. Co., 115 Mass. 564; Darling v. Boston &c. R. Co., 121 Mass. 118; Chicago &c. R. Co. v. Campbell, 47 Mich. 265, 11 N. W. 152; Morris v. St. Louis &c. Co., 58 Mo. 78; Swear-

that the company is liable if the injuries were negligently inflicted,[26] but negligence in such cases is usually regarded as a failure to observe statutory precautions, or to exercise reasonable care after the discovery of the animals to prevent injury to them. The rule determining the company's liability is, however, materially affected by the question as to whether or not the injured animal was rightfully on the highway. If the animals are wrongfully in the highway it would seem that the company is liable only for wilful injuries,[27] or, perhaps, under the last chance doctrine, but where the animals are rightfully in the highway the company is bound to use due care to prevent injuring them.[28] "This rule ordinarily applies only to animals which are being driven along the highway.[29] It does not apply to animals wrongfully running at large, for as to such animals the company is liable only for injuries wilfully inflicted.[30] It should be observed

ingen v. Missouri &c. R. Co., 64 Mo. 73; Munger v. Tonawanda &c. R. Co., 4 N. Y. 349; Hance v. Cayuga &c. R. Co., 26 N. Y. 428; Hindman v. Oregon &c. R. Co., 17 Ore. 614, 22 Pac. 116, 38 Am. & Eng. R. Cas. 310; Blair v. Milwaukee &c. R. Co., 20 Wis. 254. Mere proof of the killing at such a place, without, at least, showing negligence, is not sufficient. International &c. R. Co. v. Carr (Tex. Civ. App.), 91 S. W. 858. But see as to duty to keep a lookout. Harris v. Missouri &c. R. Co., 24 Okla. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858, and note citing and reviewing many authorities.

[26] Chicago &c. R. Co. v. McMorrow, 67 Ill. 218; Springfield &c. R. Co. v. Andrews, 68 Ill. 56; Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Chapin v. Sullivan &c. R. Co., 39 N. H. 564.

[27] Fitch v. Buffalo &c. R. Co., 13 Hun (N. Y.) 668; Chicago &c. R. Co v. Cauffman, 38 Ill. 424; Corwin v. New York &c. R. Co., 13 N. Y. 42; McDonnell v. Pittsfield &c. R Co., 115 Mass. 564; Hance v. Cayuga, 26 N. Y. 428. See also Houston &c. R. Co. v. Atlas &c. Works (Tex. Civ. App.), 71 S. W. 792. That it is liable for wilfulness, see Bateman v. Rutland R. Co., 54 Misc. 312, 105 N. Y. S. 970, and compare also Chicago &c. R. Co. v. Leiter, 59 Ind. App. 212, 109 N. E. 213; Vandalia R. Co. v. Duling, 60 Ind. App. 332. 109 N. E. 70 (last clear chance).

[28] Beers v. Housatonic R. Co., 19 Conn. 566; Smith v. San Pedro &c. R. Co., 35 Utah 390, 100 Pac. 673. See Chicago &c. R. Co. v. Nash, 1 Ind. App. 298, 27 N. E. 564. This case, however, cannot be regarded as good authority, for the supreme court of Indiana has taken the opposite view of the law. Hanna v. Terre Haute &c. R. Co., 119 Ind. 316, 21 N. E. 903.

[29] Midland &c. Co. v. Daykin, 17 C. B. 126.

[30] Hanna v. Terre Haute &c. R. Co., 119 Ind. 316, 21 N. E. 903; Mich-

that we have been considering in this section, as well as in this chapter generally, the rules applicable where the railroad is not laid longitudinally in a street or country highway rather than where the railroad is so laid in a highway. In the latter case different considerations apply. On the one hand, the company is not bound to fence, and, on the other the increased hazard and the mutual right of the parties are considerations that exert an important influence on the questions of negligence and contributory negligence. The railroad has no exclusive right to the use of the highway, and, unless the particular case is controlled by some valid statute or ordinance, one has as much right to properly drive his cattle along the highway as the railroad company has to use it in running its trains, so that where they both have the right to so use it, the rights and obligations may be said in a general way to be mutual, according to the attending conditions, emergencies and legitimate use made by each of the common thoroughfare. The questions of liability, negligence and contributory negligence under such circumstances most often arise in the case of animals killed in the operation of street or interurban railways, but they may also arise in the case of an ordinary commercial railroad so laid in a highway. As the question of liability does not depend on fencing statutes, however, it is only indirectly connected with the main subject of this chapter and we merely cited the pertinent cases—mostly interurban or street railway cases—without further comment.[31]

igan &c. R. Co. v. Fisher, 27 Ind. 96. See also Atlantic &c. R. Co. v. White, 129 Ga. 668, 59 S. E. 898; Indianapolis &c. R. Co. v. Goar, 43 Ind. App. 89, 86 N. E. 968; Mongogna v. Illinois Cent. R. Co., 115 La. Ann. 597, 39 So. 699; Griffith v. Atlantic &c. R. Co., 82 S. Car. 252, 64 S. E. 222; Missouri &c. R. Co. v. Tilbert (Tex. Civ. App.), 90 S. W. 508. But there is some difference of opinion on this subject, and the authorities are somewhat divided. See note in 20 Am. St. 161. Difference in the rule adopted as to whether the owner must keep his cattle from straying and stock laws in various jurisdictions render it difficult, if not impossible, to state any general rules on the subject of this section, and even such qualified statements as we have made may not apply in all jurisdictions. The statutes and decisions of the particular jurisdiction should be consulted.

[31] Mobile Light &c. R. Co. v. McKay, 163 Ala. 111, 50 So. 1035; Mobile Light &c. R. Co. v. Portiss, 195 Ala. 320, 70 So. 136; Little Rock R. &c. Co. v. Newman, 77 Ark. 599, 92

§ 1720 (1204). **Rate of speed—Stopping train.**—In the absence of statutory enactments regulating the speed of the railway trains railway companies may usually run their trains at any rate of speed which may best suit their convenience.[32] They are not bound to run at a slower rate of speed because animals may come upon the track and may receive injuries by reason of such high rate of speed.[33] Railway companies being engaged in the business of conveying passengers and property, and that business being regarded of the highest importance, the speed of trains may be regulated with that end in view.[34] The slight private interest which may exist because of danger of injury to animals straying upon the track must give way to the greater interests which exist in favor of the public. No rate of speed in such cases is negligence per se.[35] In some states, however, statutes are in force

S. W. 864; Little Rock Trac. &c. Co. v. Hicks, 79 Ark. 248, 96 S. W. 385; Kentucky Trac. &c. Co. v. Wright, 168 Ky. 493, 182 S. W. 604; Carrington v. Worcester Consol. St. R. Co., 222 Mass. 119, 109 N. E. 828; Nissly v. Detroit &c. R. Co., 168 Mich. 676, 682, 131 N. W. 145, 135 N. W. 268, Ann. Cas. 1913C, 719, 722; Bewernitz v. Detroit &c. R. Co., 195 Mich. 528, 161 N. W. 976, L. R. A. 1917E, 767, and note. The distinctions we have referred to are pointed out in the opinion in the last case just cited and the other cases we have cited are reviewed with three or four others in the note thereto in L. R. A. 1917E, 770, et seq.

[32] Stern v. Michigan Central R. Co., 76 Mich. 591, 43 N. W. 587; Seawell v. Raleigh &c. R. Co., 106 N. Car. 270, 10 S. E. 1045. See Molair v. Railway &c. R. Co., 31 S. Car. 510, 10 S. E. 243; Chicago &c. R. Co. v. Wheeler, 70 Kans. 755, 79 Pac. 673,

[33] Baltimore &c. R. Co. v. Mulligan, 45 Md. 486; Darling v. Boston &c. R. Co., 121 Mass. 118; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Durham v. Wilmington &c. R. Co., 82 N. Car. 352; Texas &c. R. Co. v. Langham (Tex. Civ. App.), 95 S. W. 686; Central Ohio &c. R. Co. v. Lawrence, 13 Ohio St. 66; Bemis v. Connecticut &c. R. Co., 42 Vt. 375, 1 Am. Rep. 339. Text is quoted in Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194, 69 S. W. 845, 848. But see Preece v. Oregon Short Line R. Co., 48 Utah 551, 161 Pac. 40; Rafferty v. Portland &c. R. Co., 32 Wash. 259, 73 Pac. 382.

[34] Maynard v. Boston &c. R. Co., 115 Mass. 458, 15 Am. Rep. 119; Needham v. San Francisco &c. R. Co., 37 Cal. 409; Bunnell v. Rio Grande Co., 13 Utah 314, 44 Pac. 927.

[35] East Tennessee &c. R. Co. v. Deaver, 79 Ala. 216; Western R. &c. Co. v. Sistrunk, 85 Ala. 352, 5 So. 79; Toledo &c. R. Co. v. Barlow, 71 Ill. 640; Latty v. Burlington &c. R. Co., 38 Iowa 250; McKonkey v. Chicago &c. R. Co.,

regulating the speed at which trains shall run at certain points.[36] And in municipalities there are generally ordinances in force which fix the maximum rate of speed at which trains may run within corporate limits. Where a recovery is sought on the ground that the company was running its train at the time of the injury in excess of the statutory or ordinance rate it must be made to appear before a recovery can be had that such excessive speed was the approximate cause of the injury.[37] Mere proof of the excessive speed is not sufficient.[38] There must be a showing that but for such excessive speed the injury would not have occurred.[39] Where animals are discovered upon the track the en-

40 Iowa 205; Pacific R. Co. v. Houts, 12 Kans. 328; New Orleans &c. R. Co. v. Field, 46 Miss. 574; Maher v. Atlantic &c. R. Co., 64 Mo. 267; Tonawanda R. Co. v. Munger, 5 Denio (N. Y.) 255, 49 Am. Dec. 239; Morse v. Rutland &c. R. Co., 27 Vt. 49. Greater care, however, may be due from the company where its trains pass through a thickly populated country than in unsettled country, and evidence of a high rate of speed has been admitted as evidence of negligence. Pryor v. St. Louis &c. R. Co., 69 Mo. 215; Edson v. Central &c. R. Co., 40 Iowa 47.

[36] In Alabama a statute which provided that railway companies should slacken the speed of their trains at crossings in "a curve or cut, where the engineer cannot see at least one-fourth of a mile ahead," was held not to apply to crossings in straight track where the crossings were open and visible. Nashville &c. R. Co. v. Hembree, 85 Ala. 481, 5 So. 173, 38 Am. & Eng. R. Cas. 300. But compare Western R. Co. v. Mitchell, 148 Ala. 35, 41 So. 427.

[37] Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Monahan v. Keokuk &c R. Co., 45 Iowa 523; Story v. Chicago &c. R. Co., 79 Iowa 402, 44 N. W. 690; Louisville &c. R. Co. v. Caster (Miss.), 5 So. 388; Maher v. Atlantic &c. R. Co., 64 Mo. 267; Houston &c. R. Co. v. Terry, 42 Tex. 451.

[38] Plaster v. Illinois &c. R. Co., 35 Iowa 449; Toledo &c. R. Co. v. Barlow, 71 Ill. 640; Lafayette &c. R. Co. v. Shriner, 6 Ind. 141.

[39] Chicago &c. R. Co. v. Richardson, 28 Nebr. 118, 44 N. W. 103, 42 Am. & Eng. R. Cas. 592; Union Pac. R. Co. v. Rassmussen, 25 Nebr. 810, 41 N. W. 778, 13 Am. St. 527. See Colorado &c. R. Co. v. Caldwell, 11 Colo. 545, 19 Pac. 542; Gulf &c. R. Co. v. Blake, 43 Tex. Civ. App. 180, 95 S. W. 593. Galveston &c. Ry. Co. v. Lerizza (Tex. Civ. App.), 201 S. W. 1043 (company liable where violation of city ordinance as to speed was proximate cause, as where it is shown that the animals could have been driven from the track in time except for the violation of the ordinance as to speed).

gineer is ordinarily bound to exercise some degree of care to prevent injuring them, if such care can be exercised consistent with the safety of the train or its passengers.[40] If danger would likely result to the train or passengers from an effort to stop or slacken the speed of the train there is no obligation to stop or slacken the speed, for the safety of the train and its passengers is of the highest importance and takes precedence over the safety of animals on the track.[41] And an engineer will be justified in increasing the speed of his train so as to throw animals away from the track where such a course will secure the greatest safety for the train and the property and persons being carried there-

[40] Newport News &c. R. Co. v. Hazelip, 17 Ky. L. 137, 34 S. W. 904; Carlton v. Wilmington &c. R. Co., 104 N. Car. 365, 10 S. E. 516, 40 Am. & Eng. R. Cas. 178; Chicago &c. R. Co. v. Kellam, 92 Ill. 245, 34 Am. Rep. 128; New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. 534; Missouri &c. R. Co. v. Meithvein (Tex. Civ. App.), 33 S. W. 1093. In the case last cited the court said: "We can affirm the judgment below on two grounds: 1st, because the appellant was guilty of negligence in not using efforts to stop the train. If this had been done, it is possible that the animal would not have been injured, or would not have been so severely injured. The facts in evidence warranted the inference that, if the engineer had exercised proper diligence when he discovered the animals on the track, he might have prevented the collision." See also Atlantic &c. R. Co. v. Chastain, 15 Ga. App. 707, 84 S. E. 167; Swisher v. Interurban R. Co., 151 Iowa 384, 130 N. W. 404; Hansberry v. Chicago &c. R. Co., 79 Nebr. 120, 112 N. W. 292; Willett v. Oregon &c. R. Co., 94 Wash. 71, 162 Pac. 14. Where reasonable effort is made to stop the train and prevent the accident the company will not be liable. McGhee v. Gaines, 98 Ky. 182, 32 S. W. 602. But in many jurisdictions there is a duty to keep a lookout. Harris v. Missouri &c. R. Co., 24 Okla. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858, citing and reviewing many authorities on both sides as to when, if at all, this duty exists.

[41] East Tennessee &c. R. Co. v. Deaver, 79 Ala. 216; Parker v. Dubuque &c. R. Co., 34 Iowa 399; Sandham v. Chicago &c. R. Co., 38 Iowa 88; Missouri &c. R. Co. v. Reynolds, 31 Kans. 132, 1 Pac. 150, 13 Am. & Eng. R. Cas. 510; Witherell v. Milwaukee &c. R. Co., 24 Minn. 410; Raiford v. Mississippi &c. R. Co., 43 Miss. 233; Mobile &c. R. Co. v. Gunn, 68 Miss. 366, 8 So. 648; Cleveland &c. R. Co. v. Elliott, 4 Ohio St. 474; Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66; Texas &c. R. Co. v. Langham (Tex. Civ. App.), 95 S. W. 686.

on.[42] But where it can be done consistently with the safety of the train, it is the duty of the engineer to use reasonable care to slacken the speed of the train, or even to stop it wherever it appears that it is necessary to avoid collision with animals on the track.[43] A collision not being imminent, however, no duty rests upon the company to even slacken the speed of the train.[44] And where it appears that an effort to slacken the speed would not avoid the collision with the animals the company is excused from making the effort.[45] Thus where an animal jumped suddenly in

[42] Louisville &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75, 58 Am. Dec. 647; Louisville &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Chicago &c. R. Co. v. Jones, 59 Miss. 465, 11 Am. & Eng. R. Cas. 450; Owens v. Hannibal &c. R. Co., 58 Mo. 386; Kerwhacker v. Cleveland &c. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Bemis v. Connecticut &c. R. Co., 42 Vt. 375, 1 Am. Rep. 339.

[43] St. Louis &c. R. Co. v. O'Loughlin, 49 Fed. 440; Little Rock &c. R. Co. v. Trotter, 37 Ark. 593, 11 Am. & Eng. R. Cas. 475; Paragould &c. R. Co. v. Crunk, 81 Ark. 35, 98 S. W. 682; Barnard v. Chicago &c. R. Co., 133 Iowa 185, 110 N. W. 439; Dunlap v. Chicago &c. R. Co., 87 Kans. 197, 123 Pac. 754; Northern Cent. R. Co. v. Green, 112 Md. 487, 76 Atl. 90; Yazoo &c. R. Co. v. Brumfield, 64 Miss. 637, 1 So. 905; Carr v. Minneapolis &c. R. Co., 16 N. Dak. 217, 112 N. W. 972; Texarkana &c. R. Co. v. Bell (Tex. Civ. App.), 101 S. W. 1167. It has been held that the sufficiency of the engineer's efforts to stop the train is a question for the jury. Kansas City &c. R. Co. v. Doggett, 67 Miss. 250, 7 So. 278; Cage v. Louisville &c. R. Co. (Miss.), 7 So. 509. See also Atlantic &c. R. Co. v. Chastain, 15 Ga. App. 707, 84 S. E. 167; Western R. Co. v. Smith, 15 Ga. App. 289, 82 S. E. 906; Burnham v. Chicago &c. R. Co., 87 Nebr. 696, 127 N. W. 1075.

[44] Little Rock &c. R. Co. v. Trotter, 37 Ark. 593; Louisville &c. R. Co. v. Ganote, 13 Am. & Eng. R. Cas. 519. Where animals are standing at the side of the track apparently at ease no obligation rests upon the company to slacken the speed of the train. Edson v. Central &c. R. Co., 40 Iowa 47; Peoria &c. R. Co. v. Champ, 75 Ill. 577; St. Louis &c. R. Co. v. Russell, 39 Ill. App. 443; New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. 534. See also Chicago &c. R. Co. v. Church, 49 Colo. 582, 114 Pac. 299; Central of Ga. R. Co. v. Duggan, 124 Ga. 493, 52 S. E. 768; Wallace v. Oregon &c. R. Co., 16 Idaho 103, 100 Pac. 904; Gulf &c. R. Co. v. Simpson, 41 Tex. Civ. App. 125, 91 S. W. 874.

[45] East Tennessee &c. R. Co. v. Deaver, 79 Ala. 216; Alabama &c. R. Co. v. McAlpine, 80 Ala. 73; Mobile &c. R. Co. v. Caldwell, 83

front of the locomotive, and it was impossible to avoid the collision, no liability attached.[46] The company will not be liable

Ala. 196, 3 So. 445; Alabama &c. R. Co. v. Smith, 85 Ala. 208, 30 So. 795; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; Georgia &c. R. Co. v. Wall, 80 Ga. 202, 7 S. E. 639; Georgia &c. R. Co. v. Harris, 83 Ga. 393, 9 S. E. 786; Indiana &c. R. Co. v. Overton, 117 Ind. 253, 20 N. E. 147; Chicago &c. R. Co. v. Packwood, 59 Miss. 280; Kansas City &c. R. Co. v. Myers (Miss.), 7 So. 321; Jones v. Chicago &c. R. Co., 77 Wis. 585, 46 N. W. 884. In Nashville &c. R. Co. v. Hembree, 85 Ala. 481, 5 So. 173, 38 Am. & Eng. R. Cas. 300, it was said: "Engineers are not required to do all in their power, nor to do anything, when it is manifest that nothing they can do can possibly prevent the injury." So in New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3, 14 Am. St. 534, the court said: "It cannot be said to be the duty of a railroad company to check the speed or stop its passing train every time an animal is seen near its track, unless there is something to indicate danger or the necessity of the animal going upon the track, and if an animal, when first discovered on the track, is so near the engine that collision cannot be prevented by the prompt use of all proper appliances, and the animal is killed or injured, no liability for damages is thereby incurred by the company. Impossibilities are no more required by law of railroad companies than of other persons." See also Newport News &c. R. Co. v. Mitchell, 17 Ky. L. 1086, 33 S. W. 622. The greater part of this section is quoted to this place in Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194, 69 S. W. 845, 848.

[46] Little Rock &c. R. Co. v. Turner, 41 Ark. 161; Chicago &c. R. Co. v. Bradfield, 63 Ill. 220; Illinois &c. R. Co. v. Wren, 43 Ill. 77; Louisville &c. R. Co. v. Wainscott, 3 Bush. (Ky.) 149; Hyer v. Chamberlain, 46 Fed. 341. The general rule is very clearly stated in the case of Alabama &c. R. Co. v. Moody, 90 Ala. 46, 80 So. 57, 45 Am. & Eng. R. Cas. 524. In that case a cow ran in front of the locomotive and was killed, it being impossible to stop the train so as to avoid the collision. The defendant was held not liable. The court said: "When the animal is discovered in dangerous proximity to the track, his (the engineer's) duty depends upon the circumstances. If they are such as to indicate danger of its getting on the track, or to induce the supposition that it will attempt to cross, the usual means to frighten it away being unavailing, it becomes the duty of the engineer to arrest the motion of the train, if need be, or to check the speed so as to bring and keep it under control until the animal has crossed, or the danger passed, but if the circumstances do not indicate apparent danger or an attempt to get on the track, then the duty to check

where the employes in charge of the train exercised due care to prevent the accident unless there is a statutory right of recovery.[47]

§ 1721 (1205). **Duty to look out for animals.**—In addition to the duty resting upon the railway company to avoid injuring animals seen on its tracks wherever the same can be done without danger to the train, it has been held that the company is also bound to use ordinary care to discover animals upon the track.[48]

the train does not arise. In the latter case, if the animal suddenly and unexpectedly gets on the track when the train is so near that the use of all the means within the power of the engineer could not avail to stop in time to avoid injury, the omission to make the endeavor is not negligence, and the company is not liable for the ensuing injury. These principles have been so repeatedly and well settled by the decisions of this court that a reassertion will suffice without further consideration." The court cited: South &c. R. Co. v. Jones, 56 Ala. 507; East Tennessee &c. R. Co. v. Bayliss, 77 Ala. 429, 54 Am. Rep. 69; Alabama &c. R. Co. v. Chapman, 80 Ala. 615, 2 So. 738, 31 Am. & Eng. R. Cas. 394; Western R. Co. v. Lazarus, 88 Ala. 453, 6 So. 877. See also Georgia So. R. Co. v. Sanders, 111 Ga. 128, 36 S. E. 458; Macon &c. R. Co. v. Hamilton, 9 Ga. App. 254, 70 S. E. 1126. Compare, however, Western R. &c. Co. v. Stone, 145 Alt. 663, 39 So. 723; Texas &c. R. Co. v. Crutcher (Tex. Civ. App.), 82 S. W. 341.

[47] Tison v. Savannah &c. R. Co., 97 Ga. 366, 24 S. E. 456.

[48] Gulf &c. R. Co. v. Washington, 49 Fed. 347; Eddy v. Evans, 58 Fed. 151; South &c. R. Co. v. Williams, 65 Ala. 74; Western &c. R. Co. v. Lazarus, 88 Ala. 453, 6 So. 877; Alabama &c. R. Co. v. Moody, 92 Ala. 279, 9 So. 238; Central &c. R. Co. v. Lee, 96 Ala. 444, 11 So. 424; Little Rock &c. Railway v. Holland, 40 Ark. 336; Memphis &c. R. Co. v. Sanders, 43 Ark. 225, 19 Am. & Eng. R. Cas. 497; Denver &c. R. Co. v. Henderson, 10 Colo. 1, 13 Pac. 910, 31 Am. & Eng. R. Cas. 559; Rockford &c. R. Co. v. Rafferty, 73 Ill. 58; Shuman v. Indianapolis &c. R. Co., 11 Ill. App. 472; Troutwine v. Louisville &c. R. Co., 32 Ky. L. 5, 105 S. W. 142; Kentucky &c. R. Co. v. Lebus, 14 Bush. (Ky.) 518; Omaha &c. R. Co. v. Wright, 47 Nebr. 886, 66 N. W. 842; Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729; Harris v. Missouri &c. R. Co., 24 Okla. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858 and note citing many cases; Bemis v. Connecticut &c. R. Co., 42 Vt. 375, 1 Am. Rep. 339; Baglor v. Baltimore &c. R. Co., 9 W. Va. 270. See also Louisville &c. Ry. Co. v. Wilson, 181 Ky. 322, 204 S. W. 72; Preece v. Oregon

It has been held to be the duty of an engineer to keep a lookout ahead for animals on or near the track so that he may have time to take the necessary steps to avoid injury,[49] but some of the cases state the doctrine entirely too strongly. A failure to keep such a lookout has been held to be such negligence as to render the company liable for injuries which might have been avoided if proper vigilance in the discovery of the animals had been

&c. R. Co., 48 Utah 551, 161 Pac. 40. In Arkansas it seems to have been held, in a recent case, that the engineer is under no duty to look out for stock upon the right of way. Memphis &c. R. Co. v. Kerr, 52 Ark. 162, 12 S. W. 329, 5 L. R. A. 429, 20 Am. St. 159 and note, 40 Am. & Eng. R Cas. 171. See also Locke v. First Division &c. R. Co., 15 Minn. 350. But see Prescott &c. R. Co. v. Brown, 74 Ark. 606, 86 S. W. 809; St. Louis &c. R. Co. v. Kimberlain, 76 Ark. 100, 88 S. W. 599 (under a statute passed after an earlier decision). In Russell v. Maine Cent. R. Co., 100 Maine 406, 61 Atl. 899, and Davis v. Boston &c. R. Co., 70 N. H. 519, 49 Atl. 108, it is held that no such duty to look out for trespassing animals exists, and that the company only owes the negative duty not to wantonly injure them. To the same effect, at least where the track is fenced or the animals unlawfully at large, see also Leslie v. Wabash R. Co., 118 Ill. App. 606; Dennis v. Louisville &c. R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448; Indianapolis &c. R. Co. v. Goar, 43 Ind. App. 89, 86 N. E. 968; Mears v. Chicago &c. R. Co., 103 Iowa 203, 72 N. W. 509; Stacey v. Railroad Co., 42 Minn. 158, 43 N. W. 905; Reinke v. Minneapolis &c. R. Co., 23 N. Dak. 182, 135 N. W. 779; Missouri &c. R. Co. v. Savage, 32 Okla. 376, 122 Pac. 656; Borneman v. Chicago &c. R. Co., 19 S. Dak. 459, 104 N. W. 208; Ft. Worth &c. R. Co. v. Hudgens, 43 Tex. Civ. App. 201, 94 S. W. 378. Some of the decisions to the contrary are influenced largely by local statutes.

[49] Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Missouri &c. R. Co. v. Gedney, 44 Kans. 329, 24 Pac. 464, 21 Am. St. 286, 45 Am. & Eng. R. Cas. 492; Stading v. Chicago &c. R. Co., 78 Nebr. 566, 111 N. W. 460; Carlton v. Wilmington &c. R. Co., 104 N. Car. 365, 10 S. E. 516, 40 Am. & Eng. R. Cas. 178; Wilson v. Norfolk &c. R. Co., 90 N. Car. 69; Davis v. Southern R. Co., 68 S. Car. 446, 47 S. E. 723; Washington v. Baltimore &c. R. Co., 17 W. Va. 190. In Missouri &c. R. Co. v. Wilson, 28 Kans. 637, it was said: "If the employes of the railroad company, could, by the use of ordinary prudence, see, or seeing the stock on the road, could, without danger, stop the train and avoid striking the animal, they were required to do so, because the idea is not tolerable that an injury may be inflicted, which, by ordinary care and diligence, may be avoided."

used.[50] It is held to be the duty of the company to use care to equip its locomotives with such headlights as would render a lookout effective.[51] The engineer and fireman on the train, however, are not bound to keep a constant lookout.[52] There are intervals of time when their attention must be directed to the management of the machinery of the locomotive and when it is impossible for short periods of time for them to watch the track. Where such is the case they are neither expected nor required to keep such lookout.[53] Thus where the fireman was engaged

[50] Little Rock &c. R. Co. v. Finley, 37 Ark. 562; Memphis &c. R. Co. v. Sanders, 43 Ark. 225; Denver &c. R. Co. v. Henderson, 10 Colo. 1, 13 Pac. 910; Missouri &c. R. Co. v. Reynolds, 31 Kans. 132, 1 Pac. 150, 13 Am. & Eng. R. Cas. 510; Missouri &c. R. Co. v. Gedney, 44 Kans. 329, 24 Pac. 464, 21 Am. St. 286; Kendig v. Chicago &c. R. Co., 79 Mo. 207; Wilson v. Norfolk &c. R. Co., 90 N. Car. 69; Snowden v. Norfolk &c. R. Co., 95 N. Car. 93. We do not assent to the doctrine that there is a general duty to keep a lookout, especially as to trespassing animals and at places where they are not to be expected.

[51] Alabama &c. R. Co. v. Jones, 71 Ala. 487; Wallace v. Oregon &c. R. Co., 16 Idaho 103, 100 Pac. 904. But it has been held in Tennessee that if a headlight is obscured by rain the company is not liable. Louisville &c. R. Co. v. Melton, 2 Lea (Tenn.) 262. In a recent Alabama case, the rule there is stated as follows: "It is negligence for a railroad to operate a locomotive and train of cars at night at so great a rate of speed that it is impossible to stop the train within the distance that the locomotive headlight illuminates the track." Western R. &c. Co. v. Stone, 145 Ala. 663, 39 So. 723; Western R. &c. Co. v. Mitchell, 148 Ala. 35, 39 So. 427; Anniston Elec. &c. Co. v. Hewitt, 139 Ala. 442, 36 So. 39, 107 Am. St. 42. See also Jonesboro &c. R. Co. v. Guest, 81 Ark. 267, 99 S. W. 71; Ft. Smith &c. R. Co. v. McCormick, 25 Okla. 782, 108 Pac. 377. It is also held, in the first of the last two cases cited, that the testimony of the engineer that he did not have time to make any effort to prevent the killing was a mere conclusion, and properly excluded. The opinion also holds that testimony as to the equipment was properly excluded where the negligence charged was only in the operation, and lays down a rule as to the measure of damages where cattle are killed. See also as to evidence in such cases, Hoge v. Southern R. Co., 146 Ala. 384, 41 So. 425.

[52] Mobile &c. R. Co. v. Caldwell, 83 Ala. 196, 3 So. 445; Western R. Co. v. Lazarus, 88 Ala. 453, 6 So. 877; Cincinnati &c. R. Co. v. Burgess, 27 Ky. L. 252, 84 S. W. 760.

[53] East Tennessee &c. R. Co. v.

in stoking his engine and the engineer in making necessary repairs it was held that the company was not liable for failure to keep a lookout during such interval.[54] In determining whether the employes were exercising ordinary care to discover animals on or near the track it has been held proper to take into consideration whether or not the track was fenced at the particular point,[55] and also, whether it was light or dark.[56] The question whether the employes exercised due care in looking out for animals on or near the track is generally for the jury.[57] In cases of this kind it seems that the right to recover is predicated on the negligence of the company in failing to discover the animal in time to avoid injuries, and in such cases if it appear that the injury was caused by the failure to keep a proper lookout, and that there was such a duty, the company may be liable although

Bayliss, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596. In this case the court, in speaking of an instruction, said: "It does not, and was not intended to mean, that the engineer should keep his eye steadily on the track before him, to the neglect of his other equally imperative duties. The movements of the eye are quick and rapid. The engineer, while attending to the other wants of his train, must be constantly on the lookout for obstructions; and he meets this requirement when he bestows on the service that steady, regular care and watchfulness which his other duties allow a very careful and prudent person to give it." See also Mobile &c. R. Co. v. Holiday, 79 Miss. 294, 30 So. 820; Stading v. Chicago &c. R. Co., 78 Nebr. 566, 111 N. W. 460.

[54] See Howard v. Louisville &c. R. Co., 67 Miss. 247, 7 So. 216, 19 Am. St. 302; Carlton v. Wilmington &c. R. Co., 104 N. Car. 365, 10 N. E. 516; Owens v. Hannibal &c. R. Co., 58 Mo. 386. And compare also to same general effect, Rogers v. Georgia &c. R. Co., 100 Ga. 699, 28 S. E. 457, 62 Am. St. 351; Omaha &c. R. Co. v. Wright, 47 Nebr. 886, 66 N. W. 842. But see Denver &c. R. Co. v. Henderson, 10 Colo. 1, 13 Pac. 910.

[55] Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729.

[56] St. Louis &c. R. Co. v. Vincent, 36 Ark. 451. See International &c. R. Co. v. Hall, 12 Tex. Civ. App. 11, 33 S. W. 127.

[57] Kent v. New Orleans &c. R. Co., 67 Miss. 608, 7 So. 341; Kansas City &c. R. Co. v. Watson, 91 Ala. 483, 8 So. 793; East Tennessee &c. R. Co. v. Bayliss, 74 Ala. 150; Hoge v. Southern R. Co., 146 Ala. 384, 41 So. 425. But compare the decision in this case (Southern R. Co. v. Hoge, 141 Ala. 351, 37 So. 439) on former appeal.

care may have been exercised by the employes after the actual discovery of the animal.[58]

§ 1722 (1206). Signals.—In nearly all, if not quite all, of the states statutes are in force requiring railway companies at certain distances from crossings to sound the whistle of the locomotive and to ring the bell.[59] The obvious purpose of such signals is to give notice of the approach of trains. Such signals, it seems, are not required alone for the benefit of persons about to cross the track but are also required to warn and frighten animals away from the track.[60] Where animals are injured on the track of a railway company proof of the omission to give statutory signals may be negligence or evidence of negligence. The failure to give such signals is not necessarily actionable negligence per se,[61] but there are authorities which hold that proof of an

[58] East Tennessee &c. R. Co. v. Watson, 90 Ala. 41, 7 So. 813. Question whether proper care was exercised is usually for the jury. Cockburn v. St. Louis &c. R. Co. (Tex. Civ. App.), 102 S. W. 740.

[59] Southern &c. R. Co. v. Schmidt, 44 Kans. 374, 24 Pac. 496, 45 Am. & Eng. R. Cas. 489; St. Louis &c. R. Co. v. Hendricks, 53 Ark. 201, 13 S. W. 699. Where a car which was standing on a downgrade sidetrack had been blocked, and in some unknown way the blocks were removed, and the car ran down and killed a cow, it was held that the statute as to signals did not apply. Montgomery &c. R. Co. v. Perryman, 91 Ala. 413, 8 So. 699.

[60] Alabama &c. R. Co. v. McAlpine, 71 Ala. 545; St. Louis &c. R. Co. v. Hendricks, 53 Ark. 201, 13 S. W. 699, 20 Am. St. 167; Western &c. R. Co. v. Jones, 65 Ga. 631; Charleston &c. R. Co. v. Camp, 3 Ga. App. 232, 59 S. E. 710; Heise v. Chicago &c. R. Co. (Iowa), 114 N. W. 180; Palmer v. St. Paul &c. R. Co., 38 Minn. 415, 38 N. W. 100; Hohl v. Chicago &c. R. Co., 61 Minn. 321, 63 N. W. 742, 52 Am. St. 598; Young v. Illinois Cent. R. Co., 88 Miss. 446, 40 So. 870; Howenstein v. Pacific R. Co., 55 Mo. 33; Braxton v. Hannibal &c. R. Co., 77 Mo. 455; East Tennessee &c. R. Co. v. Scales, 2 Lea (Tenn.) 688; Nashville &c. R. Co. v. Thomas, 5 Heisk. (Tenn.) 262; Memphis &c. R. Co. v. Smith, 9 Heisk. (Tenn.) 860; Galveston &c. R. Co. v. Huttner (Tex. Civ. App.), 131 S. W. 630. See Neely v. Charlotte &c. R. Co., 33 S. Car. 136, 11 S. E. 636; Fink v. Evans, 95 Tenn. 413, 32 S. W. 307.

[61] Jackson v. Chicago &c. R. Co., 36 Iowa 451; Michigan &c. R. Co. v. Fisher, 27 Ind. 96. But see Texas &c. R. Co. v. Crutcher (Tex. Civ. App.), 82 S. W. 341. It may

injury to the animal and proof of a failure to give statutory signals make a prima facie case for the plaintiff.[62] The weight of authority is to the effect that a plaintiff who is seeking a recovery for animals injured on a railway track must not only show the omission of signals but must show that such omission was the cause of the injury.[63] It has been held even where signals are not required by statute to be the duty of the company to make them whenever animals are on or near the track and such signals would be effective in frightening the animals away.[64] The com-

be negligence but it cannot be actionable negligence unless it was a proximate cause. Louisville &c. R. Co. v. Brewing Co., 150 Ala. 390, 43 So. 723; Midgett v. St. Louis &c. R. Co., 124 Mo. App. 540, 102 S. W. 56; Miller v. Chicago &c. R. Co., 21 S. Dak. 242, 111 N. W. 553; Texas Cent. R. Co. v. Mallard, 60 Tex. Civ. App. 199, 127 S. W. 1117.

[62] Little Rock &c. R. Co. v. Trotter, 37 Ark. 593; St. Louis &c. R. Co. v. Hagan, 42 Ark. 122; Great Western &c. R. Co. v. Geddis, 33 Ill. 304; Central &c. R. Co. v. Phillippi, 20 Kans. 9; Atchison &c. R. Co. v. Morgan, 31 Kans. 77, 1 Pac. 298, 13 Am. & Eng. R. Cas. 499; Stoneman v. Atlantic &c. R. Co., 58 Mo. 503; Turner v. Kansas City &c. R. Co., 78 Mo. 578; Halferty v. Wabash &c. R. Co., 82 Mo. 90. Where it is probable that signals will frighten animals away from or off the track it is negligence to omit them. Pennsylvania Co. v. Krick, 47 Ind. 368; Indianapolis &c. R. Co. v. Peyton, 76 Ill. 340; Gates v. Burlington &c. R. Co., 39 Iowa 45; Lapine v. New Orleans &c. R. Co., 20 La. Ann. 158; Owens v. Hannibal &c. R. Co., 58 Mo. 386; Bemis v. Connecticut &c. R. Co., 42 Vt. 375, 1 Am. Rep. 339; Washington v. Baltimore &c. R. Co., 17 W. Va. 190.

[63] Memphis &c. R. Co. v. Bibb, 37 Ala. 699; Louisville &c. R. Co. v. Brewing Co., 150 Ala. 390, 43 So. 723; Rockford &c. R. Co. v. Linn, 67 Ill. 109; Quincy &c. R. Co. v. Wellhoerner, 72 Ill. 60; Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194, 69 S. W. 845, 847 (quoting text); Southern &c. R. Co. v. Schmidt, 44 Kans. 374, 24 Pac. 496, 45 Am. & Eng. R. Cas. 489; Stoneman v. Atlantic &c. R. Co., 58 Mo. 503; Holman v. Chicago &c. R. Co., 62 Mo. 562; Alexander v. Hannibal &c. R. Co., 76 Mo. 494; Braxton v. Hannibal &c. R. Co., 77 Mo. 455; Mankey v. Chicago &c. R. Co., 14 S. Dak. 468, 85 N. W. 1013; Texas Cent. R. Co. v. Mallard, 60 Tex. Civ. App. 199, 127 S. W. 1117; Gulf &c. R. Co. v. Bennett, 59 Tex. Civ. App. 321, 126 S. W. 607; Hawker v. Baltimore &c. R. Co., 15 W. Va. 628, 36 Am. Rep. 825 and note. "If the injury would not have occurred but for such violation of the law, then the company would be liable; otherwise it would not." Western &c. R. Co. v. Main, 64 Ga. 649.

[64] Alabama &c. R. Co. v. Powers,

pany is bound to use ordinary care to prevent injuries to animals and where ordinary care requires the use of signals the company may be guilty of negligence in omitting them although they are not required by statute.[65] If the negligence of the owner of the animals proximately contributed to their injury the company is not liable, unless by reason of some statutory provision, although the signals were not given.[66] If an owner sees his animals on a railway track at a point where they will likely be injured he must make some effort to protect them. He cannot stand by where he could prevent the injury and rely solely upon the railway company giving signals to frighten the animals off the track.[67]

§ 1723 (1207). Actual collision with animals—Injuries caused by fright.—There is a great deal of conflict and confusion among the decided cases as to whether or not there must be an actual

73 Ala. 244; Toledo &c. R. Co. v. Fergusson, 42 Ill. 449; Indianapolis &c. R. Co. v. Hamilton, 44 Ind. 76; Gates v. Burlington &c. R. Co., 39 Iowa 45; Missouri &c. R. Co. v. Wilson, 28 Kans. 637, 11 Am. & Eng. R. Cas. 447; Owens v. Hannibal &c. R. Co., 58 Mo. 386; Bemis v. Connecticut &c. R. Co., 42 Vt. 375, 1 Am. Rep. 339. "The engineer, if he saw the ox in dangerous proximity to the track, and under circumstances indicating danger of its getting on the track, should have taken steps promptly to frighten him away." South &c. R. Co. v. Jones, 56 Ala. 507. See also Swisher v. Interurban R. Co., 151 Iowa 384, 130 N. W. 404; Harris v. Missouri &c. R. Co., 24 Okla. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858.

[65] In Eddy v. Evans, 58 Fed. 151, it was said: "It was the duty of the engineer to keep a careful lookout for stock on the track, and, when it was discovered, to use all reasonable means to avoid injuring it. . . . The engineer testifies he applied the air-brake, but he did not blow the whistle, and he gives no reason or excuse for not doing so. It was the duty of the engineer to sound the whistle, as well as to apply the brake; and the jury might well infer that, if the proper alarm signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse farthest from the engine could and would have got off the track."

[66] Ohio &c. R. Co. v. Eaves, 42 Ill. 288; Owen v. Hannibal &c. R. Co., 58 Mo. 386.

[67] Milburn v. Kansas City &c. R. Co., 86 Mo. 104, 29 Am. & Eng. R. Cas. 244. But it is held that he is only required to exercise ordinary and reasonable care and diligence. Fuqua v. Southern R. Co., 201 Ala. 164, 77 So. 690.

collision between a railway train and the animal injured before liability is imposed upon the company operating the train. It is almost impossible to reconcile this conflict, and to attempt to lay down a general rule applicable to all cases would be unsafe. The reason for this difference between the cases which hold that there must be an actual collision and those which hold that an actual collision is not necessary to impose liability is to be found in the different statutes on which the liability rests. The liability in such cases depends upon the language of, or construction placed upon, the particular statute. If it is clear from the language of the statute that it was the intention of the legislature in enacting the statute that the company should be liable only for animals injured by actual collision with the train then it must be shown that actual collision took place. This rule is adopted in many of the states.[68] But if the statute cannot be so construed as to make the company liable only for injuries to animals caused by actual collision the company will be liable for all injuries to animals caused by negligent operation of the train,[69]

[68] Schertz v. Indianapolis &c. R. Co., 107 Ill. 577, 15 Am. & Eng. R. Cas. 523; Peru &c. R. Co. v. Hasket, 10 Ind. 409, 71 Am. Dec. 335; Ohio &c. R. Co. v. Cole, 41 Ind. 331; Louisville &c. R. Co. v. Smith, 58 Ind. 575; Baltimore &c. R. Co. v. Thomas, 60 Ind. 107; Croy v. Louisville &c. R. Co., 97 Ind. 126; Louisville &c. R. Co. v. Thomas, 106 Ind. 10, 5 N. E. 198; Pennsylvania R. Co. v. Dunlap, 112 Ind. 93, 13 N. E. 403; Campbell v. Indianapolis &c. Trac. Co., 39 Ind. App. 66, 79 N. E. 223; Lafferty v. Hannibal &c. R. Co., 44 Mo. 291; Seibert v. Missouri &c. R. Co., 72 Mo. 565; Geiser v. St. Louis &c. R. Co., 1 Mo. App. 672; Logan v. St. Louis &c. R. Co., 111 Mo. App. 674, 86 S. W. 565; Knight v. New York &c. R. Co., 99 N. Y. 25, 1 N. E. 108; Holder v. Chicago &c. R. Co., 11 Lea (Tenn.) 176; Railroad v. Sadler, 91 Tenn. 508, 19 S. W. 618, 30 Am. St. 896. But compare Perkins v. St. Louis &c. R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426, and note. It may be shown by circumstantial evidence. St. Louis &c. R. Co. v. Stites, 80 Ark. 72, 95 S. W. 1004; Reinke v. Minneapolis &c. R. Co., 23 N. Dak. 182, 135 N. W. 779. Proof that blood and hair were found on the cow-catcher of the locomotive coming from the direction where the animal was injured is admissible as tending to show that there had been an actual collision. International &c. R. Co. v. Hughes, 81 Tex. 184, 16 S. W. 875. See also Texas &c. R. Co. v. King Bros., 45 Tex. Civ. App. 265, 99 S. W. 1030.

[69] Meeker v. Northern Pacific R. Co., 21 Ore. 513, 28 Pac. 639, 4 L. R. A. 841, and note, 28 Am. St. 758, 49 Am. & Eng. R. Cas. 518; Young v. St. Louis &c. R. Co., 44 Iowa 172.

or by a failure to perform the duty imposed upon the company to maintain fences and cattle-guards.[70] Thus where animals come upon the track because of the failure of the company to fence, and in attempting to escape from a train run into a bridge and culvert and are injured, the company has been held liable.[71] The decisions holding the company liable in such cases seem to us to be founded upon good reason and logic. While it is true the train may not touch the animal, still the negligence of the company in failing to construct proper fences to keep the animal off the track is the negligence on which the recovery is based and without which the injury would not have been inflicted.[72] The company has also been held liable for frightening animals upon the track because it was unfenced and thus causing them to run into wire fences along the side of the right of way and injure themselves.[73] Companies have also been held liable for injuries to animals caused by their becoming frightened at signals unnecessarily, maliciously and recklessly given by employes in charge of the train.[74] But where the animals are on the right of way through no neglect of the company and are injured because of fright or otherwise the company is not ordinarily liable unless the injuries were wilfully inflicted.[75]

[70]Atchison &c. R. Co. v. Jones, 20 Kans. 527; Young v. St. Louis &c. R. Co., 44 Iowa 172. If the injury is caused by the failure to perform some statutory duty it has been held that the company is liable, although there is no actual collision. Lafferty v. Hannibal &c. R. Co., 44 Mo. 291; Ohio &c. R. Co. v. Cole, 41 Ind. 331; Moshier v. Utica &c. R. Co., 8 Barb. (N. Y.) 427. See also Van Slyke v. Chicago &c. R. Co., 80 Iowa 620, 45 N. W. 396; Fremont &c. R. Co. v. Pounder, 36 Nebr. 247, 5 N. W. 509; Chicago &c. R. Co. v. Cox, 51 Nebr 479, 71 N. W. 37; Nelson v. Chicago &c. R. Co., 30 Minn. 74.

[71]Kraus v. Burlington &c. R. Co., 55 Iowa 338, 7 N. W. 598; Young v. St. Louis &c. R. Co., 44 Iowa 172

[72]See Liston v. Central Iowa &c. R. Co., 70 Iowa 714, 29 N. W. 445, 26 Am. & Eng. R. Cas. 593, where an animal, on being frightened by a train, leaps over a cattle-guard and runs along the track until it falls through a bridge, injuring itself.

[73]Missouri Pacific R. Co. v. Eckel, 49 Kans. 794, 31 Pac. 693; Missouri &c. Railway Co. v. Gill, 49 Kans. 441, 30 Pac. 414, 56 Am. & Eng. R. Cas. 182. See also Atlantic &c. R. Co. v. Hudson, 62 Ga. 679; Louisville &c. R. Co. v. Upton, 18 Ill. App. 605.

[74]Cobb v. Columbia &c. R. Co., 37 S. Car. 194, 15 S. E. 878.

[75]Richmond &c. R. Co. v. Buice, 88 Ga. 180, 14 S. E. 205; Burlington &c. R. Co. v. Shoemaker, 18 Nebr. 369, 25 N. W. 365; Foster v. St.

§ 1724 (1208). **Liability of lessees, mortgagees and receivers.** —It often happens that railways are operated by lessees, mortgagees, trustees, receivers or the like and not by the owner, and it also often happens that the owner and a lessee operate the same railway. Where a lessee is operating a line of railway the same duty ordinarily rests upon the company in regard to maintaining fences and cattle-guards, and the same liability attaches to the lessee for injury to animals by its trains, that is imposed upon or attaches to a company operating a road of which it is the owner.[76] In some jurisdictions the rule prevails that either the lessee or the owner may be sued for an injury to an animal caused by a moving train upon an unfenced track.[77] Where

Louis &c. R. Co., 90 Mo. 116, 2 S. W. 138; East Tennessee &c. R. Co. v. Watters, 77 Ga. 69.

[76]Illinois Central R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Pittsburgh &c. R. Co. v. Bolner, 57 Ind. 572; Pittsburgh &c. R. Co. v. Hannon, 60 Ind. 417; Pittsburgh &c. R. Co. v. Currant, 61 Ind. 38; Cincinnati &c. R. Co. v. Bunnell, 61 Ind. 183; Jeffersonville &c. R. Co. v. Downey, 61 Ind. 287; Stewart v. Chicago &c. R. Co., 27 Iowa 282; Clary v. Midland &c. R. Co., 37 Iowa 344; Downing v. Chicago &c. R. Co., 43 Iowa 96; Missouri &c. R. Co. v. Ricketts, 46 Kans. 617, 26 Pac. 50, 45 Am. & Eng. R. Cas. 485; Whitney v. Atlantic &c. R. Co., 44 Maine 362, 69 Am. Dec. 102; Bean v. Atlantic &c. R. Co., 63 Maine 293; Gould v. Bangor &c. R. Co., 82 Maine 122, 19 Atl. 84; Tracy v. Troy &c. R. Co., 38 N. Y. 433, 98 Am. Dec. 54; Clement v. Canfield, 28 Vt. 302; Cook v. Milwaukee &c. R. Co., 36 Wis. 45. "It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters and leaves improved or fenced land, whether such company owns the railroad, or simply operating it under a lease." Missouri Pacific R. Co. v. Morrow, 32 Kans. 217, 4 Pac. 87, 19 Am. & Eng. R. Cas. 630. See also Johnson v. Southern Pac. Co., 11 Cal. App. 278, 104 Pac. 713; Chicago Ry. Co. v. Martin, 81 Kans. 344, 105 Pac. 451, 27 L. R. A. (N. S.) 164; Wright v. Caney River R. Co., 151 N. Car. 529, 66 S. E. 588. For statutes upon this subject in various jurisdictions, see note in L. R. A. 1917A, 539, et seq.

[77]Ditchett v. Spuyten-Duyvil &c. R. Co., 67 N. Y. 425; Eaton v. Oregon &c. R. Co., 19 Ore. 391, 26 Pac. 415, 43 Am. & Eng. R. Cas. 57; Hindman v. Oregon &c. R. Co., 17 Ore. 619, 22 Pac. 116, 38 Am. & Eng. R. Cas. 310; St. Louis &c. R. Co. v. Curl, 28 Kans. 622, 11 Am. & Eng. R. Cas. 458; Fontaine v. Southern Pacific R. Co., 54 Cal. 645. In Texas both lessor and lessee are liable. Missouri &c. R. Co. v. Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. 484, 31 Am. & Eng. R. Cas. 530; Gulf &c. R. Co. v. Morris, 67 Tex. 692, 4 S.

the company owning a line had not yet completed the line, although it was operating it, and it allowed a contractor who was employed in completing the line to run his construction trains over the track it was held that the company was liable for injuries to animals caused by construction trains.[78] And it has also been held that a suit may be maintained against the contractor in such cases.[79] Where the property of a railway has gone into the hands of a receiver by whom the railroad is run and operated the company may still be liable for injuries to animals caused by the failure to discharge the statutory duty to fence notwithstanding the receiver's possession.[80] Suit may also be maintained against the receiver, and he is the proper person, ordinarily, against whom such a suit should be brought. Although the appointment of a receiver does not terminate the existence of the corporation, all the property of the corporation usually passes into his hands, and any suits affecting that property or a failure of the receiver to discharge his duty should properly be brought against the receiver.[81] So,

W. 156. See also Davis v. Central R. Co., 75 Ga. 645; Cincinnati &c. R. Co. v. McDougall, 108 Ind. 179, 8 N. E. 571; DeSashmutt v. Chicago &c. R. Co., 148 Iowa 556, 126 N. W. 359; Rookhardt v. Atlanta &c. R. Co., 84 S. Car. 190, 65 S. E. 1047, 137 Am. St. 839, 27 L. R. A. (N. S.) 435; Ohio &c. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561. The lessor is liable for injuries to animals because the road is not fenced on the ground that the lessee is agent of the lessor. Whitney v. Atlantic &c. R. Co., 44 Maine 362, 69 Am. Dec. 102; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Wyman v. Penobscot &c. R. Co., 46 Maine 162. See also Georgia R. &c. Co. v. Haas, 127 Ga. 187, 56 S. E. 313, 119 Am. St. 327; Clinger v. Chesapeake &c. R. Co., 33 Ky. L. 86, 109 S. W. 315, 15 L. R. A. (N. S.) 998; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Zachary v. North Carolina R. Co., 156 N. Car. 496, 72 S. E. 858; Dolan v. Newburgh &c. R. Co., 120 N. Y. 571, 24 N. E. 824. We have already considered the general question of the liability of a lessor, and approved the rule that it cannot escape its duties to the public, in another volume where the difference of opinion as to the liability of a lessor in some instances where a lease is authorized is also pointed out.

[78] Wichita &c. R. Co. v. Gibbs, 47 Kans. 274, 27 Pac. 991.

[79] Gardner v. Smith, 7 Mich. 410, 74 Am. Dec. 722. See also Huey v. Indianapolis &c. R. Co., 45 Ind. 320.

[80] Ohio &c. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561, 23 Am. & Eng. R. Cas. 149; Louisville &c. R. Co. v. Cauble, 46 Ind. 277; Ohio &c. R. Co. v. Fitch, 20 Ind. 498.

[81] Kansas Pacific R. Co. v. Wood,

a trustee engaged in running and operating a railroad is liable for injuries occasioned to animals while he is so operating the road.[82] But the receiver of a railroad company is not liable for killing live stock on another road by reason of its not being fenced where there is no negligence in the operation of the train and the receiver runs it over such other road by mere license or permission of the company owning the road and not as lessee.[83] Where a company has ceased to own the road, and it is owned, and controlled and operated by another corporation, the original owner is not liable for injuries to animals which are inflicted after the transfer of ownership.[84] And it is held under the Indiana statute making the railroad company lessee, assignee, receiver or other person operating or controlling the road liable, that such company is not liable for stock killed by a locomotive run and operated by a trespasser.[85] A partnership,[86] or an individual[87] operating a railway is bound to see that the track is properly fenced.

24 Kans. 619. The test in cases of this kind to determine whether an action should be brought against the company or against the receiver is whether the injuries arose from negligence of the receiver in the performance of his duties or from the failure to perform a duty which the company might have performed notwithstanding the existence of the receivership. A company could fence its line without interfering with the receiver, but it could not run trains without interfering with him and rendering itself guilty of contempt of court. If the action arose from the failure to perform a duty which the company might have performed then the suit may be maintained against the company, but if it arose from a failure to perform some duty which only the receiver could perform, then the suit should be brought against the receiver. See Ohio &c. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561. See also Indianapolis &c. R. Co. v. Ray, 51 Ind. 269; Harmon v. Perkins, 45 Ind. App. 83, 88 N. E. 961. See ante, § 665; Farrell v. Union Trust Co., 77 Mo. 475; Brockert v. Central Iowa R. Co., 82 Iowa 369, 47 N. W. 1026.

[82] Farrell v. Union Trust Co., 77 Mo. 475.

[83] Lusk v. Eddington, 60 Okla. 134, 159 Pac. 491, L. R. A. 1917A, 536.

[84] Western R. Co. v. Huss, 70 Ala. 565. See Lawson v. Illinois So. R. Co., 116 Mo. App. 690, 94 S. W. 807.

[85] Cleveland &c. R. Co. v. Wasson, 33 Ind. App. 316, 66 N. E. 1020, 70 N. E. 821. See also Wabash &c. R. Co. v. Rooker, 90 Ind. 581. But compare, as to the question of pleading, Western R. &c. Co. v. Stone, 145 Ala. 663, 39 So. 723.

[86] Kansas City &c. R. Co. v. Bolson, 36 Kans. 534, 14 Pac. 5.

[87] Liddle v. Keokuk &c. R. Co., 23 Iowa 378.

§ 1725 (1209). **Contributory negligence.**—Where animals are injured by a railway company's trains, there can as a rule be no recovery if the owner of the animals was guilty of contributory negligence,[88] but this may depend largely upon the statute in force in the particular jurisdiction. What will amount to contributory negligence on the part of the owner will depend much on the particular circumstances of each case and it is usually a question to be determined by the jury.[89] Where the alleged negligence of a railway company on which a recovery is sought consists in the non-performance of some statutory duty in reference to the management of the train or in the alleged negligent management of a train independent of statutory regulations, the question of the owner's contributory negligence is ordinarily eas-

[88]Williams v. Northern Pacific R. Co., 3 Dak. 168, 11 Am. & Eng. R. Cas. 421; Toledo &c. R. Co. v. Head, 62 Ill. 233; McGill v. Minneapolis &c. R. Co., 113 Iowa 358, 85 N. W. 620; Leavenworth &c. R. Co. v. Forbes, 37 Kans. 445, 15 Pac. 595, 31 Am. & Eng. R. Cas. 522; Union Pac. R. Co. v. Entsminger, 76 Kans. 746, 92 Pac. 1095; Norfolk &c. R. Co. v. Smith, 104 Md. 72, 62 Atl. 317; Hines v. Norfolk &c. R. Co., 156 N. Car. 222, 72 S. E. 325; Pittsburgh &c. R. Co. v. Methven, 21 Ohio St. 586; Baltimore &c. R. Co. v. McIlyar, 77 Ohio St. 391, 83 N. E. 497; Kenney v. Railway Co., 19 Ore. 291, 24 Pac. 233; Cincinnati &c. R. Co. v. Ford, 139 Tenn. 291, 202 S. W. 72; Ft. Worth &c. R. Co. v. Roberts, 37 Tex. Civ. App. 108, 83 S. W. 250, 251 (citing text); Irving v. Texas &c. Ry. Co. (Tex. Civ. App.), 164 S. W. 910, 911 (citing text); Knight v. Southern Pac. Co., 52 Utah 42, 172 Pac. 689. Under the Indiana statute, contributory negligence is held to be no defense to an action for damages for killing stock through failure to maintain a fence as required. Pittsburgh &c. Ry. Co. v. James, 64 Ind. App. 456, 114 N. E. 833.

[89]Central R. Co. v. Hamilton, 71 Ga. 461; Illinois Central R. Co. v. Middlesworth, 43 Ill. 64; Illinois Central R. Co. v. Gillis, 68 Ill. 317; Cairo &c. R. Co. v. Woosley, 85 Ill. 370; Hammond v. Sioux City &c. R. Co., 49 Iowa 450; Timins v. Chicago &c. R. Co., 72 Iowa 94, 33 N. W. 379; Evans v. St. Paul &c. R. Co., 30 Minn. 489, 16 N. W. 271; Schubert v. Minneapolis &c. R. Co., 27 Minn. 360, 7 N. W. 366; Jackson v. Sumpter Val. R. Co., 50 Ore. 455, 93 Pac. 356; Curry v. Chicago &c. R. Co., 43 Wis. 665; Veerhusen v. Chicago &c. R. Co., 53 Wis. 689, 11 N. W. 433. See also St. Louis &c. R. Co. v. Douglass, 152 Ala. 197, 44 So. 677; Kuehl v. Chicago &c. R. Co., 126 Iowa 638, 102 N. W. 512; Sarja v. Great Northern R. Co., 99 Minn. 332, 109 N. W. 600; Lidel v. South Dakota &c. R. Co., 25 S. Dak. 462, 127 N. W. 653; Herrell v. Chicago &c. R. Co., 114 Wis. 605, 90 N. W. 1071.

ily determined. Thus, where there is no question of failure to properly fence the track, and the alleged negligence consists wholly in the management of the train, the fact that the owner carelessly permitted his animals to stray in the immediate vicinity of a railway track has been held to be such negligence on his part as to preclude a recovery.[90] And where the owner in driving his animals along a public highway and over a railway track carelessly allows them to remain on the track when they could easily have been driven off and they are injured he cannot recover.[91] In some states, where the common law prevails and the owner is required to keep his animals up, allowing them to run at large will constitute such contributory negligence on his part as to exonerate a railway company from liability.[92] But

[90]Wabash &c. R. Co. v. Nice, 99 Ind. 152, 23 Am. & Eng. R. Cas. 169; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112; Jeffersonville &c. R. Co. v. Underhill, 48 Ind. 389; Schneekloth v. Chicago &c. R. Co., 108 Mich. 1, 65 N. W. 663.

[91]Niemann v. Michigan &c. R. Co., 80 Mich. 197, 44 N. W. 1049. See also West v. Northern Pac. R. Co., 13 N. Dak. 221, 100 N. W. 254. But it is held that "the mere fact of a horse being on the track of a railroad when injured cannot be considered an act of contributory negligence on the part of the owner, or, standing alone, as proof tending to show negligence, even though the animal was allowed to stray at large unattended, or was negligently cared for, so that it escaped." Norfolk &c. R. Co. v. Smith, 104 Md. 72, 64 Atl. 317. But see Red River &c. R. Co. v. Dooley, 35 Tex. Civ. App. 364, 80 S. W. 566.

[92]Indianapolis &c. R. Co. v. Harter, 38 Ind. 557; Pittsburgh &c. R. Co. v. Stuart, 71 Ind. 500; Louisville &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Baltimore &c. R. Co. v. Mulligan, 54 Md. 486; Maynard v. Boston &c. R. Co., 115 Mass. 458, 15 Am. Rep. 119; Williams v. Michigan &c. R. Co., 2 Mich. 259, 55 Am. Dec. 59; Robinson v. Flint &c. R. Co., 79 Mich. 323, 44 N. W. 779, 19 Am. St. 174, 45 Am. & Eng. R. Cas. 496; Johnson v. Chicago &c. R. Co., 29 Minn. 425, 13 N. W. 673; Woolson v. Northern R. Co., 19 N. H. 267; Bowman v. Troy &c. R. Co., 37 Barb. (N. Y.) 516; Tonawanda &c. R. Co. v. Munger, 5 Denio (N. Y.) 255, 49 Am. Dec. 239 and note; Halloran v. New York &c. R. Co., 2 E. D. Smith (N. Y.) 257; Spinner v. New York &c. R. Co., 67 N. Y. 153; Moses v. Southern Pacific R. Co., 18 Ore. 385, 23 Pac. 498, 8 L. R. A. 135, and note, 42 Am. & Eng. R. Cas. 555; Railroad Co. v. Skinner, 19 Pa. St. 298, 57 Am. Dec. 654; Tower v. Providence &c. R. Co., 2 R. I. 404; Red River &c. R. Co. v. Dooley, 35 Tex. Civ. App. 364, 80 S. W. 566; Stucke v. Milwaukee &c. R. Co., 9 Wis. 202; Bennett v. Chicago &c. R. Co., 19 Wis. 145; Chicago &c. R. Co. v. Goss, 17 Wis. 428, 84 Am. Dec 755. See also Rail-

where the common law is not in force and there is no statute or local law forbidding animals to run at large it is not negligence to permit them to run at large[93] and this is particularly so where there is a local law permitting cattle and other domestic animals to run at large.[94] Where it appears that the owner of animals had them in his fields around which were fences reasonably sufficient to restrain them he cannot be held guilty of contributory negligence if the animals escape and wander upon a railroad track where they are injured,[95] unless, perhaps, it be shown that the

way Co. v. Ferguson, 57 Ark. 16, 20 S. W. 545, 18 L. R. A. 110, 38 Am. St. 217; Cincinnati &c. R. Co. v. Ford, 139 Tenn. 291, 202 S. W. 72. In Hindanan v. Oregon &c. R. Co., 17 Ore. 614, 22 Pac. 116, it was said: "Knowingly allowing cattle to range upon the track, where they necessarily expose the lives and safety of the traveling public to constant danger, is, according to my notion, the highest degree of negligence upon the part of the owner, and should be regarded as contributing to the injury." But see Sarja v. Great Northern R. Co., 99 Minn. 332, 109 N. W. 600.

[93]Eddy v. Evans, 58 Fed. 151; South &c. R. Co. v. Williams, 65 Ala. 74; Little Rock &c. R. Co. v. Finley, 37 Ark. 562; McCoy v. California Pacific R. Co., 40 Cal. 532, 6 Am. Rep. 623; Orcutt v. Pacific Coast R. Co., 85 Cal. 291; Isbell v. New York &c. R. Co., 27 Conn. 393, 71 Am. Dec. 78; Rockford &c. R. Co. v. Irish, 72 Ill. 404; Searles v. Milwaukee &c. R. Co., 35 Iowa 490; Kentucky &c. R. Co. v. Lebus, 14 Bush. (Ky.) 518; Mongogna v. Illinois Cent. R. Co., 115 La. Ann. 597, 39 So. 699; Vicksburg &c. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; Gorman v. Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; Proctor v. Wilmington &c. R. Co., 72 N. Car. 579; Bethea v. Raleigh &c. R. Co., 106 N. Car. 279, 10 S. E. 1045; Kerwhaker v. Cleveland &c. R. Co, 3 Ohio St. 172; Cleveland &c. R. Co. v. Elliott, 4 Ohio St. 474; Moses v. Southern Pacific R. Co., 18 Ore. 385, 23 Pac. 498, 8 L. R. A. 135 and note, 42 Am. & Eng. R. Cas. 555; Trout v. Virginia &c. R. Co., 23 Grat. (Va.) 619; Blaine v. Chesapeake &c. R. Co., 9 W. Va. 252.

[94]Atlanta &c. R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500. But see Hanna v. Terre Haute &c. R. Co., 119 Ind. 316. In Wilmot v. Oregon &c. R. Co., 48 Ore. 494, 87 Pac. 528, 7 L. R. A. (N. S.) 202, 120 Am. St. 840, it is held a question for the jury under the general law to determine whether allowing stock to graze upon uninclosed lands near a depot is contributory negligence. Where stock law prohibits it there can usually be no recovery. Houston &c. R. Co. v. Nussbaum, 43 Tex. Civ. App. 410, 94 S. W. 1101.

[95]Bulkley v. New York &c. R. Co., 27 Conn. 479; Toledo &c. R. Co. v Milligan, 52 Ind. 505; Dennis v. Louisville &c. R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448, and note, 35 Am. & Eng. R. Cas. 141;

animals were breachy and the owner had knowledge of their breachiness.[96] Stock in charge of a herder who permits them to escape and wander upon a railway track where they are injured will be regarded as injured because of the negligence of the herder in suffering them to escape, and for their injuries the company is not liable.[97] Wilfully or recklessly exposing one's animals to danger will always constitute such contributory negligence as to preclude a recovery if the animals are injured.[98] Thus, where an owner left open a gate between his fields and the railway track and the animals escaped from the fields and were injured on the railway tracks it was held there could be no recovery.[99] But where the alleged negligence of the railway com-

Chicago &c. R. Co. v. Leiter, 59 Ind. App. 212, 109 N. E. 213; Pearson v. Milwaukee &c. R. Co., 45 Iowa 497; Doran v. Chicago &c. R. Co., 73 Iowa 115, 34 N. W. 619; Story v. Chicago &c. R. Co., 79 Iowa 402, 44 N. W. 690; Spinner v. New York &c. R. Co., 67 N. Y. 153; Railway Co. v. Howard, 40 Ohio St. 6; Chicago &c. R. Co. v. Goss, 17 Wis. 428, 84 Am. Dec. 755. See also Colorado &c. R. Co. v. Webb, 36 Colo. 224, 85 Pac. 683; O'Kelly v. Yazoo &c. R. Co., 94 Miss. 635, 47 So. 660; France v. Salt Lake &c. R. Co., 31 Utah 302, 88 Pac. 1.

[96]Dennis v. Louisville &c. R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448, and note, 35 Am. & Eng. R. Cas. 141.

[97]Keeney v. Oregon R. &c. Co., 19 Ore. 291, 24 Pac. 233, 42 Am. & Eng. R. Cas. 619. See also Dickinson v. Wabash &c. R. Co., 103 Mo. App. 332, 77 S. W. 88. But compare Lidel v. South Dakota &c. R. Co., 25 S. Dak. 462, 127 N. W. 653.

[98]Jeffersonville &c. R. Co. v. Dunlap, 29 Ind. 426; Hopkins v. Kansas Pacific R. Co., 18 Kans. 462; Missouri Pacific R. Co. v. Roads, 33 Kans. 640; Chicago &c. R. Co. v. Totten, 1 Kans. App. 558, 42 Pac. 269; Rogers v. Newburyport &c. R. Co., 1 Allen (Mass.) 16; Moser v. St. Paul &c. R. Co., 42 Minn. 480, 44 N. W. 530; Tarwater v. Hannibal &c. R. Co., 42 Mo. 193; Corwin v. New York &c. R. Co., 13 N. Y. 42; Forbes v. Atlantic &c. R. Co., 76 N. Car. 454. Where the plaintiff had attached a block of wood to his cow and it appeared that the block of wood prevented her from getting off the track when the train which struck her was approaching it was held that the negligence of the owner contributed to the injury. Guess v. Railway Co., 30 S. Car. 163, 9 S. E. 163. If an owner stands by when his animals are in danger and makes no effort to save them his negligence will preclude a recovery against the railway company. Moody v. Minneapolis &c. R. Co., 77 Iowa 29, 41 N. W. 477.

[99]Illinois &c. R. Co. v. McKee, 43 Ill. 119; Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295; Bond v. Evansville &c. R. Co., 100 Ind. 301; Man-

pany consists in its failure to erect and maintain proper fences there is some conflict in the authorities as to whether it is contributory negligence in an adjoining land-owner to turn his stock into a field near the railroad track when he knows that the fence between his field and the track is defective and not sufficient to turn stock. The weight of authority is, however, to the effect that it is not contributory negligence which will defeat a recovery on the part of the owner to turn his stock into a field along one side of which the company has failed to properly fence,[1] although there are authorities which hold that it is contributory negli-

well v. Burlington &c. R. Co., 80 Iowa 652, 45 N. W. 568, 45 Am. & Eng. R. Cas. 501; Eames v. Boston &c. R. Co., 14 Allen (Mass.) 151; Bay City &c. R. Co, v. Austin, 21 Mich. 390; Hook v. Worcester &c. R. Co., 58 N. H. 251; Richardson v. Chicago &c. R. Co., 56 Wis. 347, 14 N. W. 176. See also Missouri &c. R. Co. v. Bradshaw (Tex. Civ. App.), 83 S. W. 897; Irving v. Texas &c. Ry. Co. (Tex. Civ. App.), 164 S. W. 910, 911 (citing text, where owner of cattle tore down fence); Dickinson v. Wabash &c. R. Co., 103 Mo. App. 332, 77 S. W. 88. But compare Atkinson v. Chicago &c. R. Co., 119 Wis. 176, 96 N. W. 529. So where the owner of animals opened the gate in a fence along a railroad right of way and was driving his animals along the track intending to take them off the right of way at a gate further along the track it was held that he was guilty of such contributory negligence as to prevent his recovery for an injury to his animals while they were being so driven. Davidson v. Central Iowa R. Co., 75 Iowa 22, 39 N. W. 163, 35 Am. & Eng. R. Cas. 158.

[1]McCoy v. California &c. R. Co., 40 Cal. 532, 6 Am. Rep. 623; Wilder v. Maine &c. R. Co., 65 Maine 332, 20 Am. Rep. 698; Evans v. St. Paul &c. R. Co., 30 Minn. 489, 16 N. W. 271; Sarja v. Great Northern R. Co., 99 Minn. 332, 109 N. W. 600; Donovan v. Hannibal &c. R. Co., 89 Mo. 147, 1 S. W. 232; Cressley v. Northern R., 59 N. H. 564, 47 Am. Rep. 227; Shepard v. Buffalo &c. R. Co., 35 N. Y. 641; Roberts v. Richmond &c. R. Co., 88 N. Car. 560; Farmer v. Wilmington &c. R. Co., 88 N. Car. 564; Horner v. Williams, 100 N. Car. 230, 5 S. E. 734; Pittsburgh &c. R. Co. v. Smith, 38 Ohio St. 410; Knight v. Southern Pac. Co. (Utah), 172 Pac. 689. Some cases hold that where the injury was due to the want of a fence the company is liable, although the owner was guilty of contributory negligence in permitting his animals to be abroad. In these cases the failure of the company to perform its statutory duty is regarded as the proximate cause of the injury. Welty v. Indianapolis &c. R. Co., 105 Ind. 55, 4 N. E. 410; Cincinnati &c. R. Co. v. Hiltzhauer, 99 Ind. 486; Flint &c. R. Co. v. Lull, 28 Mich. 510. See also Atlantic Coast Line R. Co. v. Peoples, 56 Fla. 145, 47 So. 392; Baltimore &c. R. Co. v. Seitzinger, 116 Ill. App. 55.

gence.[2] Where the company utterly ignores its duty to fence or to properly repair its fences it seems to us that it is not just to an adjoining owner to hold him guilty of contributory negligence which will defeat a recovery if he turns his stock into fields adjoining the track. If this were the rule it would virtually deprive the owner of a right to pasture his stock in fields adjoining the track or else compel him to erect the fences or constantly guard his animals.[3] The railway company is the party who has failed to discharge its positive statutory duty, and on it should fall the loss. But where a railway company has been diligent in the performance of its duty in erecting and maintaining fences and the fences are destroyed by accident or thrown down by storm or other casualty the company would have a reasonable time in which to make such repairs, and if an owner with knowledge that the fence was down should turn his cattle into the adjoining fields before a reasonable time in which to make repairs had elapsed and they are injured he should be held guilty of contributory negligence.[4] But it has been held that if repairs are not made within a reasonable time the owner may turn his animals into his fields.[5] It has also been held that although a plaintiff be guilty of such contributory negligence as would under ordinary circumstances defeat a recovery, yet, if the accident

[2]Poler v. New York &c. R. Co., 16 N. Y. 476; Scowden v. Erie R Co., 26 Pa. Super Ct. 15; Martin v. Stewart, 73 Wis. 553, 41 N. W. 538; McCarme v. Chicago &c. R. Co., 96 Wis. 664, 71 N. W. 1054.

[3]"There is no negligence in pasturing his cattle upon his own premises, although he is aware of the defective condition of the fence which it is the duty of the company to maintain between it and the railroad track. He can not be deprived of the ordinary and proper use of his property by the failure of the railroad company to perform its duty." 2 Thomp. Neg. (2nd ed.) 2019. See also Donovan v. Hannibal &c. R. Co., 89 Mo. 147, 1 S. W. 232, 26 Am. & Eng. R. Cas. 588; Missouri &c. R. Co. v. Dunnaway, 43 Tex. Civ. App. 350, 95 S. W. 760.

[4]Indianapolis &c. R. Co. v. Wright, 13 Ind. 213; Spinner v. New York &c. R. Co., 67 N. Y. 153; Martin v. Stewart, 73 Wis. 553, 41 N. W. 538, 38 Am. & Eng. R. Cas. 316; Jones v. Sheboygan &c. R. Co., 42 Wis. 306; Richardson v. Chicago &c. R. Co., 56 Wis. 347, 14 N. W. 176; Carey v. Chicago &c. R. Co., 61 Wis. 71, 20 N. W. 618, 20 Am. & Eng. R. Cas. 469.

[5]Sika v. Chicago &c. R. Co., 21 Wis. 370.

happened because the employes in charge of the train failed to exercise reasonable care to prevent the injury after the animals were discovered on the track, the contributory negligence of the plaintiff will be no defense to the action.[6]

§ 1726 (1210). Animals abandoned by their owner.—Where an owner abandons his animals he cannot recover if they are injured. If his action in abandoning the animals was such as to constitute a full relinquishment of all claim to them he no doubt would be unable to recover for them on the ground that the animals were of no value or that he had no property in them. Such cases are of rare occurrence and few have found their way into the reports. But there are cases where an owner, not intending to part with the property in his animals, abandons them in the immediate vicinity of or on a railway track where danger is imminent.[7] In such cases it is held that an owner cannot recover

[6]Georgia &c. R. Co. v. Neely, 56 Ga. 540; Chicago &c. R. Co. v. Engle, 84 Ill. 397; Kuhn v. Chicago &c. R. Co., 42 Iowa 420; Wooster v. Chicago &c. R. Co., 74 Iowa 593, 38 N. W. 425, 35 Am. & Eng. R. Cas. 152; Mississippi &c. R. Co. v. Miller, 40 Miss. 45; Hannibal &c. R. Co. v. Kenney, 41 Mo. 271; Farmer v. Wilmington &c. R. Co., 88 N. Car. 564; Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729; Coyle v. Baltimore &c. R. Co., 11 W. Va. 94. See also New Albany &c. R. Co. v. Maiden, 12 Ind. 10; Missouri &c. R. Co. v. Byrd, 58 Tex. Civ. App. 612, 124 S. W. 993; Isbell v. New York &c. R. Co., 27 Conn. 393, 71 Am. Dec. 78; Barnard v. Chicago &c. R. Co., 133 Iowa 185, 110 N. W. 439 (recovery allowed notwithstanding contributory negligence where the railroad operatives of the train knew or ought to have known that the cattle were on the track, and negligently failed to slacken speed or stop the train); Sullwald v. Union Pac. R. Co., 102 Nebr. 126, 166 N. W. 190.

[7]In the case of Welty v. Indianapolis &c. R. Co., 105 Ind. 55, 24 Am. & Eng. R. Cas. 371, it was said: "An owner who abandons his animal can not recover, although it entered upon the track of a railroad, and was killed at a place where the company failed to perform its statutory duty by fencing its track. Knight v. Toledo &c. R. Co., 24 Ind. 402; Jeffersonville &c. R. Co. v. Dunlap, 29 Ind. 426; Corwin v. New York &c. R. Co., 13 N. Y. 42, see opinion, Denio, J., p. 54. Sound principle supports this rule. If an owner were permitted to voluntarily put his domestic animals in a situation where it was almost certain that they would be killed by passing trains, and yet, in the event that they were killed, recover from the railroad company, it would open the way to great frauds, since

for injuries to the animals even though they were killed because the company had failed to perform its statutory duty to fence. The act of the owner in such a case amounts to positive wilfulness, but under such circumstances his contributory negligence in leaving the animals in a place of danger would, in some jurisdictions, defeat a recovery even if there was present no element of wilfulness.[8]

§ 1727 (1211). **Animals attracted to railroad tracks.**—It sometimes happens that animals which are injured on the tracks of a railway company are attracted there by some kind of food, such as hay, salt, grain or the like, which is being shipped over the company's road. Since these injuries usually take place at depot or station grounds where the company is excused from fencing, it follows that if a recovery can be had at all, it must be based on other negligence than that in failing to fence. Negligence in failing to fence does not and cannot ordinarily exist in such a case. Where the company merely permits an article to be loaded on its cars and does not allow the loaded cars to stand for an unreasonable time after they are loaded, it will not be liable for injuries to animals which are attracted to the track by the article loaded in the cars. Thus, where it appeared that the injured animal had been attracted by hay loaded in a car, and that the car had not stood an unreasonable time, but had been moved on the same day on which the loading was completed, it was held

it would enable the owner to recover for property voluntarily exposed to destruction; but this would not be the only evil result, for a further evil consequence would be that the temptation to get rid of animals not needful or useful, at the expense of the railroad company, would endanger the safety of those who travel upon our railroads. Public policy requires that a man who voluntarily puts his property in a place where it is certain that it will be destroyed, shall not receive assistance from the courts. A man who willingly abandons his property to destruction or purposely abandons it to a known danger, has no right, either in law or morals, to invoke the assistance of the courts of justice to secure pay for it." See also Ft. Wayne &c. R. Co. v. Woodward, 112 Ind. 118, 13 N. E. 620; Brady v. Rensselaer &c. R. Co., 1 Hun (N. Y.) 378; Moody v. Minneapolis &c. R. Co., 77 Iowa 29, 41 N. W. 477; Heller v. Abbott, 79 Wis. 409, 48 N. W. 598, 599.

[8]Ante, § 1725.

that there was no liability.[9] But if the car had been allowed to stand for an unreasonable length of time the company, it was said, would have been liable.[10] In another case, it was held that there was no liability, in the absence of negligence, where trespassing cattle were killed by poison placed on the right of way to kill obnoxious grass.[11] Where the animal is attracted by an article which has been scattered over and about the track during the process of loading or unloading and is allowed to remain there, the company may sometimes be liable. Thus, where salt, in being unloaded, was scattered over the track and allowed to remain there, the company was held liable for injuries to an animal which had been attracted to the place by the salt.[12] And the company was held liable under similar circumstances where cotton-seed had been allowed to accumulate on the track.[13] But where the animals were attracted to the track by salt in a shed kept by a storekeeper who also acted as station agent, it was held that the company was not liable, it appearing that the keeping of the salt was not in any way connected with the duties of the station agent as an employe of the company.[14]

[9] Schooling v. St. Louis &c. R. Co., 75 Mo. 518, 13 Am. & Eng. R. Cas. 536.

[10] Schooling v. St. Louis &c. R. Co., 75 Mo. 518, 13 Am. & Eng. R. Cas. 536.

[11] Ft. Worth &c. Ry. Co. v. Brown (Tex. Civ. App.), 173 S. W. 943. See also Brown v. Missouri &c. Ry. Co. (Tex. Civ. App.), 69 S. W. 178; St. Louis &c. Ry. Co. v. Bailey (Tex. Civ. App.), 168 S. W. 406.

[12] Crafton v. Hannibal &c. R. Co., 55 Mo. 580. But the company is not liable for injuries to an animal which was attracted to the tracks by salt placed about switches for the purpose of freeing them from snow and ice. Louisville &c. R. Co. v. Phillips (Miss.), 12 So. 825; Kirk v. Norfolk &c. R. Co., 41 W. Va. 722, 24 S. E. 639, 32 L. R. A. 416, 56 Am. St. 899.

[13] Little Rock &c. R. Co. v. Dick, 52 Ark. 402, 20 Am. St. 190, 42 Am. & Eng. R. Cas. 591. See also Kansas City &c. R. Co. v. Kirksey, 48 Ark. 366, 3 S. W. 190; St. Louis &c. Ry. Co. v. Wilson, 116 Ark. 163, 171 S. W. 471 (but evidence held insufficient to show negligence); Page v. North Carolina R. Co., 71 N. Car. 222.

[14] Burger v. St. Louis &c. R. Co., 123 Mo. 679, 27 S. W. 313, 59 Am. & Eng. R. Cas. 637. See also on the general subject Houska v. Hrabe, 35 S. Dak. 269, 151 N. W. 1021, L. R. A. 1915D, 1074 and note (not railroad cases).

§ 1728 (1212). **Ownership of animals.**—A necessary part of a plaintiff's case in an action against a railway company for damages on account of injuries to animals is proof of ownership by the plaintiff. The plaintiff must show that he is the owner of the animal or has such a property interest in it as to entitle him to maintain an action for its injury or death.[15] Where the plaintiff testified in an action against a railway company for the death of a mule, that he had purchased the mule and had possession of it at the time of the accident, that he had not paid for it but did pay for it after the injury, it was held that he had such an interest as to entitle him to recover its full value.[16] But where a suit was brought by the husband to recover for injuries to an animal which had been obtained in exchange for a similar animal belonging to his wife, the husband having contributed a sum of money himself in addition to the animal in order to consummate the exchange, it was held that he had no such property interest as to entitle him to maintain the action.[17] It has been held that a suit for an injury to an animal cannot be brought by one person for the use of another. Such a suit is an action ex delicto and must be brought by the party for whose benefit the recovery is sought.[18] Proof of the possession of stock killed or injured is prima facie evidence of ownership.[19]

§ 1729 (1213). **Presumption of negligence.**—We have heretofore seen that statutes attempting to impose an absolute liability upon railway companies for injuries to stock where there

[15] Welsh v. Chicago &c. R. Co., 53 Iowa 632, 6 N. W. 13; Turner v. St. Louis &c. R. Co., 76 Mo. 261. Ownership must be alleged. South Georgia R. Co. v. Ryals, 123 Ga. 330, 51 S. E. 428; Williams v. Central of Ga. Ry. Co., 22 Ga. App. 386, 96 S. E. 13 (and proved unless admitted).

[16] Railway Co. v. Taylor, 57 Ark. 136, 20 S. W. 1083.

[17] Central R. &c. Co. v. Bryant, 89 Ga. 457, 15 S. E. 537. For a somewhat similar case where this question was held to be for the jury, see Davis v. Seaboard Air Line Co., 134 N. Car. 300, 46 S. E. 515.

[18] Kansas City &c. R. Co. v. Cantrell, 70 Miss. 329, 12 So. 344.

[19] Toledo &c. R. Co. v. Stevens, 63 Ind. 337. See also as to evidence of ownership, Southern R. Co. v. Pogue, 145 Ala. 444, 40 So. 565; Williams v. Central of Ga. Ry. Co., 22 Ga. App. 386, 96 S. E. 13.

is no negligence or failure to fence or the like have uniformly been held unconstitutional. But in many of the states there are in force statutes which make proof of the existence of certain facts sufficient to constitute a prima facie case of liability in favor of the plaintiff. These statutes have been held valid.[20] It is held, however, that they are not statutes which affect the liability of the company but only the mode of procedure.[21] Proof of the existence of the facts specified in the statute raises a presumption of negligence against the railway company and this makes a prima facie case in favor of the plaintiff, which, if not rebutted or overcome by the defendant, is sufficient to warrant a recovery against it. Thus, statutes are in force which make mere proof of the killing of or injury to an animal by the cars or locomotives of a railway company sufficient to raise a presumption of negligence against it.[22] As

[20] In Savannah &c. R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697, and note, 29 Am. & Eng. R. Cas. 274, it was said: "It is within the power of the legislature to provide that proof of the killing or of damage to live stock by railroad engines or trains shall be prima facie evidence of negligence on the part of the company or person operating them, as has been wisely done in some states, in view of the fact that the company always has witnessed the killing or injury." See also Atchison F. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. ed. 909; Becksted v. Montana &c. R. Co., 19 Mont. 147, 47 Pac. 795; Tredway v. Sioux City &c. R. Co., 43 Iowa 527, 14 Am. Rep. 475. But compare Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868; Dickey v. Northern Pac. R. Co., 19 Wash. 350, 53 Pac. 347.

[21] "The effect of the statute is merely to change the order of proof." Huber v. Chicago &c. R. Co., 6 Dak. 392, 43 N. W. 819, 40 Am. & Eng. R. Cas. 188. Compare as to whether they will be enforced in another jurisdiction, Kansas City &c. R. Co. v. Ingram, 80 Ark. 267, 97 S. W. 55, with Beth v. St. Louis &c. R. Co., 136 Mo. App. 234, 116 S. W. 111, and see Thomp. Neg. § 2160. As to when they do not apply see St. Louis &c. R. Co. v. Heintz, 82 Ark. 459, 102 S. W. 221; Dean v. Hilton &c. Lumber Co., 6 Ga. App. 480, 65 S. E. 300.

[22] Jones v. Bond, 40 Fed. 281; Mobile &c. R. Co. v. Williams, 53 Ala. 595; South &c. R. Co. v. Williams, 65 Ala. 74; East Tennessee &c. R. Co. v. Bayliss, 74 Ala. 150; Georgia &c. R. Co. v. Hughes, 87 Ala. 610, 6 So. 413; Little Rock &c. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; St. Louis &c. R. Co. v. Vincent, 36 Ark. 451; Kansas City

soon as this presumption arises the plaintiff has made out a prima facie case and will recover unless the defendant introduces evidence to show that it exercised due care and was not guilty of negligence.[23] This has been held to be true even though

&c. R. Co. v. Cash, 80 Ark. 284, 96 S. W. 1062; Kansas City &c. R. Co. v. Wayt, 80 Ark. 382, 97 S. W. 656; Volkman v. Chicago &c. R. Co., 5 Dak. 69, 37 N. W. 222, 35 Am. & Eng. R. Cas. 204; Huber v. Chicago &c. R. Co., 6 Dak. 392, 43 N. W. 819, 40 Am. & Eng. R. Cas. 188; Jacksonville &c. R. Co. v. Wellman, 26 Fla. 344, 7 So. 845; Georgia &c. R. Co. v. Monroe, 49 Ga. 373; Small v. Chicago &c. R. Co., 50 Iowa 338; Brentner v. Chicago &c. R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605; Kentucky Central R. Co. v. Talbot, 78 Ky. 621, 7 Am. & Eng. R. Cas. 585; Mobile &c. R. Co. v. Morrow (Ky.), 97 S. W. 389; Grundy v. Louisville &c. R. Co., 8 Ky. L. 689, 2 S. W. 899; Western Maryland &c. R. Co. v. Carter, 59 Md. 306; Kansas City &c. R. Co. v. Doggett, 67 Miss. 250, 7 So. 278; Pippen v. Wilmington &c. R. Co., 75 N. Car. 54; Wilson v. Norfolk &c. R. Co., 90 N. Car. 69; State v. Divine, 98 N. Car. 778, 4 S. E. 477, 31 Am. & Eng. R. Cas. 574; Randall v. Richmond &c. R. Co., 104 N. Car. 410, 10 S. E. 691; Keilbach v. Chicago &c. R. Co., 11 S. Dak. 468, 78 N. W. 951; Spaulding v. Chicago &c. R. Co., 33 Wis. 582. "It being shown that the animal, while on the railroad track was killed by a train of the defendant, the burden was on the defendant to acquit himself of the charge of negligence made by the complaint; and the rulings of the court to this effect were free from error." Louisville &c. R. Co. v. Kelsey, 89 Ala. 287, 7 So. 648, 42 Am. & Eng. R. Cas. 584. It has been held that the presumption of negligence does not arise where the animal injured is a dog. Wilson v. Wilmington &c. R. Co., 10 Rich. L. (S. Car.) 52. But it does where the animals injured were oxen hitched to a cart. Randall v. Richmond &c. R. Co., 104 N. Car. 410, 10 S. E. 691; contra, Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82, 19 Atl. 8, 42 Am. & Eng. R. Cas. 599. It is also held that there is no presumption that an animal will leave the track in time to avoid injury. Dennis v. Louisville &c. R. Co., 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448; Chicago &c. R. Co. v. Ramsey, 168 Ind. App. 390, 79 N. E. 1065, 1066. As to evidence held sufficient to make it a question for the jury whether the presumption was rebutted, see Atlantic &c. R. Co. v. Willis, 18 Ga. App. 674, 90 S. E. 288.

[23] Jones v. Bond, 40 Fed. 281, 40 Am. & Eng. R. Cas. 191; Louisville &c. R. Co. v. Kelsey, 89 Ala. 287, 7 So. 648, 42 Am. & Eng. R. Cas. 584; Little Rock &c. R. Co. v. Henson, 39 Ark. 413; Little Rock &c. R. Co. v. Jones, 41 Ark. 157; St. Louis &c. R. Co. v. Hagan, 42 Ark. 122; Louisville &c. R. Co. v. Smith, 67 Miss. 15, 7 So. 212; Wilson v. Norfolk &c. R. Co., 90 N. Car. 69. In Volkman v. Chicago &c. R. Co., 5 Dak. 69, 37

there be a local act in force requiring animals to be fenced in.[24] As a rule no presumption of negligence arises from mere proof of the killing or injuring an animal by the locomotives of a railway company unless there be a statute in force declaring that such proof shall make a prima facie case against the defendant or raise the presumption that it was guilty of negligence in killing or injuring the animal.[25] In a few jurisdictions, however, such proof seems to raise a presumption of negligence although there exists no statute on the subject,[26] but even then

N. W. 731, 35 Am. & Eng. R. Cas. 204, the court, in discussing a statute, which made the proof of killing or injuring sufficient to raise a presumption of negligence, said: "As this section is in derogation of the rule at common law and the general rule of practice prescribed by our code of civil procedure, it behooves us to consider the effect, scope and object of this provision, in order to properly construe it. It seems to us that this section was enacted for the purpose of overcoming the difficulty, generally supposed to exist, with plaintiffs in this kind of actions, in making proof of facts which are only known as a rule to the servants and agents of the defendant. Hence, when the railway placed their servants and employes, in whose breasts these facts are presumed to rest, on the witness stand, and purge their consciences by, testifying, under oath, touching all the facts and circumstances within their knowledge, concerning the killing or injury, the reason for the statute ceases. To hold otherwise would work great injustice and oppression, and would be to prescribe a different rule for the adjudication of rights of persons and property engaged in the railway business from that which obtains in reference to other persons and property engaged in the railway business from that which obtains in reference to other persons whose rights of property are in no wise more sacred."

[24] Roberts v. Richmond &c. R. Co., 88 N. Car. 560, 20 Am. & Eng. R. Cas. 473.

[25] Gulf &c. R. Co. v. Washington, 49 Fed. 347; Eddy v. Lafayette, 49 Fed. 798; Denver &c. R. Co. v. Henderson, 10 Colo. 1, 13 Pac. 910; Atchison &c. R. Co. v. Betts, 10 Colo. 431, 15 Pac. 821; Volkman v. Railway Co., 5 Dak. 69, 37 N. W. 731; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; Kansas City &c. R. Co. v. Bolson, 36 Kans. 534, 14 Pac. 5; Milburn v. Kansas City &c. R. Co., 86 Mo. 104; Burlington &c. R. Co. v. Wendt, 12 Nebr. 76, 10 N. W. 456; Walsh v. Virginia &c. R. Co., 8 Nev. 110; Railroad Co. v. McMillan, 37 Ohio St. 554; Railway Co. v. Heiskell, 38 Ohio St. 666, 13 Am. & Eng. R. Cas. 555; Eaton v. Oregon &c. Navigation Co., 19 Ore. 391, 24 Pac. 415.

[26] McCoy v. California &c. R.

the rule is that where the company shows by the uncontradicted testimony of its employes that the accident was unavoidable,[27] or that due care was used in the operation of the train,[28] the presumption of negligence is overcome. And it is held that there must be evidence to show that the injury was caused by the train or locomotive in order to raise the presumption.[29]

§ 1730 (1214). **Burden of proof—Evidence.**—In actions for damages against railway companies on account of injuries to animals the burden of establishing negligence on the part of the defendant rests upon the plaintiff,[30] except in those cases

Co., 40 Cal. 532, 6 Am. Rep. 623; White v. Concord R., 30 N. H. 188; Smith v. Eastern &c. R. Co., 35 N. H. 356; Murray v. South Carolina &c. R. Co., 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219; Roof v. Railroad Co., 4 S. Car. 61; Galpin v. Chicago &c. R. Co., 19 Wis. 604. See also Cincinnati &c. R. Co. v. Burgess, 27 Ky. L. 252, 84 S. W. 760.

[27] Alabama &c. R. Co. v. Roebuck, 76 Ala. 277; Railway Co. v. Shoecraft, 53 Ark. 96, 13 S. W. 422; Central of Ga. R. Co. v. Dich, 121 Ga. 65, 48 S. E. 683; Western &c. R. Co. v. Clark, 2 Ga. App. 346, 58 S. E. 510; St. Louis &c. R. Co. v. Cline, 69 Ark. 659, 65 S. W. 427.

[28] Little Rock &c. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; Mobile &c. R. Co. v. Williams, 53 Ala. 595; Central of Ga. R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780, 781. See also Lane v. Kansas City &c. Ry. Co., 78 Ark. 234, 95 S. W. 460; Miller v. Chicago &c. R. Co., 21 S. Dak. 242, 111 N. W. 553; Durham v. Wilmington &c. R. Co., 82 N. Car. 352. But it is held that the jury may disbelieve the testimony of the trainmen when contrary to the physical facts and circumstances. Atlanta &c. R. Co. v. Clute, 3 Ga. App. 508, 60 S. E. 277.

[29] St. Louis &c. R. Co. v. Hagan, 42 Ark. 122. That the statutory presumption is rebuttable and as to what will rebut it, see Lane v. Kansas City &c. R. Co., 78 Ark. 234, 95 S. W. 460; Chesapeake &c. R. Co. v. Grigsby, 131 Ky. 363, 115 S. W. 237; Corbett v. Great Northern R. Co., 19 N. Dak. 450, 125 N. W. 1054.

[30] Kansas City &c. R. Co. v. Lewis, 80 Ark. 396, 97 S. W. 56; Atchison &c. R. Co. v. Betts, 10 Colo. 431, 15 Pac. 821; Savannah &c. R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697 and note; Rockford &c. R. Co. v. Connell, 67 Ill. 216; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112; Schneir v. Chicago &c. R. Co., 40 Iowa 337; Gibson v. Iowa Cent. R. Co., 136 Iowa 415, 113 N. W. 927; Waldron v. Portland &c. R. Co., 35 Maine 422; Grand Rapids &c. R. Co. v. Judson, 34 Mich. 506; Locke v. First Div. St. Paul &c. R. Co., 15 Minn. 350; New Orleans &c. R. Co. v. Enochs, 42 Miss.

where mere proof of killing by the company raises a presumption of negligence.[31] Even in those cases the burden of proving negligence may appropriately be said to rest on the plaintiff, for on him rests the burden of showing the existence of the necessary facts to raise the presumption of negligence.[32] If those facts are not shown, the plaintiff has failed to raise a presumption of negligence and has not made out a prima facie case. Where a recovery is sought on the ground that the company failed to fence, the burden is upon the plaintiff to show that the animals came upon the track at a point where it was not securely fenced,[33] but if the defense is interposed that the company was excused from fencing at that point the burden rests upon the company to establish that defense.[34]

603; McKissock v. St. Louis &c. R. Co., 73 Mo. 456; Burlington &c. R. Co. v. Wendt, 12 Nebr. 76, 10 N. W. 456; Kennedy v. Chicago &c. R. Co., 80 Nebr. 267, 114 N. W. 165; Walsh v. Virginia &c. R. Co., 8 Nev. 110; Doggett v. Richmond &c. R. Co., 81 N. Car. 459; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Bethje v. Houston &c. R. Co., 26 Tex. 604; Fort Worth &c. R. Co. v. Tomlinson (Tex. App.). 16 S. W. 866; Lyndsay v. Connecticut &c. R. Co., 27 Vt. 643; Johnson v. Baltimore &c. R. Co., 25 W. Va. 570; Hoge v. Ohio River &c. R. Co., 35 W. Va. 562, 14 S. E. 152; Maynard v. Norfolk &c. R. Co., 40 W. Va. 331, 21 S. E. 733; Lawrence v. Milwaukee &c. R. Co., 42 Wis. 322; Martin v. Chicago &c. R. Co., 15 Wyo. 493, 89 Pac. 1025. It is error to require the company to show absence of negligence. McGhee v. Gaines, 98 Ky. 50, 32 S. W. 602. And mere proof that an animal was killed on the track has been held insufficient to show negligence. Atchison &c. R. Co. v. Adcock, 38 Colo. 369, 88 Pac. 180; Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194, 69 S. W. 845; Missouri &c. R. Co. v. Webb, 6 Ind. Ter. 280, 97 S. W. 1010.

[31] Ante, § 1729.

[32] See St. Louis &c. R. Co. v. Hagan, 42 Ark. 122; Southern R. Co. v. Forsythe, 23 Ky. L. 942, 64 S. W. 506.

[33] Rockford &c. R. Co. v. Lynch, 67 Ill. 149; Evansville &c. R. Co. v. Mosier, 101 Ind. 597, 22 Am. & Eng. R. Cas. 569; Small v. Chicago &c. R. Co., 50 Iowa 338; Cecil v. Pacific R. Co., 47 Mo. 246; Lantz v. St. Louis &c. R. Co., 54 Mo. 228; Morrison v. New York &c. R. Co., 32 Barb. (N. Y.) 568; Lawrence v. Milwaukee &c. R. Co., 42 Wis. 322. See also Chicago &c. R. Co. v. Church, 49 Colo. 582, 114 Pac. 299; Latta v. Illinois Cent. R. Co., 151 Iowa 244, 130 N. W. 1059; Severn v. St. Louis &c. R. Co., 149 Mo. App. 631, 129 S. W. 477.

[34] Indianapolis &c. R. Co. v. Lindley, 75 Ind. 426; Louisville &c. R. Co. v. Kious, 82 Ind. 357; Terre

Where it appears that the animals were injured on the track near a point where there was no fence or a defective fence the jury may infer that the animals came on the track at such point.[35] If the action is based upon the negligence of the company in failing to fulfill its statutory duty to fence, or in failing to perform some other duty imposed by statute and it appears that the company was negligent in that respect, the plaintiff is not bound to show that he was free from contributory negligence. But if the action is not based on the alleged failure of the company to discharge some statutory duty imposed upon it, freedom from contributory negligence is, in some jurisdictions, a necessary part of a plaintiff's case and the burden rests upon him to establish it.[36] In actions for injuries to animals

Haute &c. R. Co. v. Penn, 90 Ind. 284; Cleveland &c. R. Co. v. Miller, 40 Ind. App. 165, 81 N. E. 517; Chicago &c. R. Co. v. Ness, 56 Ind. App. 285, 105 N. E. 250; Cox v. Atchison &c. R. Co., 128 Mo. 362, 31 S. W. 3; Texas Cent. R. Co. v. Hico Oil Co., 59 Tex. Civ. App. 330, 126 S. W. 627. See also Central R. &c. Co. v. Lee, 96 Ala. 444, 11 So. 424; Dailey v. Chicago &c. R. Co., 121 Iowa 254, 96 N. W. 778. In Missouri the burden, under the statute, is upon the plaintiff to show that his animal entered at a place where the defendant was required to fence and did not comply with the statute. LeMaster v. Butler County R. Co. (Mo. App.), 190 S. W. 38; Johnson v. Kansas City &c. R. Co. (Mo. App.), 200 S. W. 685. But where plaintiff made a prima facie case that a fence could and should have been erected at the place where the animal entered, without encroaching on public rights, it was held that the burden was on defendant to show that a fence would have endangered its employes. Dabbs v. Kansas City &c. Ry. Co. (Mo. App.), 202 S. W. 276.

[35] McCoy v. California &c. R. Co., 40 Cal. 532, 6 Am. Rep. 623; Toledo &c. R. Co. v. Pence, 68 Ill. 524; St. Louis &c. R. Co. v. Casner, 72 Ill. 384; Bellefontaine &c. R. Co. v. Suman, 29 Ind. 40; Small v. Chicago &c. R. Co., 50 Iowa 338; Fickle v. St. Louis &c. R. Co., 54 Mo. 219; Walther v. Pacific R. Co., 55 Mo. 271; Bennett v. Chicago &c. R. Co., 19 Wis. 145. See also Denver &c. R. Co. v. Wright, 64 Colo. 310, 171 Pac. 499; Green v. Kansas &c. R. Co., 142 Mo. App. 67, 125 S. W. 865. Proof that the fence was generally insecure and defective has been held sufficient to sustain a verdict in favor of a plaintiff without proof that the particular point where the animals entered was defective. Louisville &c. R. Co. v. Spain, 61 Ind. 460.

[36] Grand Trunk R. Co. v. Porter, 49 Ind. App. 692, 97 N. E. 1040; Jef-

proof of the injury and the negligence of the company may be established by either direct or circumstantial evidence. That direct evidence is admissible there can be no question and it is almost equally well settled that circumstantial evidence of the injury or negligence in inflicting it is admissible. A great many cases of this kind arise in such a way that it is impossible to get direct evidence and in such cases circumstantial evidence must necessarily be admissible or a substantial failure of justice would result. Thus, where it is necessary to prove a collision between the defendant's trains and the animal, it is not necessary that the plaintiff should produce actual eye witnesses to the collision.[37] The collision may be proved by circumstantial evidence,[38] as where the animal is found mutilated and dead near the track with blood and hair on one of the rails,[39] or where blood is found on the track and traced to an adjoining field where the animal lay injured.[40] Proof that

fersonville &c. R. Co. v. Huber, 42 Ind. 173; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112. But not where they are wilfully injured. Chicago &c. R. Co. v. Leiter, 59 Ind. App. 212, 109 N. E. 213. And not where the action is based on failure to maintain cattle guards as required by statute; Lake Erie &c. R. Co. v. Voliva, 53 Ind. App. 170, 101 N. E. 338.

[37] Indianapolis &c. R. Co. v. Thomas, 84 Ind. 194. "It is not necessary in such a case, to show, by direct evidence, that the stock was struck by the company's train; it is sufficient if there are circumstances from which that fact may be fairly and justly inferred." Whitewater R. Co. v. Bridgett, 94 Ind. 216.

[38] South &c. R. Co. v. Small, 70 Ala. 499; St. Louis &c. R. Co. v. Stites, 80 Ark. 72, 95 S. W. 1004; Jonesboro &c. R. Co. v. Dorr, 104 Ark. 641, 148 S. W. 491; St. Louis &c. R. Co. v. Casner, 72 Ill. 384; Indianapolis &c. R. Co. v. Thomas, 84 Ind. 194; Chicago &c. R. Co. v. Keefer (Ind. App.), 119 N. E. 807 (but the particular evidence was held insufficient in this case); Mayfield v. St. Louis &c. R. Co., 91 Mo. 296, 3 S. W. 201; Keltenbaugh v. St. Louis &c. R. Co., 34 Mo. App. 147; Vaughan v. Kansas City &c. R. Co., 34 Mo. App. 141; Missouri &c. R. Co. v. Baker, 99 Tex. 452, 90 S. W. 869.

[39] Blewett v. Wyandotte &c. R. Co., 72 Mo. 583; Texas &c. R. Co. v. King Bros., 45 Tex. Civ. App. 265, 99 S. W. 1030. See also Southern Ry. Co. v. Hudson, 16 Ala. App. 271, 77 So. 421; Johnson v. Kansas City &c. R. Co. (Mo. App.), 200 S. W. 685.

[40] Mayfield v. St. Louis &c. R. Co., 91 Mo. 296, 3 S. W. 201; Louisville &c. R. Co. v. Montgomery, 17 Ky. L. 807, 32 S. W. 738.

an animal was seen near the track and afterward found on or near the track in a bruised and mutilated condition may be sufficient to establish the fact of a collision.[41] But the verdict must not be based on mere conjecture and there are many cases in which somewhat similar evidence, without more, has been held insufficient.[42] When a recovery is claimed because of the alleged negligence of the company in running its trains at a rate of speed in excess of that prescribed by a municipal ordinance, the ordinance limiting the speed and also the ordinance prohibiting stock from running at large are admissible in evidence on the question of negligence and contributory negligence.[43] Neither, however, even if violated, is conclusive proof of actionable negligence or contributory negligence.[44] Mere proof of an unlawful rate of speed is not sufficient to justify a finding against the defendant. Such proof may be prima facie evidence of negligence, but, in addition, there must be some showing that such unlawful speed was the cause of the accident.[45]

[41] New Brunswick &c. R. Co. v. Armstrong, 23 N. B. 193; Union Pac. R. Co. v. Harris, 28 Kans. 206; Jackson v. St. Louis &c. R. Co., 36 Mo. App. 170; Boing v. Raleigh &c. R. Co., 87 N. Car. 360; Morrow v. Hannibal &c. R. Co., 29 Mo. App. 432. For other cases in which circumstantial evidence was held sufficient to establish certain essential elements of the plaintiff's case, see Hobbs v. St. Louis &c. R. Co., 113 Mo. App. 126, 87 S. W. 525, and authorities cited; Brown v. Missouri &c. R. Co., 104 Mo. App. 691, 78 S. W. 273; Chicago &c. R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908; Herrell v. Chicago &c. R. Co., 114 Wis. 605, 90 N. W. 1071.

[42] Union Pac. R. v. Bullis, 6 Colo. App. 64, 39 Pac. 897; Chicago &c. R. Co. v. Rhodes, 21 Colo. App. 229, 121 Pac. 769; Shaw v. St. Louis &c. R. Co., 110 Mo. App. 561, 85 S. W. 611; Logan v. St. Louis &c. R. Co., 111 Mo. App. 674, 86 S. W. 565; Beaudin v. Oregon &c. R. Co., 31 Mont. 238, 78 Pac. 303. See also Kansas City &c. R. Co. v. Walker, 71 Ark. 643, 71 S. W. 660; Kansas City &c. R. Co. v. Lewis, 80 Ark. 396, 97 S. W. 56; Atchison &c. R. Co. v. Adcock, 38 Colo. 369, 88 Pac. 180; Southern R. Co. v. Forsythe, 23 Ky. L. 942, 64 S. W. 506; Alabama &c. R. Co. v. Boyles (Miss.), 37 So. 498; Preece v. Oregon Short Line R. Co., 48 Utah 551, 161 Pac. 40.

[43] Chicago &c. R. Co. v. Richardson, 28 Nebr. 118, 44 N. W. 103, 42 Am. & Eng. R. Cas. 592; Union Pac. R. Co. v. Rasmussen, 25 Nebr. 810, 41 N. W. 778, 13 Am. St. 527.

[44] Chicago &c. R. Co. v. Richardson, 28 Nebr. 118, 44 N. W. 103, 42 Am. & Eng. R. Cas. 592.

[45] Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Chicago &c. R. Co. v.

§ 1731 (1215). **Pleading and practice.**—The general rules of pleading and practice apply to actions for damages on account of injuries to animals by railway companies. The plaintiff must allege and prove all the material facts necessary to constitute a cause of action in his favor.[46] What must be alleged in the declaration or complaint of course varies according to the nature of the alleged negligence on which the action is based and also according to the provisions of the statute in force in the jurisdiction in which the action is brought. In several states it is necessary to allege and prove that the animal was injured in the county in which the action was commenced.[47] It is not always necessary, however, to prove in express terms that the point where the injury occurred is in the county where the action is brought. Courts are bound to take judicial notice of the limits of the county in which they sit and also of the prominent and general geographical features of the county, and where it appears that an animal was killed at a certain town or at a certain distance from a town, or between two towns, the proof will be sufficient if the court knows that such town is in the county or that the distance from the town or other well-known point falls within the limits of the county.[48] It has been held that a complaint need not be more specific as to the place where

Engle, 58 Ill. 381. See also San Antonio &c. R. Co. v. Clark, 26 Tex. Civ. App. 280, 62 S. W. 546. And see generally as to evidence Johnson v. Southern Pac. Co., 11 Cal. App. 278, 104 Pac. 713; Cleveland &c. R. Co. v. Miller, 40 Ind. App. 165, 81 N. E. 517.

[46] See McGhee v. Gaines, 98 Ky. 182, 32 S. W. 602.

[47] Kansas City &c. R. Co. v. Burge, 40 Kans. 734, 19 Pac. 791, 40 Am. & Eng. R. Cas. 181; Ellis v. Missouri Pac. R. Co., 83 Mo. 372; Mitchell v. Missouri Pac. R. Co., 82 Mo. 106; Backenstoe v. Wabash &c. R. Co., 86 Mo. 492. See also Beaudin v. Oregon &c. R. Co., 31 Mont. 238, 78 Pac. 303; Little Rock &c. R. Co. v. Jamison, 70 Ark. 387, 68 S. W. 153; Southern R. Co. v. Brock, 115 Ga. 721, 42 S. E. 65; Severn v. St. Louis &c. R. Co., 149 Mo. App. 631, 129 S. W. 477.

[48] Indianapolis &c. R. Co. v. Case, 15 Ind. 42; Louisville &c. R. Co. v. Hixon, 101 Ind. 337; Indianapolis &c. R. Co. v. Moore, 16 Ind. 43; Indianapolis &c. R. Co. v. Stephens, 28 Ind. 429; Terre Haute &c. R. Co. v. Pierce, 95 Ind. 496, 19 Am. & Eng. R. Cas. 581. See also Chicago &c. R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908; Pittsburgh &c. R. Co. v. Vance, 58 Ind. App. 1, 108 N. E. 158.

the animal was killed than to name the county.[49] Where there is a material variance between the allegations and the proof the plaintiff cannot recover. Thus, where the plaintiff sued for a wilful and intentional injury he is not entitled to recover upon proof that the engineer of the train which struck the animals negligently failed to discover the animals or to stop the train after their discovery.[50] An immaterial variance, or slight variance between the allegations and the proof will not ordinarily be fatal to a plaintiff's case.[51] Amending a pleading so as to make it include a demand for damages for loss by fire in addition to a claim for injuries to stock has been held sufficient to constitute a misjoinder of causes of action and should not be allowed.[52] Under the codes of some of the states it is held that an action for damages on account of injuries to animals by a railway train may be assigned and suit maintained by the assignee.[53] In an action for injury to animals where there is no conflict in the evidence and it is to the effect that the company was not guilty of any actionable negligence, so that only one reasonable inference can be drawn, the court may direct a verdict for the defendant.[54] But where there is any material

[49] Jacksonville &c. R. Co. v. Wellman, 26 Fla. 344, 7 So. 845. That is, as against a general demurrer.

[50] Indiana &c. R. Co. v. Overton, 117 Ind. 253, 20 N. E. 147. See also Clement v. Pere Marquette R. Co., 138 Mich. 57, 100 N. W. 999. An averment that it was at or near a certain place in a certain county is sufficient, and the name of the employe in charge of the locomotive need not be stated. Western R. Co. v. Stone, 145 Ala. 663, 39 So. 723. See also Western R. &c. v. Mitchell, 148 Ala. 35, 41 So. 427; High v. Southern Pac. R. Co., 49 Ore. 98, 88 Pac. 961.

[51] See St. Louis &c. R. Co. v. Pickens (Tex.), 14 S. W. 1071; St. Louis &c. R. Co. v. Evans, 78 Tex. 369, 14 S. W. 798. See also Chicago &c. R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908; Central of Ga. R. Co. v. Edmondson, 135 Ala. 336, 33 So. 480; Kinyon v. Chicago &c. R. Co., 118 Iowa 349, 96 Am. St. 382, 92 N. W. 40; Southern R. Co. v. Pogue, 145 Ala. 444, 40 So. 565.

[52] Union Pac. R. Co. v. Sternberg, 13 Colo. 141, 21 Pac. 1021.

[53] Snyder v. Wabash &c. R. Co., 86 Mo. 613, 29 Am. & Eng. R. Cas. 237; Louisville &c. R. Co. v. Goodbar, 88 Ind. 213.

[54] Anderson v. Birmingham &c. R. Co., 109 Ala. 128, 19 So. 519. See also Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194, 69 S. W. 845.

conflict in the evidence, the case should go to the jury.[55] Questions as to pleading and practice in cases involving injuries to animals are so different in the different states and so largely depend on local statutes that it is impossible to here discuss those questions in detail. In these cases one cannot safely rely on any general work on the subject but must consult the decisions of the jurisdiction in which the action is pending.[56]

§ 1732 (1216). **Notice and demand for damages.**—In some jurisdictions it is provided by statute that an owner whose animals are injured by the trains of a railway company shall, within a specified time after the injury, serve notice upon the railway company of the injury and claim therein such damages as may have been sustained. The object of these notices is to apprise the company of the injury and the claim for damages so as to give it an opportunity to settle the claim without suit. The railway company after the service of such notice is given a certain specified time to pay the claim and if it fails to pay the claim within such time and suit is afterward brought and the plaintiff is adjudged entitled to recover, some penalty, such as the recovery of double damages or the like may be assessed against the company. Such notices and claims for damages are ordinarily required to be verified. The object of a verification is to avoid extravagant and excessive claims.[57] The affidavit of the loss or damage may be made by any one who is acquainted with the facts,[58] and the affidavit, claim and notice may be embodied in a single writing.[59] The affidavit

[55] Baird v. Georgia &c. R. Co., 19 So. 661.

[56] The following recent cases, however, may be consulted: Central of Ga. R. Co. v. Williams, 163 Ala. 119, 50 So. 328; Pittsburgh &c. R. Co. v. Vance, 58 Ind. App. 1, 108 N. E. 158; Baltimore &c. R. Co. v. Dickey, 43 Ind. App. 509, 87 N. E. 1047; Vandalia R. Co. v. Clem, 49 Ind. App. 94, 96 N. E. 789; Cleveland &c. R. Co. v. VanNatta, 44 Ind. App. 608, 87 N. E. 999; St. Louis &c. R. Co. v. Hoff, 76 Kans. 506, 92 Pac. 539; Clem v. Quincy &c. R. Co., 119 Mo. App. 245, 96 S. W. 226; McKnight v. Oregon &c. R. Co., 33 Mont. 40, 82 Pac. 661; Meier v. Northern Pac. R. Co., 51 Ore. 69, 93 Pac. 691.

[57] Mendell v. Chicago &c. R. Co., 20 Iowa 9.

[58] Henderson v. St. Louis &c. R. Co., 36 Iowa 387.

[59] Mendell v. Chicago &c. R. Co., 20 Iowa 9.

and notice must be served on some agent of the company.[60] The service may be made by any one,[61] and proof of service may be made by affidavit[62] or by the official return of an officer if the notice was served by an officer.[63] In Iowa a copy of the affidavit or notice may be served on the company,[64] and the proof of service may be made by correct copies without requiring the company to produce the originals.[65] Care must be taken to see that a proper amount is inserted in the affidavit and claim, for where double damages are allowed the recovery will be limited to double the amount stated in the affidavit.[66] Where a bill is made out in writing stating an account in favor of the plaintiff, giving the value of the animal and the date and place of the accident and is delivered to the company within thirty days of the accident it is held to be a sufficient demand.[67] Where notice and demand is necessary to complete a cause of action such notice and demand must be alleged and proved in order to complete plaintiff's cause of action.[68] A notice that

[60] Welsh v. Chicago &c. R. Co., 53 Iowa 632, 6 N. W. 13; Brandt v. Chicago &c. R. Co., 26 Iowa 114; Alabama &c. R. Co. v. Roebuck, 76 Ala. 277; St. Louis &c. R. Co. v. Hale, 82 Ark. 175, 100 S. W. 1148 (on station agent sufficient). Where the statute required that the notice be served on a "station or ticket agent," proof of service on "the agent" of the company is not sufficient. Chicago &c. R. Co. v. Totten, 1 Kans. App. 558, 42 Pac. 269. See Alabama &c. R. Co. v. Killian, 69 Ala. 277.

[61] Mundhenk v. Central Iowa &c. R. Co., 57 Iowa 718, 11 N. W. 656.

[62] Macon &c. R. Co. v. Baber, 42 Ga. 300; Brandt v. Chicago &c. R. Co., 26 Iowa 114.

[63] Liston v. Central Iowa &c. R. Co., 70 Iowa 714, 29 N. W. 445.

[64] Mendell v. Chicago &c. R. Co., 20 Iowa 9; Van Slyke v. Chicago &c. R. Co., 80 Iowa 620, 45 N. W. 396.

[65] Smith v. Kansas City &c. R. Co., 58 Iowa 622, 12 N. W. 619; Brentner v. Chicago &c. R. Co., 58 Iowa 625, 12 N. W. 615.

[66] Manwell v. Burlington &c. R. Co., 80 Iowa 662, 45 N. W. 568, 45 Am. & Eng. R. Cas. 501. But a claim has been held sufficient which put the company on inquiry. Latta v. Illinois Cent. R. Co., 151 Iowa 244, 130 N. W. 1059.

[67] Fort Scott &c. R. Co. v. Holman, 45 Kans. 167, 25 Pac. 585.

[68] Missouri &c. R. Co. v. Morrow, 36 Kans. 495, 13 Pac. 789, 31 Am. & Eng. R. Cas. 520; Keyser v. Kansas City &c. R. Co., 56 Iowa 440, 9 N. W. 338. In Kansas &c. R. Co. v. Ball, 19 Kans. 535, it was said: "The statute is a stringent one, and imposes new burdens upon railroad corporations; and

attorney's fees will be claimed is not required to be served on the company; the existence of the statute providing that attorney's fees may be recovered is sufficient notice to the company.[69]

§ 1733 (1217). **Appraisement of damages.**—Statutes have been enacted and are in force in some of the states providing for an appraisement of the damages done to an animal before suit is brought. Although such a statute is in force it seems that the appraisement is not a necessary prerequisite to the right of a plaintiff to maintain the action.[70] The object in having appraisement made is to procure evidence of the value of the animals or the extent of the injury sustained by them. Such an appraisement is not, however, conclusive of the amount of damage done and a statute which attempts to make such an appraisement conclusive is unconstitutional and void as being in conflict with the constitution of the United States because it denies the right of trial by jury.[71] But an act which makes the valuation fixed by the appraiser only prima facie evidence of the value of the stock killed may be constitutional since the report is open to contradiction.[72]

§ 1734 (1218). **Measure of damages.**—Where an animal is killed by a railway company and the company is liable the measure of damages is usually the value of the animal at the time it was

he who would avail himself of its benefits ought to bring himself clearly within its terms." See also Chicago &c. R. Co. v. Totten, 1 Kans. App. 558, 42 Pac. 269.

[69] Peoria &c. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619, 20 Am. & Eng. R. Cas. 489.

[70] Volkman v. Chicago &c. R. Co., 5 Dak. 69, 37 N. W. 731, 35 Am. & Eng. R. Cas. 204. But see Atchison &c. R. Co. v. Lujan, 6 Colo. 338, where it was held that the failure of an owner to have his stock appraised before bringing suit was proper subject-matter for a plea in abatement. It was also held that such a defense would be waived unless presented at the earliest opportunity.

[71] Graves v. Northern &c. R. Co., 5 Mont. 556, 6 Pac. 16, 51 Am. R. 81, 19 Am. & Eng. R. Cas. 436; Oregon &c. R. Co. v. Smalley, 1 Wash. 206, 23 Pac. 1008, 22 Am. St. 143, 42 Am. & Eng. R. Cas. 550; Oregon &c. R. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415.

[72] Illinois &c. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618, 56 Am. & Eng. R. Cas. 157. See Maberry v. Missouri Pac. R. Co., 83 Mo. 664.

killed.[73] The same rule applies where the animal is so badly injured that it has to be killed.[74] The value may be shown by proving what the animal was worth on the market,[75] and it is competent for persons who are engaged in the stock business and are familiar with the value of animals to give their opinion as to the value of the animal for whose death a recovery is sought.[76] It is competent to prove the quality or breed of an animal as tending to show its value.[77] A judgment which is for a greater

[73] Alabama &c. R. Co. v. McAlpine, 75 Ala. 113; Jacksonville &c. R. Co. v. Wellman, 26 Fla. 344, 7 So. 845; Toledo &c. R. Co. v. Arnold, 43 Ill. 418; Toledo &c. R. Co. v. Johnston, 74 Ill. 83; Madison &c. R. Co. v. Herod, 10 Ind. 2; Indianapolis &c. R. Co. v. Mustard, 34 Ind. 50; Jeffersonville &c. R. Co. v. Tull, 37 Ind. 341; Cincinnati &c. R. Co. v. Jones, 111 Ind. 259, 12 N. E. 113; Chicago &c. R. Co. v. Barnes, 116 Ind. 126, 18 N. E. 459; Central Branch R. Co. v. Nichols, 24 Kans. 242; Lapine v. New Orleans &c. R. Co., 20 La. Ann. 158; Harris v. Panama &c. R. Co., 58 N. Y. 660; Houston &c. R. Co. v. Muldrow, 54 Tex. 233; Texas &c. R. Co. v. Lanham, 1 Tex. App. Civ. Cas. 99; Galveston &c. R. Co. v. Turner, 1 Tex. App. Civ. Cas. 344; Burlington v. Newport News &c. R. Co., 32 W. Va. 436, 9 S. E. 876. It is the value of the stock at the time and in the vicinity in which the animals were killed. Shahan v. Lusk (Mo. App.), 190 S. W. 43. It is proper to ask a plaintiff who testifies as to the value of the animal injured, what the animal cost him. Railway Co. v. Sageley, 56 Ark. 549, 20 S. W. 413. The value must be proven or there can be no recovery. St. Louis &c. R. Co. v. Pickens, 3 Tex. App. Civ. Cas. 471, 14 S. W. 1071. What an animal was worth in another state from that in which it was injured is not competent unless it be shown that there was no local market at the place of the injury. Jones v. Railway Co., 53 Ark. 27, 13 S. W. 416, 22 Am. St. 175. See next page as to deducting value of carcass where animal is killed.

[74] Gulf &c. R. Co. v. Keith, 74 Tex. 287, 11 S. W. 1117; Page v. Sumpter, 53 Wis. 652, 11 N. W. 60. See also Ft. Worth &c. R. Co. v. Chisholm (Tex. Civ. App.), 146 S. W. 988.

[75] Ft. Worth &c. R. Co. v. Chisholm (Tex. Civ. App.), 146 S. W. 988. Offers of compromise made by a plaintiff are not admissible to prove value. Georgia &c. R. Co. v. Smith, 85 Ga. 530, 11 S. E. 859.

[76] Parker v. Lake Shore &c. R. Co., 93 Mich. 607, 53 N. W. 834; Texas &c. R. Co. v. Virginia &c. R. Co. (Tex.), 7 S. W. 341, 35 Am. & Eng. R. Cas. 201; Atchison &c. R. Co. v. Gabbert, 34 Kans. 132, 8 Pac. 218.

[77] Richmond &c. R. Co. v. Chandler (Miss.), 13 So. 267; Parker v. Lake Shore &c. R. Co., 93 Mich. 607, 53 N. W. 834; East Tennessee &c. R. Co. v. Watson,

amount than the market value will be regarded as excessive and may be set aside.[78] A plaintiff should be given his choice between a remittitur or a new trial where excessive damages are awarded.[79] Where the animal killed has a value after its death, such as the value of a cow for beef or for her hide, and the owner keeps such animal or disposes of it the measure of damages is the market value less the value of the carcass of the animal.[80] Where the stock is only injured the measure of damages is usually the difference between the market value of the same at the time of the infliction of the injury and its value after the injury.[81] An owner may also recover as a part of the damages such sum as he may properly have expended in caring for and curing the injured animal,[82] including the value of his own

90 Ala. 41, 7 So. 813; Central Branch &c. R. Co. v. Nichols, 24 Kans. 242.

[78] Jacksonville &c. R. Co. v. Garrison, 30 Fla. 431; Horton v. St. Louis &c. R. Co., 83 Mo. 541; St. Louis &c. R. Co. v. Pickens, 3 Tex. App. Civ. Cas. 471, 14 S. W. 1071.

[79] St. Louis &c. R. Co. v. Hagan, 42 Ark. 122; Indiana &c. R. Co. v. Dooling, 42 Ill. App. 63; Georgia &c. R. Co. v. Crawley, 87 Ga. 191, 13 S. E. 508. See Chicago &c. R. Co. v. Jarrett, 59 Miss. 470.

[80] Georgia &c. R. Co. v. Fullerton, 79 Ala. 298; Memphis &c. R. Co. v. Hembree, 84 Ala. 182, 4 So. 392; Illinois &c. R. Co. v. Finnigan, 21 Ill. 646; Jackson v. St. Louis &c. R. Co., 74 Mo. 526; Case v. St. Louis &c. R. Co., 75 Mo. 668, 13 Am. & Eng. R. Cas. 564; Roberts v. Richmond &c. R. Co., 88 N. Car. 560, 20 Am. & Eng. R. Cas. 473; Boing v. Raleigh &c. R. Co., 91 N. Car. 199; Godwin v. Wilmington &c. R. Co., 104 N. Car. 146, 10 S. E. 136. The net profits only should be deducted. The owner should be paid for his time and trouble in caring for and disposing of the carcass. Dean v. Chicago &c. R. Co., 43 Wis. 305. And see, as to cost of transporting carcass, Western R. &c. v. Stone, 145 Ala. 663, 39 So. 723.

[81] Fritts v. New York &c. R. Co., 62 Conn. 503, 26 Atl. 347; Atlantic &c. R. Co. v. Hudson, 62 Ga. 679; Keyes v. Minneapolis &c. R. Co., 36 Minn. 290, 30 N. W. 888.

[82] Central &c. R. Co. v. Warren, 84 Ga. 329, 10 S. E. 918; Finch v. Central &c. R. Co., 42 Iowa 304; Manwell v. Burlington &c. R. Co., 80 Iowa 662, 45 N. W. 568, 45 Am. & Eng. R. Cas. 501; Gillett v. Western R. Co., 8 Allen (Mass.) 560; Keyes v. Minneapolis &c. R. Co., 36 Minn. 290, 30 N. W. 888; International &c. R. Co. v. Cocke, 64 Tex. 151, 23 Am. & Eng. R. Cas. 226; Gulf &c. R. Co. v. Keith, 74 Tex. 287, 11 S. W. 1117. But in no case can the whole damages be allowed to exceed the value of the horse. Gillett v.

services rendered. The owner is also entitled, in a proper case, to recover as a part of the damages the value of the services of the animal during the time of the injury and before the cure is effected.[83] If it appears that the injuries were wilfully or wantonly inflicted exemplary damages may sometimes be awarded in addition to the actual damages.[84] And in some jurisdictions by complying with certain statutory provisions the plaintiff may recover attorney's fees[85] or double damages.[86] The expenses incurred by the plaintiff because of the "litigious litigation" carried on by the defendant may be recovered, it seems in Georgia.[87] If the carcass of a dead animal is abandoned by the owner when he could have secured a profit from it and such profit is lost the loss must usually fall on the owner.[88] It is his duty to use every reasonable effort to render the loss as small as possible and where he negligently fails to avail himself of the value of a dead animal or fails to use reasonable effort to properly care for and cure an injured animal he must so far bear the loss.[89] Under some of the

Western &c. R. Co., 8 Allen (Mass.) 560; Keyes v. Minneapolis &c. R. Co., 36 Minn. 290, 30 N. W. 888. The jury is to determine whether the expenditures were reasonable and made in good faith. Ellis v. Hilton, 78 Mich. 150, 43 N. W. 1048, 18 Am. St. 438, 6 L. R. A. 454.

[83] Streett v. Laumier, 34 Mo. 469; Missouri &c. R. Co. v. Hannibal &c. R. Co., 79 Mo. 478; Atlanta &c. R. Co. v. Hudson, 62 Ga. 679.

[84] Vicksburg &c. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552. In Cobb v. Columbia &c. R. Co., 37 S. Car. 194, 15 S. E. 878, it was held that actual damages could not be awarded in an action for exemplary damages. Exemplary damages cannot be assessed where the animals were killed or injured through ordinary negligence. Toledo &c. R. Co. v. Arnold, 43 Ill. 418; Chicago &c. R. Co. v. Jarrett, 59 Miss. 470.

[85] Post, § 1736.

[86] Post, § 1735.

[87] Selma &c. R. Co. v. Fleming, 48 Ga. 514. Such a recovery depends, however, on special statutory enactments.

[88] Harrison v. Missouri Pac. R. Co., 88 Mo. 625; Illinois &c. R. Co. v. Finnigan, 21 Ill. 646. "The cow, as the plaintiff testified, was worth from eighteen to twenty dollars as beef, and was still his property. If she could have been sold for that sum, or was worth it to the owner, he should have made reasonable use or disposition of the cow as would have proportionately diminished the damages." Roberts v. Richmond &c. R. Co., 88 N. Car. 560.

[89] Memphis &c. R. Co. v. Hembree, 84 Ala. 182, 4 So. 392; Georgia &c. R. Co. v. Fullerton, 79 Ala. 298. The owner has a reasonable time in which to dispose of a dead animal.

statutes interest may be included in estimating the amount of damages, the interest being calculated on the amount of the recovery from the date of the accident to the date of the judgment.[90] Interest, however, wherever allowed must be calculated only on the amount of the actual damages; it will not be allowed on the attorney's fees, on exemplary damages, nor in cases where double damages are allowed.[91]

§ 1735 (1219). **Double damages.**—In many jurisdictions in this country statutes are in force which permit a plaintiff, under certain conditions prescribed by the statute, to recover double damages in an action against a railway company for damages to stock.[92] Certain conditions in the nature of conditions precedent

Toledo &c. R. Co. v. Parker, 49 Ill. 385.

[90]Alabama &c. R. Co. v. McAlpine, 75 Ala. 113; St. Louis &c. R. Co. v. Biggs, 50 Ark. 169, 6 S. W. 724; Varco v. Chicago &c. R. Co., 30 Minn. 18, 13 N. W. 921, 11 Am. & Eng. R. Cas. 419; Lackin v. Delaware &c. R. Co., 22 Hun (N. Y.) 309; Baltimore &c. R. Co. v. Schunz, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. 324; Houston &c. R. Co. v. Muldrow, 54 Tex. 233; Woodland v. Union Pac. R. Co., 27 Utah 543, 26 Pac. 298. Interest, however, will not be allowed unless the statute under which the action is brought is broad enough to cover interest. Many of the authorities hold that an action for injuries to animals is a pure case of tort, and interest should not be allowed. See Atchison &c. R. Co. v. Gabbert, 34 Kans. 132, 8 Pac. 218; Houston &c. R. Co. v. Muldrow, 50 Tex. 233; Meyer v. Atlantic &c. R. Co., 64 Mo. 542; De Steiger v. Hannibal &c. R. Co., 73 Mo. 33. Compare Mote v. Chicago &c. R. Co., 27 Iowa 22; Dean v. Chicago &c. R. Co., 43 Wis. 305. See, also the following cases which hold that interest cannot be allowed: Toledo &c. R. Co. v. Johnston, 74 Ill. 83; Brentner v. Chicago &c. R. Co., 68 Iowa 530, 23 N. W. 245, 19 Am. & Eng. R. Cas. 448; Atchison &c. R. Co. v. Gabbert, 34 Kans. 132, 8 Pac. 218. While the jury may not allow interest eo nomine, they may consider the length of time elapsing since the accident and the length of time the plaintiff has been kept out of his money, and increase the damages on that account. Western &c. R. Co. v. McCauley, 68 Ga. 818.

[91]Brentner v. Chicago &c. R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605, 19 Am. & Eng. R. Cas. 448; Wade v. Missouri Pac. R. Co., 78 Mo. 362.

[92]Henderson v. Wabash &c. R. Co., 81 Mo. 605 See ante, § 1698; St. Louis I. M. & R. Co. v. Wynne, 224 U. S. 345, 32 Sup. Ct. 493, 56 L. ed. 799. Where, after notice of the loss and claim for damages, the defendant had sent a due bill to the plaintiff and the due bill was not paid within

to the right to recover double damages are usually imposed on a plaintiff. These conditions must be complied with before a recovery of double damages can be adjudged. Thus, by the terms of some of the statutes, the plaintiff must serve notice upon the defendant of his loss and claim before bringing suit and his failure to do so will prevent his securing a recovery of double damages.[93] In Arkansas the company is required to post up at certain places lists of animals killed or injured, and on failure so to do, double damages may be awarded.[94] Statutes providing for double damages are generally held constitutional,[95] and are applicable even though the road is in the hands of and

the time fixed by the statute, it was held that the acceptance of the due bill fixed the amount of damages, and double damages could not be allowed. Shaw v. Chicago &c. R. Co., 82 Iowa 199, 47 N. W. 1004.

[93]Manwell v. Burlington &c. R. Co., 80 Iowa 662, 45 N. W. 568, 45 Am. & Eng. R. Cas. 501; Van Slyke v. Chicago &c. R. Co., 80 Iowa 620, 45 N. W. 396. See also Lidel v. South Dakota &c. R. Co., 25 S. Dak. 462, 127 N. W. 653. An assignee of a claim for injuries to stock may recover double damages upon making the same showing as would entitle the original owner to double damages. Everett v. Central Iowa R. Co., 73 Iowa 442, 35 N. W. 609.

[94]Memphis &c. R. Co. v. Carlley, 39 Ark. 246; St. Louis &c. R. Co. v. Castleberry, 98 Ark. 441, 136 S. W. 284 (even though the owner knows of the killing). See also Jones v. Americus &c. R. Co., 80 Ga. 803, 7 S. E. 117; St. Louis &c. R. Co. v. Wright, 57 Ark. 327, 21 S. W. 476; Little Rock &c. R. Co. v. Payne, 33 Ark. 816. Evidence that the company failed to post such notice is inadmissible unless the plaintiff makes a claim for double damages in his declaration. St. Louis &c. R. Co. v. Kimmons, 61 Ark. 200, 32 S. W. 505. See however Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868, where a statute somewhat similar to the Arkansas statute was held unconstitutional.

[95]Missouri Pac. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; Missouri Pac. R. Co. v. Terry, 115 U. S. 523, 6 Sup. Ct. 114, 29 L. ed. 467; Goodridge v. Union Pac. R. Co., 35 Fed. 35; Memphis &c. R. Co. v. Horsfall, 36 Ark. 651; Mackie v. Central R. Co., 54 Iowa 540, 6 N. W. 723; Barnett v. Atlantic R. Co., 68 Mo. 56, 30 Am. Rep. 773; Spealman v. Missouri Pac. R. Co., 71 Mo. 434; Humes v. Missouri Pac. R. Co., 82 Mo. 221, 52 Am. Rep. 369 and note; Hines v. Missouri Pac. R. Co., 86 Mo. 629; Phillips v. Missouri Pac. R. Co., 86 Mo. 540; McGill v. South Dakota &c. R. Co., 28 S. Dak. 467, 134 N. W. 885. See also ante, § 1698. But see ante, § 785. And compare St. Louis I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 32 Sup. Ct. 493, 56 L. ed. 799.

being operated by a receiver.[96] Double damages are imposed upon railway companies in the nature of a penalty, because the companies fail or refuse to settle meritorious claims to which their attention has been called.[97] Where a plaintiff has a meritorious claim and he gives the company full and fair notice of his claim, and the company has opportunity to adjust the claim but fails to do so, it is but just that it should be made to suffer an additional penalty for compelling the plaintiff to resort to a court to collect his claim. The amount involved in such cases is usually small, and in many cases the expense of prosecuting a suit will be greater than the amount of actual damages which might be recovered, so that unless some penalty was imposed upon the company in favor of a plaintiff, meritorious rights would often go unredressed. Double damages are imposed in the nature of a penalty and it is held to be no objection to the validity of the law that they are given to the plaintiff. Not only the actual damages are doubled where such a recovery is adjudged, but it is held that the plaintiff is also entitled to recover double the amount of the expense to which he has been put in caring for and curing an injured animal.[98] In arriving at a judgment

[96]Central Trust Co. v. Wabash &c. R. Co., 26 Fed. 12.

[97]Manz v. St. Louis &c. R. Co., 2 West R. 472. In some of the cases it is intimated that double damages are allowed in the nature of compensation to the owner rather than as a penalty against the company. Koons v. Chicago &c. R. Co., 23 Iowa 493.

[98]See Young v. Kansas City &c. R. Co., 52 Mo. App. 530; Johnson v. Chicago &c. R. Co., 29 Minn. 425, 13 N. W. 673. In Manwell v. Burlington &c. R. Co., 80 Iowa 662, 45 N. W. 568, it was said: "But the damages caused to the stock are physical, and the owner is entitled to recover double the financial damages which result therefrom. In this case, the plaintiff expended time and money in proper efforts to heal the injured animals. The evidence tends to show that, without attention, one of them would have died, and the other would have become worthless. Under the theory of the instruction, single damages only are recoverable for the time and money so spent; yet they were as much the direct result of the alleged wrong of defendant as was the depreciation in the value of the horses, and the reason for allowing double damages applies as strongly to them as to the loss in value. The same rule would apply to all damages which resulted directly from the injuries in question." But it has been held that single damages are not recoverable in an action for double damages. Stout v. St. Louis &c. R. Co., 142 Mo. App. 1, 125 S. W. 230.

for double damages the usual practice, it seems, is to permit a jury to fix the amount of actual damages in their verdict, and the court to double this amount in rendering the judgment,[99] although in some states the jury may include double damages in their verdict.[1] Where a plaintiff is required to serve notice on the defendant of his claim, and send a verified statement of the claim with such notice, in a subsequent suit the plaintiff will not ordinarily be permitted to recover more than double the amount claimed in such notice and affidavit.[2]

§ 1736 (1220). **Attorney's fees.**—Statutes permitting an attorney's fee to be added to the actual damages in suits against railway companies for injuries to stock are in force in many of the states. There is some conflict in the decisions as to whether a statute providing for the allowance of an attorney's fee in such cases is constitutional. The weight of modern authority is to the effect that such statutes are constitutional,[3] but there are a few cases which hold them unconstitutional.[4] It is usually pro-

[99]Hollyman v. Hannibal &c. R. Co., 58 Mo. 480; Wood v. St. Louis &c. R. Co., 58 Mo. 109.

[1]See Memphis &c. R. Co. v. Carlley, 39 Ark. 246.

[2]Manwell v. Burlington &c. R. Co., 80 Iowa 662, 45 N. W. 568, 45 Am. & Eng. R. Cas. 501.

[3]Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463, 22 Am. & Eng. R. Cas. 557; Yazoo & M. V. R. Co. v. Jackson Vinegar Co., 226 U. S. 217, 33 Sup. Ct. 49, 57 L. ed. 193; Kansas City S. R. Co. v. Anderson, 233 U. S. 325, 34 Sup. Ct. 599, 58 L. ed. 983; Meeker v. Lehigh Val. R. Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. ed. 644 (provision for attorney's fees in interstate commerce act); Jacksonville &c. R. Co. v. Prior, 34 Fla. 271, 15 So. 760; Peoria &c. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Terre Haute &c. R. Co. v. Salmon, 161 Ind. 131, 67 N. E. 918, citing text; Kansas Pac. R. Co. v. Mower, 16 Kans. 573; Atchison &c. R. Co. v. Harper, 19 Kans. 529; Missouri &c. R. Co. v. Shirley, 20 Kans. 660; Central Pacific &c. R. Co. v. Nichols, 24 Kans. 242; Missouri &c. R. Co. v. Abney, 30 Kans. 41, 1 Pac. 385, 13 Am. & Eng. R. Cas. 650; Kansas City &c. R. Co. v. Burge, 40 Kans. 734, 19 Pac. 791; Johnson v. Chicago &c. R. Co., 29 Minn. 425, 13 N. W. 673; Perkins v. St. Louis &c. R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426 and note; Gulf &c. R. Co. v. Ellis (Tex.), 18 S. W. 723, 49 Am. & Eng. R. Cas. 509.

[4]St. Louis &c. R. Co. v. Williams, 49 Ark. 492, 5 S. W. 883; Wilder v. Chicago &c. R. Co., 70 Mich. 382, 38 N. W. 11. The Michigan case cited holds that such legislation is class

vided in these statutes that as a prerequisite to the right to recover an attorney's fee the plaintiff must serve notice of his loss on the railway company and give them an opportunity to settle the claim without suit.[5] In such cases it is held to be but just that the validity of a statute allowing an attorney's fee to the plaintiff should be upheld. The railway company by its refusal to settle the just claim of which it has been notified virtually compels a plaintiff to resort to the courts and to incur a liability for attorney's fees and it is only fair that such fee or a reasonable fee should be paid by the company.[6] A statute providing

legislation and void. In the case of Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666 (reversing 87 Tex. 19, 26 S. W. 985, 61 Am. & Eng. R. Cas. 357) this opposite view was also taken, but there was no statute requiring railroad companies to fence, and the case has been distinguished on more than one ground in other decisions by the same court. See also South &c. R. Co. v. Morris, 65 Ala. 193; Denver &c. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Rio Grande &c. R. Co. v. Vaughn, 3 Colo. App. 465; Lafferty v. Chicago &c. R. Co., 71 Mich. 35, 38 N. W. 660; Schut v. Chicago &c. R. Co., 70 Mich. 433, 38 N. W. 291; Rinear v. Grand Rapids &c. R. Co., 70 Mich. 620, 38 N. W. 599; Dewell v. Northern Pac. Ry. Co., 54 Mont. 350, 170 Pac. 753; Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149. Some of the cases cited in this note were no doubt correctly decided as the particular statute in question was subject to constitutional objections, but it does not follow that no statute providing for attorney's fees in a proper case where the demand is just and not excessive can be constitutional. As to construction and application of statute held to make it void. See Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 34 Sup. Ct. 301, 58 L. ed. 554; St. Louis &c. R. Co. v. Wynne, 224 U. S. 354, 34 Sup. Ct. 293, 42 L. R. A. (N. S.) 102 (where statute apparently authorized this although demand was excessive).

[5]Illinois Central R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618, 56 Am. & Eng. R. Cas. 157, and cases cited in next to last preceding note.

[6]In Illinois Central R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618, it was said: "This additional penalty is not imposed except upon the contingency that the company shall refuse settlement upon the basis of the prima facie valuation, and upon the further condition that the owner of the live stock killed or injured shall establish both the liability of the company and that the appraised value was not excessive. What the state may impose as a penalty without condition it may impose subject to condition. The measure of the damages for failure to fence, as well as the disposition of any recovery in excess of actual compensation was wholly within the legislative discretion. The additional or increase of damages, in

for the allowance of an attorney's fee is held to be not unconstitutional as being class legislation.[7] Legislation of this kind is also intended to compel railway companies to properly fence their tracks and is held to be a valid exercise of the police power of the state.[8]

§ 1737 (1220a). Expense of preventing further injuries as element of damages.—In an action for damages caused by the negligence of a railroad company to keep cattle-guards in repair, it has been held that the land-owner has the right to include in his claim for damages the value of his services, and that of his family, in driving out and herding stock to prevent further and additional damages. These expenses are regarded as the natural

case the company unsuccessfully contests its liability for the full amount of the appraisement, is to be measured by the reasonable expense thrown upon the plaintiff in what is there established to have been unnecessary litigation."

[7]Gulf &c. R. Co. v. Ellis, 87 Tex. 19, 26 S. W. 985, 61 Am. & Eng. R. Cas. 158; Illinois Central R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618, 56 Am. & Eng. R. Cas. 157.

[8]Perkins v. St. Louis &c. R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426, and note. In Illinois Central R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618, it was said: "It is argued that this is the imposition of a burden upon one class of litigants in favor of another, and violates the constitutional rule which requires equality of right, privilege and exemption. These objections overlook the fact that this legislation is intended to compel railroad companies to fence in their tracks; and that the liability imposed is a consequence of failure of the offending company to adopt so necessary a means toward the protection of the property of others, and as a precaution against accidents resulting from the presence of animals on the road, thus endangering the safety of those controlling, and then using, so dangerous a mode of conveyance. If the state may, in the exercise of its police power, compel all railroad companies to fence in their tracks, it may enforce such policy by making the offending company liable to all who sustain injury by neglecting such precaution. . . . The view here taken of this act, its objects and scope, excludes the assumption that the statute is one merely imposing a burden upon one class of litigants not borne by all others. The subject of the legislation being within the police power of the state, it is not objectionable that additional or increased damages are imposed upon such terms and subject to such contingencies as the public interest shall demand." This and the preceding section are cited in Chicago &c. R. Co. v. Irons, 38 Ind. App. 196, 78 N. E. 207. See also note in 31 L. R. A. (N. S.) 863.

and direct consequence of the negligence of the railroad company.[9] On this question the supreme court of Iowa has said: "There was no error in an instruction given to the effect that a plaintiff might recover as damages, a reasonable compensation for time and labor necessarily expended in trying to save his crop from destruction. If he in the exercise of ordinary efforts to prevent the destruction of his crops because of defendant's fault, expended money or labor, he should be compensated therefor. This is one of the natural and ordinary consequences of the neglect of the appellant to comply with the statutory requirement to put in the cattle-guard, and if plaintiff is not allowed to recover for this, the law fails to compensate him fully for the injury inflicted, while it required at his hands the performance of this duty."[10]

§ 1738 (1220b). Statutory duty of railroad company to advertise or report fact of killing.—Some of the states have enacted statutes making it obligatory upon railroad companies to post or advertise the fact of killing stock, and these statutes subject railroad companies to penalties or render them liable in double damages for a failure to comply with this provision. In Arkansas—a state having a statute of this character—it has been held that the company was liable for double damages, altough the owner had actual notice of the killing of his stock. This decision, which is certainly unusual since the whole purpose of the advertisement seems to have been accomplished, is grounded by the court on the fact that the statute does not specially except from its provisions the case of the owner who has actual notice of the killing of his stock.[11] It is held, under the Georgia statute rendering railroad companies liable in double damages for the failure of overseers or track menders to report the killing of stock, that the penalty should be recovered in separate proceed-

[9]St. Louis &c. R. Co. v. Sharp, 27 Kans. 134; St. Louis &c. R. Co. v. Ritz, 33 Kans. 408, 6 Pac. 533; Missouri &c. R. Co. v. Ricketts, 45 Kans. 617, 26 Pac. 50.

[10]Smith v. Chicago &c. R. Co., 38 Iowa 518.

[11]Memphis &c. R. Co. v. Carlley, 39 Ark. 246. This view is still taken in a recent case. St. Louis &c. R. Co. v. Castleberry, 98 Ark. 441, 136 S. W. 284.

ings before a justice of the peace. The action is not subject to consolidation.[12]

§ 1739 (1220c). Release of damages.—A land-owner's release of "all damages and rights of damages, action and causes of action, which I might sustain or be entitled to by reason of anything connected with, or consequent upon, the location or construction of said work, or the repairing thereof when finally established or completed," has been held to relate solely to damages resulting from the location, construction, or repair of the road and not to refer to damages for the injury or destruction of cattle by the running of cars along the railroad.[13] And an attempted release by a land-owner of the duty to fence, does not affect the rights of a stranger thereto so as to prevent such stranger from recovering for injury to his stock by the railroad company on account of a defective fence.[14]

[12] Jones v. Americus &c. R. Co., 80 Ga. 803, 7 S. E. 117.

[13] Cleveland &c. R. Co. v. Crossley, 36 Ind. 370. See also Dibblee v. Astoria &c. R. Co., 57 Ore. 428, 111 Pac. 242.

[14] Rinehart v. Kansas City &c. R. Co., 204 Mo. 269, 102 S. W. 958.

CHAPTER LIII.

FIRES SET BY RAILWAY COMPANIES.

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§ 1745 (1221). **Common-law liability.**—The rule of the ancient common law governing the use of fire was very strict, going so

far as to make the person setting out fires absolutely liable to a third person, whose property was injured thereby.[1] This strict rule of the common law seems to have been enforced in England up to 1860, but in that year its harshness was modified, and the rule laid down in a railway fire case, in an opinion by Chief Justice Cockburn, that a railway company which has been authorized by legislative authority to operate a railway and incidentally to use fire in its locomotives, is not liable for damages caused by such fire unless the company has been guilty of negligence.[2] The strict and ancient rule of the common law has never been in force in this country, and the true rule of liability, independent of statutory enactments, is, that where the railway company is operating its railway by virtue of legislative authority and uses reasonable precaution in the selection and operation of its locomotives, it is not liable for fires resulting therefrom unless it be guilty of some act of negligence.[3] Negligence is the gist of the

[1] Turberville v. Stampe, 1 Ld. Raym. 264; Pantam v. Isham, 1 Salk. 19. See also St. Louis & S. F. R. Co. v. Matthews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611, reviewing English authorities, and giving history of the law and statutes upon the subject in this country.

[2] Vaughan v. Taff Vale R. Co., 5 H. & N. 679. In that case it was said: "Although it may be true that if a person keep an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument; yet, when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that, if damage results from the use of such thing, independently of negligence, the party using it is not responsible."

[3] Savannah &c. R. Co. v. Pelzer Co., 60 Fed. 39; Louisville &c. R. Co. v. Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. R. 66; Southern R. Co. v. Dickens, 161 Ala. 144, 49 So. 766; Flynn v. San Francisco &c. R. Co., 40 Cal. 14, 6 Am. Rep. 595, and note; Burroughs v. Housatonic &c. R. Co., 15 Conn. 124, 38 Am. Dec. 64, and note; Inman v. Elberton &c. R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. 232; Southern R. Co. v. Thompson, 129 Ga. 367, 58 S. E. 1044; Osburn v. Oregon R. &c. Co., 15 Idaho 478, 98 Pac. 627, 19 L. R. A. (N. S.) 742; Illinois &c. R. Co. v. Mills, 42 Ill. 467; Toledo &c. R. Co. v. Larmon, 67 Ill. 68; Indianapolis &c. R. Co. v. Paramore, 31 Ind.

action, and unless negligence be shown there can be no recovery.[4] The distinction must be borne in mind between those cases in which liability exists independent of negligence as a result of

143; Louisville &c. R. Co. v. Richardson, 66 Ind. 43, 32 Am. Rep. 94, and note; Gandy v. Chicago &c. R. Co., 30 Iowa 420, 6 Am. Rep. 682; Jackson v. Chicago &c. R. Co., 31 Iowa 176, 7 Am. Rep. 120; Kansas &c. R. Co. v. Butts, 7 Kans. 308; Leavenworth &c. R. Co. v. Cook, 18 Kans. 261; Atchison &c. R. Co. v. Riggs, 31 Kans. 622, 3 Pac. 305, 15 Am. & Eng. R. Cas. 531; Kentucky &c. R. Co. v. Barrow, 89 Ky. 638, 20 S. W. 165; Edrington v. Louisville &c. R. Co., 41 La. Ann. 96; Meyer v. Vicksburg &c. R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. R. 408; Chapman v. Atlantic &c. R. Co., 37 Maine 92; New England Box Co. v. New York &c. R. Co., 210 Mass. 465, 97 N. E. 140; Woodson v. Milwaukee &c. R. Co., 21 Minn. 60; Mississippi Home Ins. Co. v. Louisville &c. R. Co., 70 Miss. 119, 12 So. 156; Morris &c. R. Co. v. State, 36 N. J. L. 553; Sheldon v. Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155; Webb v. Rome &c. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; McCaig v. Erie Ry. Co., 8 Hun (N. Y.) 599; Deppe v. Atlantic &c. R. Co., 154 N. Car. 523, 70 S. E. 622; Huyett v. Philadelphia &c. R. Co., 23 Pa. St. 373; Frankford &c. R. Co. v. Philadelphia &c. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97; Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. R. 652; Brown v. Atlanta &c. R. Co., 19 S. Car. 39, 15 Am. & Eng. R. Cas. 479; White v. Chicago &c. R. Co., 1 S. Dak. 326, 47 N. W. 146, 9 L. R. A. 824, and note; Norfolk &c. R. Co. v. Ferguson, 79 Va. 241; Sheeler v. Chesapeake &c. R. Co., 81 Va. 188, 59 Am. Rep. 654; Bernard v. Richmond &c. R. Co., 85 Va. 792, 17 Am. St. 103; Jacobs v. Baltimore &c. R. Co., 68 W. Va. 618, 70 S. E. 369; McHugh v. Chicago &c. R. Co., 41 Wis. 75; Piggot v. Eastern &c. R. Co., 54 Eng. Com. Law, 228; McCready v. South &c. R. Co., 2 Strob. 356. In the case of Atchison &c. R. Co. v. Riggs, 31 Kans. 622, it was said: "As frequently decided in this court, railroad companies are not insurers against fire, but are liable only for negligence; and if they are guilty of no negligence then no action can be maintained against them for any accidental fire caused by the escape of fire from their engines."

[4] Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 16 L. R. A. 299, 27 Am. St. 652; Bernard v. Richmond &c. R. Co., 85 Va. 792, 8 S. E. 785, 17 Am. St. 103. See also Atlantic &c. R. Co. v. Benedict &c. Co., 52 Fla. 165, 42 So. 529; Wallace v. New York &c. R. Co., 208 Mass. 16, 94 N. E. 306, and cases cited in last preceding note. "But for some reason, perhaps because the common law in reference to the liability for damages caused by accidental fires was not considered ap-

statutory enactments and those in which the burden of proof is upon the defendant to disprove negligence. In those cases in which the burden of proof is upon the defendant the establishment of negligence is as essential to a right to recover as it is in cases where the burden is upon the plaintiff, and the mere fact that the burden of proof is changed must not in any way be regarded as rendering the establishment of negligence less necessary.[5] The mere fact that a locomotive emits more sparks when ascending a grade does not in itself amount to negligence on the part of the company.[6] But the company may be held guilty of negligence in unnecessarily running a heavy freight train up grade at twice the schedule rate of speed, when it is unusually dry and there is a liability to cause fire.[7] Where two fires, one of which was negligently set by the company, the other not, commingle and destroy property the company is liable.[8] What par-

plicable to our condition as a new country, the uniform current of decisions in America has been, in the absence of statute, to the effect that negligence or misconduct is the gist of the liability of railroad companies for injuries caused by fire escaping from their engines, though the authorities are in hopeless conflict as to which party must assume the burden of proof in such cases." Union &c. R. Co. v. DeBusk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. 221, 3 L. R. A. 350. As to presumption of negligence where fire is set by locomotive, see McCullen v. Chicago &c. R. Co., 101 Fed. 66, and note, 49 L. R. A. 642; Piggott v. Eastern Counties R. Co., 3 C. B. 229, 54 Eng. Com. L. 228.

[5] See Union &c. R. Co. v. DeBusk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. 221, 3 L. R. A. 350. There is some difference of opinion as to whether the statutory presumption of negligence from the setting of the fire requires a preponderance of evidence or merely counterbalancing evidence to rebut it, but the point we make here is that such a statute merely changing the burden of proof, or making the setting of the fire prima facie evidence of negligence, does not create a liability where it is rebutted, but, on the contrary, leaves negligence as the basis of the liability.

[6] Frier v. President &c. Co., 86 Hun 464, 33 N. Y. S. 886. Compare also Woodward v. Chicago &c. Ry. Co., 145 Fed. 577.

[7] Norfolk &c. R. Co. v. Fritts, 103 Va. 687, 49 S. E. 971, 68 L. R. A. 864, 106 Am. St. 911. Compare also Van Dyke v. Grand Trunk R. Co., 84 Vt. 212, 78 Atl. 958, Ann. Cas. 1913A, 640.

[8] McClellan v. St. Paul &c. R. Co., 58 Minn. 104, 59 N. W. 978. The court said: "If two fires have been set, the origin of one or both of which can be traced to the negli-

ticular acts or omissions will amount to negligence on the part of the company will more fully appear in the sections following.

§ 1746 (1222). Statutory liability.—In a great many of the states the common law liability of railway companies for damages on account of fires set by them has been changed by statute. Some of these statutes do not change the liability imposed by the common law but change only the manner of enforcing the liability, such as casting the burden of proof upon the defendant to show that the fire was not negligently started, or making proof of fire prima facie evidence of negligence.[9] But in addition to changing the common law method of enforcing the remedy there are a number of states which have statutes imposing an absolute liability upon railway companies for fires set by sparks from their locomotives.[10] And it has been held that a fire caused by burning grass and weeds off the right of way is within the scope of a statute making a railway company liable for fires set out in the operation of its road.[11] A statute imposing an absolute

gence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle. All the legal consequences of being joint wrong-doers must follow, one being that each is liable to the full extent of the damages growing out of the wrongful acts; or, as it is sometimes said, where the injury is the result of two concurring causes, one party is not exempt from full liability, although another party is equally culpable."

[9] The statutes to which we have just referred will be discussed in the section on burden of proof. See § 1766, post; also note in 5 L. R. A. (N. S.) 99.

[10] Denver &c. R. Co. v. Henderson, 10 Colo. 1, 13 Pac. 910; Union &c. R. Co. v. DeBusk, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. 221; Rodemacher v. Milwaukee &c. R. Co., 41 Iowa 297, 20 Am. St. 592; Pratt v. Atlantic &c. R. Co., 42 Maine 579; Ross v. Boston &c. R. Co., 6 Allen (Mass.) 87; Perley v. Eastern &c. R. Co., 98 Mass. 414, 96 Am. Dec. 645, and note; Folsom v. Illinois Cent. R. Co., 116 Miss. 561, 77 So. 604; Thorpe v. Rutland &c. R. Co., 27 Vt. 140, 62 Am. Dec. 625. See authorities cited in next section infra.

[11] Pratt v. Atlantic R. Co., 42 Maine 579; Hooksett v. Concord &c. R. Co., 38 N. H. 242. And in Missouri it is held that the statute should be liberally construed. Fritz v. St. Louis &c. R. Co., 243 Mo. 62, 148 S. W. 74. See also England v. Wabash R. Co., 114 Mo. App. 546, 90 S. W. 111; Missouri Pacific Co. v. Cady, 44 Kans. 633; Hart v.

liability upon a railway company for fires set out in the operation of its road applies to the destruction of personal property as well as to the destruction of or injury to real estate.[12]

§ 1747 (1223). **Constitutionality of statutes imposing liability.** —Statutes imposing absolute liability for damages, on account of fires set out by railway locomotives have been attacked in many of the states where they are in force on the ground that they are unconstitutional, but in all the decisions, where the question has directly arisen, so far as we have been able to discover, they have been held constitutional.[13] In Iowa such a

Western &c. R. Co., 13 Met. (Mass.) 99, 46 Am. Dec. 719, and note.

[12] Stearns v. Atlantic &c. R. Co., 46 Maine 95; Bean v. Atlantic &c. R. Co., 63 Maine 293; Thatcher v. Maine Central R. Co., 85 Maine 502, 27 Atl. 519; Bassett v. Conn. River &c. R. Co., 145 Mass. 129, 13 N. E. 370, 1 Am. St. 443, and note; Hooksett v. Concord &c. R. Co., 38 N. H. 244; Cleveland v. Grand Trunk &c. R. Co., 42 Vt. 449. But see Clark v. Kansas City &c. R. Co., 129 Fed. 341. A New Hampshire statute has been held not applicable to an engine operating in Canada which starts a fire in New Hampshire, although the railroad is also authorized to operate engines in such state. Connecticut Valley Lumber Co. v. Maine Cent. R. Co., 78 N. H. 553, 103 Atl. 263 (when a bridge spanning an international boundary was burned).

[13] See St. Louis &c. R. Co. v. Matthews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611; St. Louis &c. R. Co. v. Shore, 89 Ark. 418, 117 S. W. 515; Pittsburgh &c. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403 (citing text). And authorities cited in subsequent notes to this section. Undoubtedly the weight of authority is that such statutes are constitutional, but, on principle, there is some, although not perhaps sufficient reason for doubting the soundness of the accepted doctrine. As we have elsewhere said, the legislature, in authorizing the construction and operation of a railroad, authorizes the use of fire, and if there is a proper performance of the authorized act it is difficult to perceive how the proper performance of that act can be arbitrarily declared unlawful. Ante, § 1746, note. It is by no means easy to reconcile the doctrine of the cases which uphold the validity of such statutes with the long established principles affirmed in such cases as Clark v. Foot, 8 Johns. (N. Y.) 421; Macy v. Indianapolis, 17 Ind. 267; Radcliff's Ex. v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357, and note; Patridge v. Scott, 3 Mees. & W. 220; Acton v. Blundell, 12 Mees. & W. 324; Chadwick v. Tower, 6 Bing. (N. Cas.) 1; Governor &c. of Cast &c. Manu-

statute was attacked on the ground that it violated the obligations of a contract, the statute having been passed after the railway company was chartered, but the court held that the railroad company took its charter subject to such changes as might be made in the laws.[14] In many cases the reasoning is that, although, it would seem to be a harsh rule to impose an absolute liability upon a railway company for damages on account of fires set out by its locomotives when the company was guilty of no negligence whatever and was engaged in a lawful business duly authorized by the laws of the land yet it would be much harsher to compel a property-owner along the line of the road to suffer loss of his property by reason of a dangerous agency set in motion by a third person when such property-owner was entirely free from fault. The constitutionality of statutes imposing absolute liability has been upheld in several cases on the ground that where loss must fall upon one of two innocent persons that

facturers v. Meredith, 4 Term. R. 794; Vaughan v. Taff Vale &c. R. Co., 5 Hurl. & N. 678. It may also be said that if a railroad company may be made absolutely liable for loss caused by fire, so may all corporations and all individuals that use fire, and certainly the common law of America forbids any such conclusion, for it is only for negligence in using fire that there is a liability. 2 Thomp. Neg. (2nd ed.) § 2230. It is going pretty far to hold that if injury results from a fire, although attributable to pure accident, the corporation or person who uses the fire is liable. There is certainly some reason in the dissent of McIver, C. J., in McCandless v. Richmond &c. R. Co., 38 S. Car. 103, 18 L. R. A. 440, 61 Am. & Eng. R. Cas. 524. Chief Justice McIver makes the distinction, which we have elsewhere noted, between the power to regulate the public duties of a corporation and the power to abridge its private rights. But as far as the decisions of the state courts can settle a question this question is settled against the view taken in the dissenting opinion to which we have just referred, although the reasoning in many cases supports that view. New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629, 14 Am. St. 534; Oregon &c. R. Co., v. Smalley, 1 Wash. 206, 22 Am. St. 143; San Mateo v. Southern Pacific R. Co., 13 Fed. 722; Zeigler v. South &c. R. Co., 58 Ala. 594.

[14] Rodemacher v. Milwaukee &c. R. Co., 41 Iowa 297, 20 Am. Rep. 592. See also Lyman v. Boston &c. Corp., 4 Cush. (Mass.) 288; Matthews v. St. Louis &c. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161.

person causing the loss should bear the burden of it.[15] In Colorado it was held that such a statute was but a re-enactment of the ancient common law and did not violate any provisions of their constitution.[16] The first state to enact such a statute was Massa-

[15] In Rodemacher v. Milwaukee &c. R. Co. 41 Iowa 297, 20 Am. Rep. 592, it was said: "The statute simply recognizes the doctrine that the use of a locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks and cause destructive conflagrations; that when this occurs, loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury." To the same effect are the following cases: Matthews v. St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, affirmed in 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611. In Campbell v. Missouri &c. R. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. 530, the constitutionality of the Missouri statute was upheld, the court saying, inter alia: "It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things. The corporation is given the right, by the statute, to run its engine by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property along the line of the road, which is exposed to fire from those engines regardless of the care and vigilance he may exercise. Both parties are faultless, but, nevertheless, the property of the owner is consumed by fire from an engine. The property-owner has the right to own the property, and to claim protection under the law, equal at least to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties; which one of them shall suffer the loss, the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that every one should so use his own property as not to injure that of his neighbor."

[16] Union Pacific R. Co. v. DeBusk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. 221, 3 L. R. A. 350. In that case it was said: "Undoubtedly the enforcement of such acts will stimulate railroad companies to the greatest diligence to prevent fires from the operation of their roads. . . . A hundred years ago, when a man's house burned without any negligence on his part—a case of pure accident—and the fire

chusetts, which passed it in the year 1840. That statute has been declared constitutional by the Supreme Court of Massachusetts in a number of cases,[17] and in the many states in which the same or substantially the same, statute has been enacted, it has also been held constitutional.[18] In many of the states where these statutes are in force, provision is made whereby a railroad com-

caused the burning of his neighbor's house, it was deemed a harsh law that required him to make good his neighbor's loss as well as to bear his own; and so resort was had to act of parliament to remedy the supposed hardship. 14 Geo. III, chap. 78. The adoption of the statute in this and other states making railroad companies liable for damages by fire caused by the operation of their locomotive engines is but the re-enactment pro tanto of the ancient common law for the better protection of property exposed to such unusual dangers." Denver &c. R. Co. v. DeGraff, 2 Colo. App. 42, 29 Pac. 664; Union Pac. R. Co. v. Arthur, 2 Colo. App. 159, 29 Pac. 1031; Union Pacific R. Co. v. Tracy, 19 Colo. 331, 37 Pac. 537; Rowell v. Railroad, 57 N. H. 132, 24 Am. Rep. 59.

[17] Ross v. Boston &c. R. Co., 6 Allen (Mass.) 87; Ingersoll v. Stockbridge &c. R. Co., 8 Allen (Mass.) 438; Hart v. Western &c. R. Co., 13 Met. (Mass.) 99, 46 Am. Dec. 719, and note; Perley v. Eastern &c. R. Co., 98 Mass. 414, 96 Am. Dec. 645, and note; Sufford v. Boston &c. R. Co., 103 Mass. 583; Pierce v. Worcester &c. R. Co., 105 Mass. 199; Bassett v. Connecticut &c. R. Co., 145 Mass. 129, 1 Am. St. 443, and note; Trask v. Hartford &c. R. Co., 16 Gray (Mass.) 71.

[18] St. Louis &c. R. Co. v. Shore, 89 Ark. 418, 117 S. W. 515; Denver &c. R. Co. v. Henderson, 10 Colo. 1, 13 Pac. 910; Pittsburgh &c. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403 (citing text and holding that the statute applies to a railroad operated by a partnership); Brady v. Des Moines &c. R. Co., 57 Iowa 393; Gissell v. Housatonic &c. R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. 138; Regan v. New York &c. R. Co., 60 Conn. 124, 25 Am. St. 306; Martin v. New York &c. R. Co., 62 Conn. 331; Chapman v. Atlantic &c. R. Co., 37 Maine 92; Pratt v. Atlantic &c. R. Co., 42 Maine 579; Bean v. Atlantic &c. R. Co., 63 Maine 293; Lowney v. New Brunswick &c. R. Co., 78 Maine 479; Thatcher v. Maine Central R. Co., 85 Maine 502; Adams v. St. Louis &c. R. Co. (Mo.), 28 S. W. 496; Hooksett v. Concord Railroad, 38 N. H. 242; Rowell v. Railroad Co., 57 N. H. 132, 24 Am. Rep. 59; Smith v. Boston &c. R. Co., 63 N. H. 25; Thompson v. Richmond &c. R. Co., 24 S. Car. 366; McCandless v. Richmond &c. R. Co., 38 S. Car. 103, 18 L. R. A. 440; Hunter v. Columbia &c. R. Co., 41 S. Car. 86, 19 S. E. 197; Lipfield v. Charlotte &c. R. Co., 41 S. Car. 285, 19 S. E. 497; Thorpe v. Rutland &c. R. Co., 27 Vt. 140, 62 Am. Dec. 625.

pany has an insurable interest in property along its line which is likely to be burned and for which it would have to pay in case of destruction by fire.[19] A statute imposing absolute liability, however, will not be so construed as to confine the liability of the company to such property as it may obtain insurance upon.[20] Such statutes as those considered in this section have also been held constitutional by the Supreme Court of the United States, and the question may now be regarded as finally settled.[21]

§ 1748 (1224). Equipment—Spark arresters—Ash-pans—Fuel. —The operation of the modern railway necessarily requires the use of steam power and that power is furnished by means of locomotives in which steam is generated. In the generation of steam it is necessary to use fire, and it is from the use of this fire that nearly all the losses occasioned by railway fires result. In the construction of locomotives it is almost impossible, or at least it has been so up to the present time, to entirely prevent the escape of fire.[22] Hundreds of different devices and appliances have

[19] Simmonds v. New York &c. R. Co., 52 Conn. 264, 52 Am. Rep. 587; Grissell v. Housatonic &c. R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. 138, 32 Am. & Eng. R. Cas. 349; Thatcher v. Maine &c. R. Co., 85 Maine 502, 27 Atl. 519; Perley v. Eastern &c. R. Co., 98 Mass. 414, 96 Am. Dec. 645; Rowell v. Railroad, 57 N. H. 132, 24 Am. Rep. 59; Laird v. Railroad, 62 N. H. 254, 13 Am. St. 564.

[20] Campbell v. Missouri &c. R. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. 530, and note; Adams v. St. Louis &c. R. Co. (Mo.), 28 S. W. 496.

[21] St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611. See also Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282, 283, 41 L. ed. 677; Grand Trunk R. Co. v. Richardson, 91 U. S. 456, 472, 23 L. ed. 356; Chicago &c. R. Co. v. Kendall, 186 Fed. 139; Jensen v. South Dakota &c. R. Co., 25 S. Dak. 506, 127 N. W. 650, 35 L. R. A. (N. S.) 1015 and note Ann. Cas. 1912C, 700, and note (holding a statute imposing absolute liability for double damages constitutional). And the Indiana statute of 1911 has been held applicable and constitutional as to railroads constructed before the passage of the act. Pittsburgh &c. R. Co. v. Home Ins. Co., 183 Ind. 355, 108 N. E. 525.

[22] There are some authorities which indicate that with the present scientific appliances it is possible to altogether prevent the escape of sparks. If this were true then suffering the escape of sparks could seldom be otherwise than negligent, and liability would be

been invented and used but none has yet been invented which will completely render the use of fire harmless. In the selection and use of machinery and appliances to prevent the escape of fire, the duty resting upon railway companies is very clearly defined. In those states where there are statutes imposing an absolute liability on account of fires the use of a particular kind of appliance would seem to be immaterial,[23] but in those states in which no such statutes are in force, it is the duty of railway companies to adopt and use on their locomotives approved appliances in general use to prevent the escape of sparks and fire, and an omission to perform such duty generally constitutes negligence.[24]

practically absolute. We do not believe that the doctrine indicated by such authorities is warranted by the history of railway fire cases and mechanical appliances to prevent escape of sparks. See Longabaugh v. Virginia &c. R. Co., 9 Nev. 271; Small v. Chicago &c. Co., 50 Iowa 338, 6 Cent. L. J. 310; Case v. Northern &c. R. Co., 59 Barb. (N. Y.) 644; Toledo &c. R. Co. v. Parks, 163 Ind. 592, 72 N. E. 592; St. Louis &c. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27, 28; Menominee &c. Co. v. Milwaukee &c. R. Co., 91 Wis. 447, 65 N. W. 176, supporting the text.

[23] The statute fixes the liability independent of the kind of devices and appliances used. However, the use of the best appliances will prevent fires, and lessen the number of cases of absolute liability, and it is the policy of companies to make use of such appliances as far as possible.

[24] Eddy v. Lafayette, 49 Fed. 807; Burroughs v. Housatonic &c. R. Co., 15 Conn. 124, 38 Am. Dec. 64; Hannaker v. St. Paul &c. R. Co., 5 Dak. 1, 37 N. W. 717; Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33, and note; Bass v. Chicago &c. R. Co., 28 Ill. 9; St. Louis &c. R. Co. v. Gilham, 39 Ill. 455; Toledo &c. R. Co. v. Pindar, 53 Ill. 447; Toledo &c. R. Co. v. Corn, 71 Ill. 493; Indiana &c. R. Co. v. Paramore, 31 Ind. 143; Pittsburgh &c. R. Co. v. Nelson, 51 Ind. 150; Indianapolis &c. R. Co. v. Clem, 51 Ind. 591; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Jackson v. Chicago &c. R. Co., 31 Iowa 176; Metzgar v. Chicago &c. R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. 224; Chesapeake &c. R. Co. v. Richardson, 30 Ky. L. 786, 99 S. W. 642; Illinois Cent. R. Co. v. Scheible, 162 Ky. 469, 172 S. W. 910; Meyer v. Vicksburg &c. R. Co., 41 La. Ann. 639, 6 So. 218; Wallace v. New York &c. R. Co., 208 Mass. 16, 94 N. E. 306; Fitch v. Pacific &c. R. Co., 45 Mo. 322; Kenney v. Hannibal &c. R. Co., 63 Mo. 99; Diamond v. Northern &c. R. Co., 6 Mont. 580, 13 Pac. 367, 29 Am. & Eng. R. Cas. 117; Burlington &c. R. Co. v. Westover, 4 Nebr. 268; Longabaugh v. Virginia City &c. R. Co., 9 Nev. 271; Watt v. Nevada

But in such cases if it appear that the company had in use on the locomotive which set the fire appliances and machinery then in general use for the prevention of the escape of the sparks and coals of fire, and it is not shown to have been negligent in other particulars, there is no liability.[25] A railway company is not

&c. R. Co., 23 Nev. 154, 44 Pac. 423; Anderson v. Cape Fear &c. Co., 64 N. Car. 399; Hoff v. West Jersey &c. R. Co., 45 N. J. L. 201, 13 Am. & Eng. R. Cas. 476; Erie &c. R. Co. v. Decker, 78 Pa. St. 293; Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299; Smith v. Old Colony &c. R. Co., 10 R. I. 22; White v. Chicago &c. R. Co., 1 S. Dak. 326, 47 N. W. 146, 9 L. R. A. 824 and note, 45 Am. & Eng. R. Cas. 565; Gulf &c. R. Co. v. Reagan (Tex.), 32 S. W. 846; Texas &c. Co. v. Levi, 59 Tex. 674; Gulf &c. R. Co. v. Benson, 69 Tex. 407; Rost v. Missouri &c. R. Co., 76 Tex. 168, 12 S. W. 1131; Missouri &c. R. Co. v. Bartlett, 81 Tex. 42, 16 S. W. 638; Missouri &c. R. Co. v. Neiser, 54 Tex. Civ. App. 460, 118 S. W. 166; Ide v. Boston &c. R. Co., 83 Vt. 66, 74 Atl. 401; Brighthope v. Rogers, 76 Va. 443, 8 Am. & Eng. R. Cas. 710; Snyder v. Pittsburgh &c. R. Co., 11 W. Va. 14; Spaulding v. Chicago &c. R. Co., 30 Wis. 110, 11 Am. Rep. 550. See Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833, 836; Paris &c. R. Co. v. Nesbitt, 11 Tex. Civ. App. 608, 33 S. W. 280. Perhaps it would be better to say that it is the duty of the company to use reasonable care and diligence to do so. La-Salle v. Central R. Co., 73 Ore. 203, 144 Pac. 414; Southern Ry. Co. v. Smith, 21 Ga. App. 814, 95 S. E. 328 (must use ordinary care and diligence to supply its engines with best practicable appliances in general use and reasonable care and skill in keeping them in good condition).

[25]Inman v. Elberton &c. R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. 232; New York &c. R. Co. v. Baltz, 141 Ind. 661, 36 N. E. 414, 38 N. E. 402; Toledo &c. R. Co. v. Parks, 163 Ind. 592, 72 N. E. 592; Chicago &c. R. Co. v. Smith, 11 Bradw. (Ill. App.) 348; Greenfield v. Chicago &c. R. Co., 83 Iowa 270, 49 N. W. 95; Union Pac. R. Co. v. Motzner, 2 Kans. App. 342, 43 Pac. 785; Burlington &c. R. Co. v. Westover, 4 Nebr. 268; Bevier v. Delaware &c. R. Co., 13 Hun (N. Y.) 254; Frace v. New York &c. R. Co., 143 N. Y. 182, 38 N. E. 102; Brown v. Atlanta &c. R. Co., 19 S. Car. 39, 13 Am. & Eng. R. Cas. 479; Missouri &c. R. Co. v. Platzer, 73 Tex. 117, 11 S. W. 160, 15 Am. St. 771; St. Louis &c. R. Co. v. Lindley (Tex. Civ. App.), 29 S. W. 1101; Vaughan v. Taff Vale &c. R. Co., 5 H. & N. 679. See also Hagan v. Railroad Co., 86 Mich. 615, 49 N. W. 509; Lesser Cot. Co. v. St. Louis &c. R. Co., 114 Fed. 133; Northern Pac. Ry. Co. v. Mentzer, 214 Fed. 10; St. Louis &c. R. Co. v. Coombs, 76 Ark. 132, 88 S. W. 595; Bottoms v. Seaboard Air Line R. Co., 136 N. Car. 472, 49 S. E. 348; Williams v. Atlantic &c. R. Co., 140 N. Car. 623,

bound to adopt any particular kind of appliances or machinery for the prevention of fires, and it cannot be held guilty of negligence for failing to adopt a different kind or pattern of appliances from that which it has adopted,[26] if it has exercised reasonable care in the selection and the latter is approved and in general

53 S. E. 448; Anderson v. Oregon R. Co., 45 Ore. 211, 77 Pac. 119; LaSalle v. Central R. Co., 73 Ore. 203, 144 Pac. 414; Missouri &c. Ry. Co. v. Hopkins (Tex. Civ. App.), 80 S. W. 414; McCullough v. Oregon &c. R. Co., 44 Utah 337, 140 Pac. 767; Atlantic Coast Line R. Co. v. Watkins, 104 Va. 154, 51 S. E. 172. In a case in Pennsylvania it was held that where a railway company had used every precaution in the selection and use of the best appliances for the prevention of fires, it would not be liable, though it fire "every rod of country through which it run." Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341. In the case of Texas &c. R. Co. v. Levi, 59 Tex. 674, 13 Am. & Eng. R. Cas. 464, it was said: "The evidence tends to show that, by the use of the most improved spark-arresters, it is impracticable to prevent entirely the escape of sparks from locomotives, unless the draught is so closed by the spark-arrester as to prevent the generation of steam. If such be the case, a railway company is authorized to operate its engines with such protection against injury to others by fire as can be given by the use of a high degree of care in the selection and use of such appliances as are approved by prudent and skillful persons, generally engaged in such business, and are found to be best adapted to prevent the escape of fire by which others may be injured, even though as thus operated there may be danger of injury to others from fire escaping from locomotives. The business being authorized by law, no liability can be incurred from its exercise, unless there be a want of care in its prosecution, even though it be attended with some risks of injury to others."

[26]The rule is thus stated in the case of Menominee &c. Co. v. Milwaukee &c. R. Co., 91 Wis. 447, 65 N. W. 176: "Considerable evidence was directed at the trial to the relative merits of short-front engines, as the one in question, and extension-front engines, in respect to their ability to prevent the escape of sparks and cinders. The evidence does not tend to show any decided superiority of one over the other, but that both kinds were of approved construction, and in very general use, with others; and the court ruled that, unless it was a well-established fact that a certain plan or device was superior to all others, no company could be held negligent in not using that device, although the court or jury might be convinced that it was the best device, and that it could not be found that the defendant was guilty of negligence in using a short instead of an extension-front engine. As applied to the evidence the ruling was clearly correct. Frace v. New York &c. R. Co., 143 N. Y. 182, 38 N. E. 102; Flinn v. New York R. Co., 142 N. Y. 11, 36 N. E. 1046."

use. This seems to us to be the true rule, for if the company has taken every precaution and secured approved machinery in general use, it has done all that lies in its power to do, consistent with the operation of its road, and there ought, on principle, to be no liability for a purely accidental fire.[27] Even where such machinery and appliances as are in general use are adopted, however, it is still incumbent upon the company to use care to see that they are kept in proper repair and working order and if it is negligent in that respect and loss occurs on account thereof the company will be liable.[28] Some of the authorities hold that it is the duty of the company to make regular and careful inspections of its locomotives to see that the spark arresters and

[27]Louisville &c. R. Co. v. Reese, 85 Ala. 497, 7 Am. St. 66. In the course of the opinion in the case just cited the court said: "Railroad companies, being authorized to employ the powerful and dangerous agency of steam, are required by law to use due and reasonable care to prevent injury to the property of others; as has often been said, a high degree of care. Reasonable care, however, does not require the adoption of every new invention or contrivance which science may or can suggest, as to the utility of which men equally skilled may differ. They fulfill the measure of their duty in this respect by adopting such appliances and contrivances as are in practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty they are not liable for accidental injuries caused by the escape of fire from their engines." See Jennings v. Penna. Co., 93 Pa. St. 337; St. Louis &c. Ry. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27, 28; St. Louis &c. Ry. Co. v. Thompson &c. Co., 79 Ark. 12, 94 S. W. 707. In the recent case of St. Louis &c. R. Co. v. Hoover, 3 Kans. App. 577, 43 Pac. 854, the court said: "A railway company in the operation of its railway, with locomotive engines, propelled by steam, generated by fire, and drawing its trains over its road in the usual and ordinary manner, is not liable for damages done by the mere unavoidable accidental escape of fire from the engine."

[28]Johnson v. Chicago &c. R. Co., 77 Iowa 666, 42 N. W. 512; Chicago &c. Co. v. Quaintance, 58 Ill. 389; Toledo &c. R. Co. v. Larmon, 67 Ill. 68; Pittsburgh &c. R. Co. v. Campbell, 86 Ill. 443. See § 1749, infra; also Cleveland &c. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448; Illinois Cent. R. Co. v. Scheible, 162 Ky. 469, 172 S. W. 910; Louisville &c. R. Co. v. Guttman, 148 Ky. 235, 146 S. W. 731. The company may be negligent by having an insufficient style of spark arrester, by having its spark arrester in a state of disrepair or by the negligent operation of the engine. Florence v. Delaware &c. R. Co., 258 Pa. St. 456, 102 Atl. 133.

ash-pans are in proper repair.[29] In the selection and adoption of appliances and machinery railway companies are only bound in general to use care to select such as have stood practical tests and are in general use. They are not required to adopt every new invention even though it has the highest scientific approval,[30] nor are they bound at once to discard all their machinery and appliances and adopt new and better ones which are coming into general use.[31] And it has been held in a recent case that it is not a question for a jury to determine whether or not a railway company was guilty of negligence in adopting a particular kind of spark arrester on its locomotives.[32] Railway com-

[29]See Menominee &c. Co. v. Milwaukee &c. R. Co., 91 Wis. 447, 65 N. W. 176; Cleveland &c. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448. As to evidence on this subject, see Woodward v. Chicago &c. R. Co., 145 Fed. 577.

[30]Louisville &c. R. Co. v. Reese, 85 Ala. 497, 7 Am. St. 66; Tombigbee Val. R. Co. v. Howard, 185 Ala. 612, 64 So. 338; Jefferis v. Philadelphia &c. R. Co., 3 Houst. (Del.) 447; Cleveland &c. R. Co. v. Hayes (Ind.), 79 N. E. 448; Hagan v. Chicago &c. R. Co., 86 Mich. 615; Hoff v. West Jersey &c. R. Co., 45 N. J. L. 201; Steinweg v. Erie R. Co., 43 N. Y. 123, 3 Am. Rep. 673; Crist v. Erie &c. R. Co., 58 N. Y. 638; Flinn v. New York &c. R. Co., 142 N. Y. 11, 36 N. E. 1046; Lackawanna &c. R. Co. v. Doak, 52 Pa. St. 379, 91 Am. Dec. 166; Frankford &c. R. Co. v. Philadelphia &c. R. Co., 54 Pa. St. 345, 93 Am. Dec. 708.

[31]Flinn v. New York &c. R. Co., 142 N. Y. 11, 36 N. E. 1046. In that case it was said: "A railroad company is not bound to at once introduce every new appliance which is claimed to make its engines safer or more useful. It must have time for trial and experiment. It can not arrest all of its engines at once to make changes, but must have the time requisite, taking into consideration expense, convenience, the operation of its road, and all the problems connected with such a change." See also St. Louis &c. Ry. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27, 28 (citing text); Rosen v. Railroad Co., 83 Fed. 300; St. Louis &c. Ry. Co. v. Thompson-Hilley Co., 79 Ark. 12, 94 S. W. 707. In Vallester v. Atlantic City R. Co., 72 N. J. L. 334, 62 Atl. 993, it is held that the company is not liable merely because the kind of spark arrester used on the locomotive in question might not be so good as a different kind used on some of its other locomotives where, after the exercise of due care and skill it had adopted both and believed both to be equally good.

[32]Frace v. New York &c. R. Co., 143 N. Y. 182, 38 N. E. 102. Where the statute prescribes the kind, it is held that there is no negligence in using that kind. West Jersey R. Co. v. Abbott, 60 N. J. L. 150, 37 Atl. 1104.

panies are not ordinarily bound to use any particular kind of fuel in their locomotives or to select a kind which is least likely to emit sparks or scatter fire,[33] but it has been held that a company was guilty of negligence in using wood for fuel in a locomotive constructed for burning coal.[34]

§ 1749 (1225). **Management of engines.**—In the preceding section we discussed the duty of railway companies in regard to the adoption of machinery and appliances for the prevention of the escape of fires from locomotives. Here we propose to discuss the management of such locomotives after proper appliances have been adopted. While it is true that a railway company may generally escape liability in those states where an absolute liability is not imposed by statute, by showing that it had equipped its locomotives with the appliances and contrivances in general use, that rule is to be taken with some qualification, for there are cases in which the companies will be liable notwithstanding the use of proper machinery and where no question is made as to the kind of machinery used. In addition to exercising care and precaution in selecting and keeping in repair the machinery and appliances the company must not be guilty of

[33]Collins v. New York &c. R. Co., 5 Hun (N. Y.) 499; New Brunswick &c. R. Co. v. Robinson, 11 Sup. Ct. of Can. 689, 29 Am. & Eng. R. Cas. 132; Lackawanna &c. R. Co. v. Doak, 52 Pa. St. 379, 91 Am. Dec. 166; Baltimore &c. R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72. "While any ordinary fuel may be used in a locomotive engine for the generation of steam, the exercise of this right is subject to the restriction that the latest improvement in its management in general use shall be applied to it." Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. 652, 48 Am. & Eng. R. Cas. 16. See Glanz v. Chicago &c. Ry. Co., 119 Iowa 611, 93 N. W. 575.

[34]Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Chicago &c. R. Co. v. Ostrander, 116 Ind. 266, 15 N. E. 227, 38 Am. & Eng. R. Cas. 346; St. Joseph &c. R. Co. v. Chase, 11 Kans. 47. And in Texas it seems to be considered that it is the duty of a company to use oil instead of coal where such oil is easily accessible. Loeb Compress Co. v. Bromberg (Tex. Civ. App.), 140 S. W. 475. In an action against a railway company for damages on account of fire alleged to have been negligently set by the company's locomotives it is improper to permit a witness to state as an inference that he knew that wood must have been used in the engines. Ireland v. Cincinnati &c. R. Co., 79 Mich. 163, 44 N. W. 426.

negligence in operating that machinery, for if it so negligently operates machinery that fires result, it will be liable. Such liability has been declared and enforced in a number of cases. Thus it has been held or found to be negligent to use a greater amount of steam than was reasonably necessary, so as to cause an unusually large number of sparks to be emitted[35] in attempting to draw too heavy a load up a grade with a single engine, so that as a consequence a heavy shower of sparks was emitted;[36] to overload a locomotive[37] or to run at an unlawful speed;[38] in running with the dampers of the fire box open so that coals of fire may escape;[39] to switch off a burning car from a train and leave it in such a position that plaintiff's property was fired and destroyed;[40] and in burning wood in a coal burning engine.[41] But it has been held not to be negligence to run a train up a grade without breaking into sections contrary to the usual custom, where it appears that the engine was properly and carefully managed and operated.[42] And a company is not bound to shut off the steam and

[35] Great Western &c. R. Co. v. Haworth, 39 Ill. 346. Compare Central City &c. Co. v. Illinois Cent. R. Co., 156 Ky. 759, 162 S. W. 81.

[36] North Shore &c. R. Co. v. McWillie, 17 Can. Sup. Ct. 511.

[37] Toledo &c. R. Co. v. Pindar, 53 Ill. 447, 5 Am. Rep. 57.

[38] Martin v. Western &c. R. Co., 23 Wis. 437, 99 Am. Dec. 189. See also Norfolk &c. R. Co. v. Fritts, 103 Va. 687, 49 S. E. 971, 68 L. R. A. 864, 106 Am. St. 911. It must appear, however, that the unlawful speed was the proximate cause of the injury. Bennett v. Missouri &c. R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834; Clisby v. Mobile &c. R. Co., 78 Miss. 937, 29 So. 913.

[39] Cantlon v. Eastern &c. R. Co., 45 Minn. 481, 48 N. W. 22.

[40] St. Louis &c. R Co. v. Hecht, 38 Ark. 357, 9 Am. & Eng. R. Cas. 222.

[41] See next section, supra. Among other decisions supporting the general rule as to liability where there is negligence in the management of the engine, see Norfolk &c. R. Co. v. Perrow, 101 Va. 345, 43 S. E. 614; McLaughlin v. Baltimore &c. R. Co., 75 W. Va. 287, 83 S. E. 999 (citing text on the general proposition to this effect); Norris v. Baltimore &c. R. Co., 109 Fed. 591; Illinois &c. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Toledo &c. R. Co. v. Fenstermaker, 163 Ind. 534, 72 N. E. 561; Lake Erie &c. R. Co. v. McFall, 165 Ind. 574, 76 N. E. 400; Glanz v. Chicago &c. R. Co., 119 Iowa 611, 93 N. W. 575; Southern R. Co. v. McGeoughey, 31 Ky. L. 291, 102 S. W. 270.

[42] Abbott v. Gore, 74 Wis. 509, 43 N. W. 365, 40 Am. & Eng. R. Cas. 244.

allow a locomotive to roll slowly by buildings which may be set on fire.[43] And it is not negligence per se to run an ordinary freight train at the rate of forty miles an hour.[44] Nor is it negligence to put on steam when the locomotive is standing near the plaintiff's property. Putting an unusually large amount of coal in the fire-box of a locomotive is not necessarily negligence.[45] The question as to whether or not a company was guilty of negligence in managing and operating its locomotives is, as a rule, but not always, a question of fact to be determined by a jury.[46]

§ 1750 (1226). Duty as to right of way—Combustible material. —As it is impossible to entirely prevent the escape of sparks and coals of fire from railway locomotives, and as the sparks and coals that do escape usually fall on the right of way, it is held that it is the duty of a railway company to keep its tracks and right of way free from dry grass, weeds and other combustible material which are liable to be ignited by sparks and coals of fire and thus communicate fire to the premises of others, and if it fails to discharge this duty and permits the fire to escape to adjoining premises, it may be found guilty of negligence.[47] The removal

[43] Mississippi &c. Co. v. Louisville &c. R. Co., 70 Miss. 119, 12 So. 156, 54 Am. & Eng. R. Cas. 512.

[44] Hagen v. Chicago &c. R. Co., 86 Mich. 615, 49 Am. & Eng. R. Cas. 670; Michigan &c. R. Co. v. Anderson, 20 Mich. 244. See also Woodward v. Chicago &c. R. Co., 145 Fed. 577. But running at such a speed as violates an ordinance is negligence per se. Salley Oil Mill v. Southern Ry. &c. Div., 108 S. Car. 131, 93 S. E. 336.

[45] McGibbon v. Northern Pacific R. Co., 11 Ont. Rep. 307, 25 Am. & Eng. R. Cas. 486.

[46] Coffman v. Louisville &c. R. Co., 184 Ala. 474, 63 So. 527; Budd v. Ann Arbor &c. R. Co., 200 Mich. 250, 166 N. W. 927; Philadelphia &c. R. Co. v. Yerger, 73 Pa. St. 121; Frey v. Pennsylvania R. Co., 244 Pa. 443, 90 Atl. 798; Northern Pac. Ry. Co. v. Mentzer, 214 Fed. 10. For evidence held insufficient to sustain a verdict for the plaintiff, see Cyle v. Denver &c. R. Co., 37 Colo. 298, 86 Pac. 1010.

[47] Southern R. Co. v. Dickens, 161 Ala. 144, 49 So. 766; McMahon v. Hetchhetchy &c. R. Co., 2 Cal. App. 400, 84 Pac. 350; Atlantic &c. R. Co. v. Davis, 5 Ga. App. 214, 62 S. E. 1022; Toledo &c. R. Co. v. Wand, 48 Ind. 476; Baltimore &c. R. Co. v. O'Brien, 38 Ind. App. 143, 77 N. E. 1131; Walker v. Chicago &c. R. Co., 76 Kans. 32, 90 Pac. 772, 12 L. R. A. (N. S.) 624, 123 Am. St. 119; Ohio &c. Ry. Co. v. Whitt, 180

of dry and combustible material being quite as effectual in preventing fires as the adoption of improved machinery and appliances it would seem that companies should be held equally responsible for a negligent failure to perform one of these duties as the other.[48] In some cases it is held that permitting an ac-

Ky. 418, 202 S. W. 899; North Fork Lumber Co. v. Southern R. Co., 143 N. Car. 324, 55 S. E. 781; Atlantic Coast Line R. Co. v. Watkins, 104 Va. 154, 51 S. E. 172. The burden of proving negligence in the accumulation of combustible matter on the right of way is upon the plaintiff where that is the only negligence alleged. Bond v. Carolina &c. Ry., 175 N. Car. 606, 96 S. E. 22.

[48] Henry v. Southern &c. R. Co., 50 Cal. 176; Steele v. Pacific &c. R. Co., 74 Cal. 323, 15 Pac. 851, 32 Am. & Eng. R. Cas. 333; St. Johns &c. R. Co. v. Ransom, 33 Fla. 406, 14 So. 892; Chicago &c. R. Co. v. Goyette, 133 Ill. 21; Indiana &c. R. Co. v. Overman, 110 Ind. 538, 10 N. E. 575, 29 Am. & Eng. R. Cas. 161; Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534; Kesee v. Chicago &c. R. Co., 30 Iowa 78, 6 Am. Rep. 643; West v. Chicago &c. R. Co., 77 Iowa 654, 35 N. W. 479, 32 Am. & Eng. R. Cas. 339; Atchison &c. R. Co. v. Stanford, 12 Kans. 354; Carter v. Maryland &c. R. Co., 112 Md. 599, 77 Atl. 301; Jones v. Michigan &c. R. Co., 59 Mich. 437, 25 Am. & Eng. R. Cas. 482; Bowen v. St. Paul &c. R. Co., 36 Minn. 522, 32 Am. & Eng. R. Cas. 370; Longabaugh v. Virginia City &c. R. Co., 9 Nev. 271; Watt v. Nevada &c. R. Co., 23 Nev. 154, 44 Pac. 423; Troxler v. Richmond &c. R. Co., 74 N. Car. 377; Black v. Aberdeen &c. R. Co., 115 N. Car. 667, 20 S. E. 713, 20 S. E. 909; Thomas v. Hammer Lumber Co, 153 N. Car. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584; Gram v. Northern Pacific R. Co., 1 N. Dak. 252, 46 N. W. 972; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Martin v. New York &c. R. Co., 62 Hun (N. Y.) 181; Webb v. Rome &c. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; O'Neill v. New York &c. Co., 115 N. Y. 579, 29 N. E. 217, 5 L. R. A. 591, and note; 40 Am. & Eng. R. Cas. 240; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Hawley v. Sumpter Val. R. Co., 49 Ore. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526; Rost v. Missouri &c. R. Co., 76 Tex. 168, 12 S. W. 1131; Gulf &c. R. Co. v. Rowland (Tex. Civ. App.), 23 S. W. 421; Texas &c. R. Co. v. Gains (Tex. Civ. App.), 26 S. W. 433; Gulf &c. R. Co. v. Reagan (Tex. Civ. App.), 32 S. W. 846; Brighthope &c. R. Co. v. Rogers, 76 Va. 443, 8 Am. & Eng. R. Cas. 710; Fireman's Fund &c. Co. v. Northern Pac. R. Co., 46 Wash. 635, 91 Pac. 13; Kellogg v. Chicago &c. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Gibbon v. Wisconsin &c. R. Co., 66 Wis. 161, 28 N. W. 170; Abbott v. Gore, 74 Wis. 509, 43 N. W. 365, 40 Am. & Eng. R. Cas. 244; More v. Chicago &c. R. Co., 78 Wis. 120, 47

cumulation of dry and combustible material to remain on the track is negligence per se,[49] but the decided weight of authority is that it is a circumstance only from which negligence may be found,[50] and not necessarily negligence in itself or regardless

N. W. 273; Flannigan v. Canadian Pacific R. Co., 17 Ont. R. 6, 38 Am. & Eng. R. Cas. 362; Smith v. London &c. R. Co., L. R. 5 C. P. 98. The fact that a railway runs through a prairie country where only wild grass grows on the right of way and the lands adjacent thereto does not excuse the company from clearing its right of way of inflammable material. Sibilrud v. Minneapolis &c. R. Co., 29 Minn. 58, 7 Am. & Eng. R. Cas. 99.

[49]Diamond v. Northern Pacific R. Co., 6 Mont. 580, 29 Am. & Eng. R. Cas. 117. See also Thomas v. Hammer Lumber Co., 153 N. Car. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584. And compare Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 N. E. 362. In the case of Richmond &c. R. Co. v. Medley, 75 Va. 499, 40 Am. Rep. 734, 7 Am. & Eng. R. Cas. 493, the court said: "A railway company may be supplied with the best engines and most improved apparatus for preventing the emission of sparks, operated by the most skillful engineers. It may do all that science and skill can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its tracks, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most approved and best constructed machinery. Many of the authorities hold that to allow the accumulation of such matter is per se negligence, which will render the company responsible if loss ensues. Others hold, and perhaps with better reason, that it is a question for the jury to determine upon all the circumstances of the case."

[50]Eddy v. Lafayette, 49 Fed. 807; Louisville &c. R. Co. v. Stevens, 87 Ind. 198; St. Louis &c. R. Co. v. Richardson, 47 Kans. 517, 28 Pac. 183; Cantlon v. Eastern &c. R. Co., 45 Minn. 481; Burlington &c. R. Co. v. Westover, 4 Nebr. 268; Gulf &c. R. Co. v. Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. 74, 32 Am. & Eng. R. Cas. 330; Union &c. R. Co. v. Gilland, 4 Wyo. 953, 34 Pac. 953. In the case of San Antonio &c. R. Co. v. Long, 4 Tex. Civ. App. 497, 23 S. W. 499, it was held that it was not negligence, as matter of law, to permit weeds and grass to grow on a railroad right of way. See also Gram v. North-

of circumstances. The latter rule is, we think, the true one. In a number of the states statutes are in force requiring railway companies to clear their right of way of combustible material at certain stated periods.[51] A mere failure to comply with such a statute would seem to be negligence in itself.[52] In cases where fires start in combustible material permitted to accumulate on the track and right of way, the question of negligence in setting the fire is immaterial as affecting the liability, for the right to recover is based on negligence in permitting the dry and combustible materials to accumulate and the fire to escape and the establishment of negligence in that respect is sufficient to justify a recovery.[53] And evidence as to the kind of a spark arrester

ern Pac. R. Co., 1 N. Dak. 252, 46 N. W. 972; Bass v. Chicago &c. R. Co., 28 Ill. 9, 81 Am. Dec. 254; Taylor v. Pennsylvania &c. R. Co., 174 Pa. St. 171, 34 Atl. 457. The length of time, amount and kind of material, condition of the weather, and various other circumstances of the particular case will usually have to be considered and the question as to whether the company has been negligent and whether allowing the material upon the right of way is a proximate cause, must, both upon principle and authority, usually be a question for the jury.

[51]Diamond v. Northern Pacific R. Co., 6 Mont. 580, 13 Pac. 367, 29 Am. & Eng. R. Cas. 117; Spencer v. Montana &c. R. Co., 11 Mont. 164, 27 Pac. 681; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660; Higgins v. Long Island R. Co., 129 App. Div. 415, 114 N. Y. S. 262; Union &c. R. Co. v. Gilland, 4 Wyo. 953, 34 Pac. 953. See also People v. Long Island R. Co., 194 N. Y. 130, 87 N. E. 79.

[52]Diamond v. Northern Pacific R. Co., 6 Mont. 580, 13 Pac. 367, 29 Am. & Eng. R. Cas. 117. Compare Chicago &c. R. Co. v. Goyette, 133 Ill. 21, 24 N. E. 549, 43 Am. & Eng. R. Cas. 36; Texas &c. R. Co. v. Medaris, 64 Tex. 92.

[53]Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111; Brinkman v. Bender, 92 Ind. 234; Wabash &c. R. Co. v. Johnson, 96 Ind. 40; Indiana &c. R. Co. v. Overman, 110 Ind. 538, 10 N. E. 575, 29 Am. & Eng. R. Cas. 161; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750 and note 22 Am. St. 582; Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534; Knott v. Cape Fear &c. R. Co., 142 N. Car. 238, 55 S. E. 150; Hawley v. Sumpter Val. R. Co., 49 Ore. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526. See also Williams v. Atlantic Coast Line R. Co., 140 N. Car. 623, 53 S. E. 448; Richmond &c. R. Co. v. Medley, 75 Va. 499, 40 Am. Rep. 734; New York &c. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; ante, n 47. And it has been so held even where the

or ash pans in use would seem to be incompetent where the action is based solely on negligence in permitting an accumulation of dry and combustible material,[54] but such evidence may be competent where the question is whether the locomotive caused the fire. The company is liable if it negligently permits combustibles to accumulate and the fire to escape no matter how perfect its spark arresters may be,[55] and ordinarily it is its duty in clearing off the right of way to do so for the entire width.[56] It has also been held that it is not sufficient for a company to cut grass or weeds on its right of way, and that they must be removed or destroyed.[57] Whether or not a company is guilty of negligence in suffering combustible material to accumulate on its right of way is usually a question of fact for the jury.[58]

§ 1751 (1227). Fires set to burn off right of way.—It frequently becomes necessary for a railway company, in order to effectively remove rubbish and inflammable material from its right of way, to resort to the use of fire. In such cases where the fire is set by voluntary act of the company, for a lawful purpose, there

train is operated by an independent contractor. Thomas v. Hammer Lumber Co., 153 N. Car. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584. See also St. Louis &c. R. Co. v. Madden, 77 Kans. 80, 93 Pac. 586, 17 L. R. A. (N. S.) 788.

[54] Indiana &c. R. Co. v. Overman, 110 Ind. 538, 10 N. E. 575.

[55] Galveston &c. R. Co. v. Polk (Tex.), 28 S. W. 353, ante, n. 47, 53. See also Missouri Pacific R. Co. v. Platzer, 73 Tex. 117, 11 S. W. 160, 15 Am. St. 771; Watt v. Nevada Cent. R. Co., 23 Nev. 154, 62 Am. St. 772, and note.

[56] Blue v. Aberdeen &c. R. Co., 117 N. Car. 644, 23 S. E. 275.

[57] Smith v. London &c. R. Co., L. R. 5 C. P. 98. But whether this has been sufficiently done and whether there is negligence under all the circumstances must usually be a question for the jury.

[58] Perry v. Southern Pac. R. Co., 50 Cal. 578; Bass v. Chicago &c. R. Co., 28 Ill. 9, 81 Am. Dec. 254, and note; Illinois &c. R. Co. v. Frazier, 47 Ill. 505; Rockford &c. R. Co. v. Rogers, 62 Ill. 346; White v. Missouri Pacific R. Co., 31 Kans. 280, 1 Pac. 611; Jones v. Michigan &c. R. Co., 59 Mich. 437; Van Ostrand v. Wallkill &c. R. Co., 19 N. Y. S. 621; Texas &c. R. Co. v. Medaris, 64 Tex. 92; Wines v. Rio Grande &c. R. Co., 9 Utah 228, 33 Pac. 1042; Richmond &c. R. Co. v. Medley, 75 Va. 49, 40 Am. Rep. 734; Gibbons v. Wisconsin &c. R. Co., 58 Wis. 335.

can ordinarily be no negligence in starting the fire. But after such a fire has once been started it is incumbent upon the company to guard the fire and see that it does not escape and do damage to others and if the company negligently allows such a fire to escape and the property of third persons is destroyed it will be liable to such persons for damages.[59] The action is predicated on negligence in setting the fire or permitting it to escape, not in permitting combustibles to accumulate.[60] And there may be cases, owing to the dangerous nature of the places and surroundings where such a fire is set out, in which the action of the company will be regarded as a direct and positive wrong.[61]

[59]Indiana &c. R. Co. v. Overman, 110 Ind. 538, 10 N. E. 575, 29 Am. & Eng. R. Cas. 161; Missouri &c. R. Co. v. Fithian, 73 Kans. 784, 85 Pac. 594; B. E. Brister Co. v. Illinois Cent. R. Co., 84 Miss. 33, 36 So. 142. See also Kansas City So. Ry. Co. v. Wilson, 119 Ark. 143, 171 S. W. 484. And it has been so held even where the negligence was that of an independent contractor employed by the company to burn a fire guard along its right of way. St. Louis &c. R. Co. v. Madden, 77 Kans. 80, 93 Pac. 586, 17 L. R. A. (N. S.) 788 and note. See also Cameron v. Oberlin, 19 Ind. App. 142, 48 N. E. 386. But compare St. Louis &c. R. Co. v. Yonley, 53 Ark. 503, 13 S. W. 333, 14 S. W. 800, 9 L. R. A. 654; Callahan v. Burlington &c. R. Co., 23 Iowa 562.

[60]Gulf &c. R. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43.

[61] Gordon v. Grand Rapids &c. R. Co., 103 Mich. 379, 61 N. W. 549; Cole v. Lake Shore &c. R. Co., 105 Mich. 549, 63 N. W. 647; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750, and note, 22 Am. St. 582, 45 Am. & Eng. R. Cas. 532. In the last case the company, in a very dry time, started a fire on a bed of peat over which its right of way extended for the purpose of clearing off rubbish and combustible material. The fire caught in the peat and spread to and destroyed the property of adjacent owners. The court, in discussing the liability of the company for starting a fire under such circumstances, said: "An essential and ruling element of this case is this: It was a tortious act to set out the fire which caused the plaintiff's injury. It was something more than culpable negligence to start a fire on a bed of turf or peat, in a season of great drought, when for weeks no rain had fallen, and the ground was parched and dry. The act of the defendant in setting out a fire at such a place and under such conditions was a positive wrong, for the law forbids that one person should put the property of another in jeopardy by such an act. In degree only is there difference between such a case as this and one in which a person kindles a fire

Evidence is admissible, as tending to show negligence in setting a fire at an improper time, that the plaintiff cautioned defendant's section foreman at the time he set the fires and objected to his setting them because everything was dry and likely to be destroyed.[62] Cases in which fires have been set to consume inflammable material and rubbish stand on a different basis from those which are started because of defective apparatus and appliances, negligent operation or the presence of combustible material on the right of way. In those cases the ground of liability is usually the failure of the company to perform some antecedent duty imposed upon it to prevent the starting of fires, while in the cases mentioned here the recovery is based upon the failure of the company to properly guard a fire lawfully started.[63]

near a train of gunpowder, leading to a magazine filled with explosive substances. In essence the case is the same as that of one who builds a fire upon materials that will ignite and continue burning in a place where all surrounding materials are of the same combustible character. * * * A railroad company has a right to remove combustible material from its right of way, and, ordinarily, it may not be negligence to employ fire for that purpose; but, where the conditions are such as to put in great peril adjacent property, fire can not be rightfully used for such a purpose." See also Grant v. Omaha &c. R. Co., 91 Mo. App. 312, 68 S. W. 91.

[62] Gordon v. Grand Rapids &c. R. Co., 103 Mich. 379, 61 N. W. 549.

[63] In Williams v. Atlantic Coast Line R. Co., 140 N. Car. 623, 53 S. E. 448, 449, it is said: "(1) If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence. (2) If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. Moore v. Wilmington R. Co., 124 N. Car. 341, 32 S. E. 710; Phillips v. Durham &c. R. Co., 138 N. Car. 12, 50 S. E. 462. (3) If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way, or not by a skillful engineer, and the fire catches off the right of way, the defendant is liable. In the first case there would be, as above stated, no negligence. In the second case the foul right of way would

Thus it has been held that a company is not liable under a statute imposing absolute liability on account of railway fires for damages caused by a fire lawfully started to burn off a right of way.[64] And where a fire set out to destroy rubbish escapes through pure accident the company is not liable.[65] The burden is on the plaintiff to show negligence and of this the fire itself may be no sufficient proof.[66] But where a fire was negligently set on the right of way and escaped and did damage, the company is liable although its employes did all in their power to check its spread.[67] Where a fire which has been set on the right of way by the employes of the company escapes therefrom and destroys the property of a third person it has been held that the railway company will not be liable unless the act of the employes in setting the fire was within the scope of their duties as such employes.[68]

§ 1752 (1228). Extra precautions—Dry seasons—Wind—Exposed property.—It is a well settled principle of law that care in doing any particular act must be exercised in proportion to the danger attending the act. Where the doing of any particular act is attended with unusual hazards unusual care must be exercised, but where the performance of the act it attended with only ordinary hazards less care is required.[69] These principles have

be negligence, and in the third the defective engine or spark arrester, or the negligent operation of a good engine, would be negligence."

[64] Atchison &c. R. Co. v. Dennis, 38 Kans. 424, 17 Pac. 153, 32 Am. & Eng. R. Cas. 318. See also Rogers v. Florence R. Co., 31 S. Car. 378, 9 S. E. 1059.

[65] Atchison &c. R. Co. v. Dennis, 38 Kans. 424, 17 Pac. 153, 32 Am. & Eng. R. Cas. 318. See also Lake Erie &c. R. Co. v. Naron, 18 Ind. App. 193, 47 N. E. 691.

[66] Mattoon v. Fremont &c. R. Co., 6 S. Dak. 301, 60 N. W. 69.

[67] Chicago &c. R. Co. v. Luddington, 10 Ind. App. 636, 38 N. E. 342. See also Mobile &c. R. Co. v. Stinson, 74 Miss. 453, 21 So. 14, 522; Austin v. Chicago &c. R. Co., 93 Wis. 496, 67 N. W. 1129.

[68] Where the employes built a fire on the right of way for the purpose of warming their dinners and the fire escaped the company was not liable. Morier v. St. Paul &c. R. Co., 31 Minn. 351, 47 Am. Rep. 793. But compare St. Louis &c. R. Co. v. Ford, 65 Ark. 96, 45 S. W. 55.

[69] Frankford &c. R. Co. v. Philadelphia &c. R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Chicago &c. R.

frequently been applied in railway fire cases for the circumstances under which fires are likely to occur and do occur are so varied that different measures of care must necessarily be employed. In proportion as the hazards increase there should be a corresponding increase in the care exercised. Thus it has been held that it is the duty of a railway company in an unusually dry season, where all inflammable material is like tinder and liable to be set on fire from the smallest spark, to exercise greater precaution and care than in wet or damp seasons.[70] So, where the wind is blowing directly from an engine toward wooden buildings or combustible materials greater precautions may be required,[71] and when a train is running through a densely popu-

Co. v. Quaintance, 58 Ill. 389; Smith v. Old Colony &c. R. Co., 10 R. I. 22; Pierce v. Worcester &c. R. Co., 105 Mass. 199; Salmon v. Delaware &c. R. Co., 38 N. J. L. 5, 20 Am. Rep. 356; Jones v. Festiniog &c. R. Co., L. R. 3 Q. B. 733. See also Gracy v. Atlantic Coast R. Co., 53 Fla. 350, 42 So. 903, 909 (citing text); McLaughlin v. Baltimore &c. R. Co., 75 W. Va. 287, 83 S. E. 999, 1001 (citing text).

[70] Chicago &c. R. Co. v. Smith, 6 Ind. App. 262, 33 N. E. 244; Marvin v. Chicago &c. R. Co., 79 Wis. 140, 44 S. W. 1123, 11 L. R. A. 506 and note, 45 Am. & Eng. R. Cas. 540; Louisville &c. R. Co. v. Fort, 112 Tenn. 432, 80 S. W. 429; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110, 7 Am. & Eng. R. Cas. 524. In the last case cited the court said: "If a locomotive were running under a fall of drenching rain, it would hardly be deemed negligent if trackmen were not employed to extinguish emitted sparks or coals, however large and numerous; but if, on the contrary, every thing was dry, and combustible material was accumulated upon or along the track, extra precautions would be required, which it would be negligence to omit; and the fact that the company used machinery properly constructed and kept in repair with a view to prevent the spread of fire, and the engines were operated with care and skill to the same end would not, in the case supposed in the instruction, necessarily constitute the proper precaution and care, unless, indeed, as demonstrated by experience, the machinery was so far perfect as that further safe-guards or watchfulness were unnecessary. . . . Due care is a relative term, to be measured according to the circumstances of each case, and extra dangers call for extra precautions." See also Norfolk &c. R. Co. v. Fritts, 103 Va. 687, 49 S. E. 971, 68 L. R. A. 864, 866, 106 Am. St. 911, 914 (quoting text).

[71] Kellogg v. Milwaukee & St. P. R. Co., 5 Dill. (U. S.) 537, Fed. Cases No. 7664, 1 Cent. L. Jr. 278, 94 U. S. 469, 24 L. ed. 256; Fero v.

lated country or village where there are a greater number of buildings exposed to the hazards of fire greater precaution must generally be exercised than is necessary when running through the country where there are no buildings.[72] Unusual precautions are not ordinarily required, such as the purchase and use of tarpaulins or other similar means to protect against fires.[73]

§ 1753 (1229). Fires started on right of way.—A different rule of liability prevails in reference to fires started on the right of way from that which prevails where fires are started off the right of way. Where a fire is started on the right of way, whether negligently or otherwise, no right of action can, ordinarily accrue to any one so long as that fire does not escape and do damage to the property of others. Since no liability can arise unless the fire escapes from the right of way it necessarily follows that a right of recovery must be founded on the negligence in suffering the fire to escape.[74] And a company may be

Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178 and note; Johnson v. Chicago &c. R. Co., 31 Minn. 57, 16 N. W. 488, 13 Am. & Eng. R. Cas. 460. See also Taffe v. Oregon &c. N. Co., 60 Ore. 177, 117 Pac. 990. Company may be liable, however, even if the wind shifts. Florida &c. R. Co. v. Welch, 53 Fla. 145, 44 So. 250; Donough v. New York Cent. R. Co., 124 App. Div. 38, 108 N. Y. S. 270; Ide v. Boston &c. R. Co., 83 Vt. 66, 74 Atl. 401.

[72] Fero v. Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178 and note; Kendrick v. Towle, 60 Mich. 363, 1 Am. St. 526, 25 Am. & Eng. R. Cas. 473. See also generally as to circumstances to be considered, Riley v. Chicago &c. R. Co., 71 Mich. 425, 74 N. W. 171; Jones v. Michigan Cent. R. Co., 59 Mich. 437, 26 N. W. 622, 25 Am. & Eng. R. Cas. 482; Longabaugh v. Virginia City &c. R. Co., 9 Nev. 271; Louisville &c. R. Co. v. Fort, 112 Tenn. 432, 80 S. W. 429; Continental Ins. Co. v. Chicago &c. Ry. Co., 97 Minn. 467, 107 N. W. 548, 554 (citing text to effect that care must be in proportion to danger).

[73] Tribette v. Illinois Central R. Co., 71 Miss. 212, 13 So. 899.

[74] Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111; Pittsburgh &c. R. Co. v. Jones, 86 Ind. 496, 44 Am. Rep. 334 and note; Louisville &c. R. Co. v. Ehlert, 87 Ind. 339; Indiana &c. R. Co. v. Adamson, 90 Ind. 60; Indiana &c. R. Co. v. McBroom, 91 Ind. 111; Brinkman v. Bender, 92 Ind. 234; Pittsburgh &c. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285; Mattoon v. Fremont &c. R. Co., 6 S. Dak. 301, 60 N. W. 69. Mere proof that

found negligent in suffering a fire to escape whether it stands by and allows fire to escape without making any effort to check it or whether it negligently allows the conditions to become and remain such as that any fire which may be ignited may readily escape, for, as we have heretofore said, a company may be guilty of negligence in allowing combustibles to accumulate by means of which the spread of fires is easily caused.[75] In cases of fires started on the right of way there is some conflict in the authorities as to whether it is material whether or not the fire was negligently started. Some of the authorities seem to hold that it must be shown that the fire was negligently started, but we do not regard these authorities as stating the correct rule. The correct rule, and that held and declared by the weight of authority, is that if the company negligently suffers the fire to escape it is liable independently of how the fire was started, whether negligently or otherwise. And under this rule it is immaterial what kind of locomotives and appliances were used or the manner in which they were operated.[76]

§ 1754 (1230). **Fires started off the right of way.**—Where fires are started off the right of way a recovery is based on some wrong of the company in failing to adopt and use proper machinery and appliances or in unskillfully and negligently managing the same. The gist of the action is negligence in some one of the respects which we have just mentioned. In these cases the condition of the right of way is immaterial for it is in no way

the fire started on the right of way is not sufficient to render the company liable. Taylor v. Pennsylvania &c. R. Co., 174 Pa. St. 171, 34 Atl. 457. "The railroad corporation is bound at all hazards to prevent the fire from spreading, and is liable inevitably unless there is contributory negligence on the part of the land-owner." Simmonds v. New York &c. R. Co., 52 Conn. 264, 52 Am. Rep. 587, 23 Am. & Eng. R. Cas. 369.

[75] Ante, § 1750.

[76] International &c. R. Co. v. McIver (Tex. Civ. App.), 40 S. W. 438 (citing text); Smith v. Central Vt. R. Co., 80 Vt. 208, 67 Atl. 535; McMahon v. Hetchhetchy &c. Ry. Co., 2 Cal. App. 400, 84 Pac. 350; New York &c. R. Co. v. Roper, 176 Ind. 497, 96 N. E. 468. See also Ball v. Grand Trunk R. Co., 16 U. C. C. P. 252.

connected with the fire. It is well to bear in mind the different theories on which a recovery is based dependent upon the point where the fire started, for, as we shall hereafter show, different pleadings are required and different proof must be made.[77]

§ 1755 (1231). **Remote fires.**—By remote fires is meant those fires which do not catch directly from sparks from an engine or from a fire spreading from the right of way to the property of an owner, but those fires which are originally set by the company and after spreading to the land of one owner spread from his land to the land of others. It is somewhat difficult to give an accurate definition of a remote fire, but for the purposes of this discussion we shall consider remote fires to be those fires which are communicated to the lands of second and subsequent owners after having passed over the lands of the first owner to whose lands they were directly communicated by the railway company. This is hardly a just distinction, for where a fire starts and continues to burn, it is one fire, no matter how long it burns or how far it extends, and it can only be said to be remote because it extends over the lands of owners remote from the point where the fire started. The material question in the case of remote fires is whether or not the injury was proximately caused by the negligence of the company.[78] If the company was guilty of negligence in the first instance in starting the fire and it burns in one continuous fire without the intervention of any independent agency and destroys the property of a land-owner, no matter how remote or how great a number of various land-owner's lands the fire may have been passed over before reaching the particular

[77] This section is quoted and applied in Lake Erie &c. R. Co. v. McFall, 165 Ind. 574, 76 N. E. 400, 401, 402, 403. And evidence as to accumulation of combustible material on the right of way is held inadmissible where the fire originated outside of the right of way and was not on the right of way at all. Gulf &c. R. Co. v. Meentzen, 52 Tex. Civ. App. 416, 113 S. W. 1000. Infra, §§ 1764, 1765.

[78] Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Clemens v. Hannibal &c. R. Co., 53 Mo. 366, 14 Am. Rep. 460. See also Carter v. Maryland &c. R. Co., 112 Md. 599, 77 Atl. 301; Ft. Worth &c. R. Co. v. Arthur, 58 Tex. Civ. App. 163, 124 S. W. 213; Missouri &c. R. Co. v. Morgan (Tex. Civ. App.), 146 S. W. 336.

land-owner's property, the company will be liable for the resulting damages.[79] This doctrine is founded on the theory that he who sets a dangerous agency in motion must be responsible for all the damages which proximately result from his act. It is as old as the famous "squib case," and has been enforced in the courts of this country time and time again.[80] If, however, some

[79] Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Butcher v. Vaca &c. R. Co., 67 Cal. 518, 23 Am. & Eng. R. Cas. 356; Fent v. Toledo &c. R. Co., 59 Ill. 349, 14 Am. Rep. 13; Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; Chicago &c. R. Co. v. Pennell, 110 Ill. 435; Louisville &c. R. Co. v. Krinning, 87 Ind. 351; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229, 9 L. R. A. 750 and note, 22 Am. St. 582; Pittsburg &c. R. Co. v. Welch, 54 Ind. App. 335, 101 N. E. 748; St. Joseph &c. R. Co. v. Chase, 11 Kans. 47; Atchison &c. R. Co. v. Stanford, 12 Kans. 354, 15 Am. Rep. 362; Atchison &c. R. Co. v. Bales, 16 Kans. 252; Chicago &c. R. Co. v. McBride, 54 Kans. 172, 37 Pac. 978; Annapolis &c. R. Co. v. Gantt, 39 Md. 115; Baltimore &c. R. Co. v. Shipley, 39 Md. 251; Perley v. Eastern &c. R. Co., 98 Mass. 414, 96 Am. Dec. 645 and note; Hoyt v. Jeffers, 30 Mich. 181; Kuhn v. Jewett, 32 N. J. Eq. 647; Poeppers v. Missouri &c. R. Co., 67 Mo. 715, 29 Am. Rep. 518; Burlington &c. R. Co. v. Westover, 4 Nebr. 268; Hooksett v. Concord &c. R. Co., 38 N. H. 242; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Webb v. Rome &c. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Pollett v. Long, 56 N. Y. 200; O'Neill v. New York &c. R. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591 and note, 40 Am. & Eng. R. Cas. 240; Troxler v. Richmond &c. R. Co., 74 N. Car. 377; Doggett v. Richmond &c. R. Co., 78 N. Car. 305; Pennsylvania &c. R. Co. v. Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Yankton Fire Ins. Co. v. Freemont &c. R. Co., 7 S. Dak. 428, 64 N. W. 514; Smith v. London &c. R. Co., L. R. 5 C. P. 98. In the case of Kellogg v. Chicago &c. R. Co., 26 Wis. 223, 7 Am. Rep. 69, the court said: "It would be strange, indeed, if the liability of a party for the negligent destruction of property by fire were to depend upon the fact whether he set fire at once to the property or whether he set fire to some other combustible material at some distance from it, but communicating with it and which it was apparent at the time would inevitably lead to its destruction." See also St. Louis &c. R. Co. v. League, 71 Kans. 79, 80 Pac. 46; Phillips v. Durham &c. R. Co., 138 N. Car. 12, 50 S. E. 462; St. Louis &c. R. Co. v. Gentry (Tex. Civ. App.), 80 S. W. 844.

[80] Denver &c. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146; Billman v. Indianapolis &c. R. Co., 76 Ind. 166, 40 Am. Rep. 250; Terre Haute &c. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep.

independent cause intervenes, so as to break the line of causation between the defendant's original act and the property destroyed, there is no liability.[81] Where a heavy wind arose after the starting of a fire and wafted a brand of fire across an intervening ridge of land and set fire to and destroyed the plaintiff's property, it was held that such wind was an independent intervening cause and there could be no recovery.[82] But, ordinarily, the wind cannot be regarded as an independent intervening cause, for it is a natural cause reasonably to be expected, and a defendant who wrongfully sets out a fire should be charged with knowledge that such a natural cause is likely to intervene and be held responsible for damages done thereby.[83] It matters not how far

168; Louisville &c. R. Co. v. Falvey, 104 Ind. 409; Ohio &c. R. Co. v. Hecht, 115 Ind. 443; Louisville &c. R. Co. v. Snyder, 117 Ind. 435, 3 L. R. A. 434, 10 Am. St. 60 and note; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750 and note, 22 Am. St. 582; Lake Shore &c. R. Co. v. Rosenzweig, 113 Pa. St. 510, 6 Atl. 545.

[81] Doggett v. Richmond &c. R. Co., 78 N. Car. 305; Brown v. Atlanta &c. R. Co., 19 S. Car. 39. See also Stone v. Boston &c. R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794. Where fire was communicated to the property of A and from that of A to that of B, it was held that the negligence of A in leaving combustible material on his premises which caused the spread of the fire was not an independent cause. Johnson v. Chicago &c. R. Co., 31 Minn. 57, Am. & Eng. R. Cas. 460; St. Louis &c. Ry. Co. v. Gentry (Tex. Civ. App.), 80 S. W. 844. But compare Hoffman v. King, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. 715, 46 L. R. A. 672; Palmer v. Missouri Pac. R. Co., 76 Mo. 217. See also Wiley v. West Jersey R. Co., 44 N. J. L. 247; Beckham v. Seaboard &c. R. Co., 127 Ga. 550, 56 S. E. 638.

[82] Marvin v. Chicago &c. R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506 and note, 45 Am. & Eng. R. Cas. 540. See also Toledo &c. R. Co. v. Muthersbaugh, 71 Ill. 572; Kansas Pac. R. Co. v. Butts, 7 Kans. 308; Pennsylvania R. Co. v. Whitlock, 99 Ind. 16. (See Louisville &c. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750 and note, 22 Am. St. 582, where this case is limited.)

[83] Northern Pacific R. Co. v. Lewis, 51 Fed. 658; Chicago &c. R. Co. v. Lesh, 158 Ind. 423, 63 N. E. 794; Manhattan &c. R. Co. v. Keeler, 32 Kans. 163, 4 Pac. 143; Safford v. Boston &c. R. Co., 103 Mass. 583; Poeppers v. Missouri &c. R. Co., 67 Mo. 715, 29 Am. Rep. 518; Hightower v. Missouri &c. R. Co., 67 Mo. 726; Kenney v. Hannibal &c. R. Co., 70 Mo. 252; Tyler v. Ricamore, 87 Va. 466, 12 S. E. 799; Smith v London &c. R. Co., L. R.

a fire may spread, for, if the line of causation remains unbroken the defendant will be liable.[84] The time intervening between the starting of the fire and the destruction of the property sued for is immaterial so long as the line of causation is unbroken.[85] Whether a fire, however remote, occurs as a proximate result of the defendant's original wrong is usually a question to be determined by the jury.[86] And where there was an agreement between the land-owner to whose land fire had been communicated and the railway company setting out the fire to let the fire burn and consume rubbish on the land-owner's property and the fire was afterwards communicated to a bed of peat under a third owner's land and damage was done, it was held that the company was liable to such third owner and that it was proper for the jury to determine whether or not the original fire was the proximate cause of the injury.[87]

5 C. P. 98, 6 C. P. 14. See also Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 So. 250; Albany &c. R. Co. v. Wheeler, 6 Ga. App. 270, 64 S. E. 1114.

[84] Atchison &c. R. Co. v. Stanford, 12 Kans. 354, 15 Am. Rep. 362; Atchison &c. R. Co. v. Bales, 16 Kans. 252 (three or four miles); Chicago &c. R. Co. v. McBride, 54 Kans. 172, 37 Pac. 978 (ten miles); Perley v. Eastern &c. R. Co., 98 Mass. 414, 96 Am. Dec. 645 and note; Safford v. Boston &c. R. Co., 103 Mass. 583; Poeppers v. Missouri &c. R. Co., 67 Mo. 715, 29 Am. Rep. 518 (a fire spreading eight miles); Hightower v. Missouri &c. R. Co., 67 Mo. 726; Burlington &c. R. Co. v. Westover, 4 Nebr. 268 (one-half mile); Smith v. London &c. R. Co., L. R. 5 C. P. 98 (200 yards).

[85] Louisville &c. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750 and note, 22 Am. St. 582; Missouri &c. R. Co. v. Cullers, 81 Tex. 382, 13 L. R. A. 542.

[86] Kellogg v. Milwaukee &c. R. Co., 5 Dill. (U. S.) 537; Henry v. Southern Pacific R. Co., 50 Cal. 176; Perry v. Southern Pacific R. Co., 50 Cal. 578; Louisville &c. R. Co. v. Krinning, 87 Ind. 351; Atchison &c. R. Co. v. Bales, 16 Kans. 252; Clemens v. Hannibal &c. R. Co., 53 Mo. 366, 14 Am. Rep. 460; Gram v. Northern &c. R. Co., 1 N. Dak. 252, 46 N. W. 972; Frace v. New York &c. R. Co., 143 N. Y. 182, 38 N. E. 102; Pennsylvania &c. R. Co. v. Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Lehigh &c. R. Co. v. McKeen, 90 Pa. St. 122, 35 Am. Rep. 644 and note. And where a fire was supposed to be extinguished but afterward broke out and destroyed property it was held to be a question for the jury as to whether the original fire was the proximate cause of the second fire. Green Ridge &c. R. Co. v. Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755.

[87] Simmonds v. New York &c. R.

§ 1756 (1232). **Duty to extinguish fires.**—Where it is possible for a company to easily extinguish a fire negligently started it would be to the best interests of the company to do so, for it could thus lessen the amount of damages for which it would be liable. Most of the authorities, however, in defining the duty of a company to extinguish a fire do not make any distinction between fires negligently started and those not negligently started. Many of the authorities hold that where there was no negligence in starting a fire no duty rests upon the employes of the company as servants of the company to extinguish the fire, and that the company is not liable for a failure to extinguish such a fire.[88] But some of the authorities seem rather opposed to the doctrine just stated and it is held by the weight of authority that where a fire has been set by the sparks from locomotives of the company and the company's servants discover the fire in time

Co., 52 Conn. 264, 52 Am. Rep. 587, 23 Am. & Eng. R. Cas. 369.

[88] Kenney v. Hannibal &c. R. Co., 70 Mo. 252. The court in this case held that the only duty resting on the servants of the company was the mere social duty one citizen owes to another to prevent the destruction of his property if reasonably within his power. The court, in the course of its opinion, said: "We hold that the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty, as citizens, to prevent the spread of the fire, and by their conduct on the occasion, as testified to by one of their number, they manifested a cruel and brutal indisposition to the destruction of a neighbor's property, but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it. If not liable for the origin of the fire, he, (the master), can not be held so on account of the neglect of the social duty by persons in his employment, in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society." See also Baltimore &c. R. Co. v. Shipley, 39 Md. 251; Gulf &c. R. Co. v. Meentzen, 52 Tex. Civ. App. 416, 113 S. W. 1000. Train crew need not stop and leave train to extinguish the fire. Galveston &c. Ry. Co. v. Chiltein, 31 Tex. Civ. App. 40, 71 S. W. 294; Pittsburg &c. R. Co. v. Brough, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. (N. S.) 401; Mississippi &c. Ins. Co. v. Louisville &c. R. Co., 70 Miss. 119, 12 So. 156; Ide v. Boston &c. R. Co., 83 Vt. 66, 74 Atl. 401. But compare Rolke v. Chicago &c. R. Co., 26 Wis. 537.

to extinguish it and to prevent it from doing damages to others and negligently fail to do so, the company will be liable.[89] Where a fire is discovered by the employes operating a train the duty of such employes to the passengers would seem to be superior to their duty to stop and extinguish the fire and thus delay the train, but where a fire is discovered by trackmen walking or traveling along the track they should use care to extinguish it. There is no obligation resting upon a company to employ men to patrol its track to extinguish fires which may be started by passing trains.[90]

§ 1757 (1233). **Ownership of property burned.**—The question of the ownership of property destroyed by a railway fire is very material in an action brought to recover its value. The general rule is that a plaintiff must show a general or special property right in himself or there can be no recovery.[91] Where a

[89] Bass v. Chicago &c. R. Co., 28 Ill. 1; Kenney v. Hannibal &c. R. Co., 63 Mo. 99; Eighme v. Rome &c. R. Co., 10 N. Y. S. 600; Missouri &c. R. Co. v. Platzer, 73 Tex. 117, 11 S. W. 160, 15 Am. St. 771 and note, 38 Am. & Eng. R. Cas. 366; Rolke v. Chicago &c. R. Co., 26 Wis. 537; Erd v. Chicago &c. R. Co., 41 Wis. 65; Moore v. Chicago &c. R. Co., 78 Wis. 120, 47 N. W. 273. See also Wallace v. New York &c. R. Co., 208 Mass. 16, 94 N. E. 306; VanDyke v. Grand Trunk R. Co., 84 Vt. 212, 78 Atl. 958, Ann. Cas. 1913A, 640. "Without entering into any discussion as to the degree of care a railway company should use to extinguish a fire caused by the escape of fire from its engine, we feel constrained to hold that the duty does exist, however careful such companies may be to prevent the escape of fire from their engines, and that the failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper will give a cause of action for an injury resulting." Missouri &c. R. Co. v. Platzer, 73 Tex. 117, 11 S. W. 160, 15 Am. St. 771 and note.

[90] Baltimore &c. R. Co. v. Shipley, 38 Md. 251. Where employes attempt to extinguish the fire they should use due care. Ft. Worth &c. R. Co. v. Arthur, 58 Tex. Civ. App. 163, 124 S. W. 213; Indianapolis &c. R. Co. v. Paramore. 31 Ind. 143.

[91] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357, 9 Am. & Eng. R. Cas. 222; Woodward v. Northern Pac. R. Co., 16 N. Dak. 38, 111 N. W. 627; Wick v. Tacoma &c. R. Co., 40 Wash. 408, 82 Pac. 711; Reed v. Chicago &c. R. Co., 71 Wis. 399, 37 N. W. 225, 32 Am. & Eng. R. Cas. 320; McNarra v. Chicago &c. Railway Co., 41 Wis. 69.

plaintiff is the absolute owner of the property there can ordinarily be no question as to his right to maintain the action, and where his right to the property is of a special or qualified nature, proof of that right is generally sufficient to entitle him to recover, at least to the extent of his interest in the property.[92] Where a person entered upon lands of a third person under a parol license from one who claimed to be the agent of the owner, and cut and put up hay which was afterwards destroyed by a railway company, it was held that such person had a right of action against the company where there was evidence tending to show that the owner ratified the act of his alleged agent, although there was no proof that such agent had authority to act for the land-owner.[93] And where buildings are erected on the land of another with a right of removal such buildings are personal property and the owner may maintain an action for their destruction by fire.[94] A lessee is entitled to recover for buildings burned, where, by the terms of his lease, he is bound to replace the buildings if they are destroyed,[95] and the railway company cannot question the lessee's title merely because he failed to have his lease recorded as required by statute.[96] Where

[92] In North Carolina it is held that the life tenant and remainderman may join as plaintiffs in a proper case. Boney v. Atlantic Coast Line R. Co., 175 N. Car. 354, 95 S. E. 560. And that in an action by the equitable owner for injuries to land by a railway fire, the person who owns the legal title may be made a defendant. Mull v. Louisville &c. R. Co., 175 N. Car. 593, 96 S. E. 27. Possession has been held to be prima facie proof of title. Spurlock v. Port Townsend &c. R. Co., 13 Wash. 29, 42 Pa. 520. See also Texas &c. R. Co. v. Pippin, 59 Tex. Civ. App. 477, 127 S. W. 1153.

[93] Bullis v. Chicago &c. R. Co., 76 Iowa 680, 39 N. W. 245. See Northern &c. R. Co. v. Lewis, 51 Fed. 658. Where a plaintiff owned grass which was burned, under a verbal lease from the owner of the land, the defendant can not set up the invalidity of such lease. International &c. R. Co. v. Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

[94] Laird v. Connecticut &c. R. Co., 62 N. H. 254, 13 Am. St. 564, 43 Am. & Eng. R. Cas. 63.

[95] Anthony v. New York &c. R. Co., 162 Mass. 60, 37 N. E. 780. And for nursery stock planted with an understanding that it may be removed. Adams v. St. Louis &c. R. Co., 138 Mo. 242, 28 S. W. 496, 29 S. W. 836.

[96] Anthony v. New York &c. R. Co., 162 Mass. 60, 37 N. E. 780.

it was shown that a widow had resided for eighteen years with her husband and for four years after his death on the land where the property was destroyed, and that the possession had been undisturbed during all of that time and that she claimed the property as a homestead, it was held that she was entitled to maintain an action for her benefit for the destruction by a railway fire of grass, rails and logs on the land.[97] It has also been held that where a plaintiff is in possession of lands under claim of title, he can recover for hay destroyed without proving title to the land.[98] If the property destroyed is covered by an insurance policy, with a right of subrogation to the rights of the insured against a wrong-doer in favor of the insurance company on payment of the policy, it is held that the owner may bring an action for his benefit and that of the insurance company,[99] or that the insurance company may maintain an action itself on being subrogated,[1] or that both may maintain a joint action.[2]

[97] International &c. R. Co. v. Timmermann, 61 Tex. 660.

[98] McClellan v. St. Paul &c. R. Co., 58 Minn. 104, 59 N. W. 978. Adverse possession of real estate for the statutory period is sufficient title to enable a holder to maintain an action for injury thereto by a railway fire. Busby v. Florida &c. R. Co., 45 S. Car. 312, 23 S. E. 50.

[99] Regan v. New York &c. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. 306; Hart v. Western &c. R. Co., 13 Met. (Mass.) 99, 46 Am. Dec. 719; Swarthout v. Chicago &c. R. Co., 49 Wis. 625, 6 N. W. 314. See also Jacobs v. New York Cent. R. Co., 186 N. Y. 586, 79 N. E. 1108.

[1] Southern Ry. Co. v. Blunt, 165 Fed. 258; Connecticut &c. R. Co. v. New York &c. R. Co., 25 Conn. 265, 65 Am. Dec. 571; Peoria Ins. Co. v. Frost, 37 Ill. 333; Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Rockingham &c. Co. v. Bosher, 39 Maine 253, 63 Am. Dec. 618; Hart v. Western &c. R. Co., 13 Met. (Mass.) 99, 46 Am. Dec. 719 and note; Connecticut &c. R. Co. v. Erie &c. Co., 73 N. Y. 399, 29 Am. Rep. 171. But see (under statute) Farren v. Maine &c. R. Co., 112 Maine 81, 90 Atl. 497; Lyons v. Boston &c. R. Co., 181 Mass. 551, 64 N. E. 404; Boston Ice Co. v. Boston &c. R. Co., 77 N. H. 6, 86 Atl. 356, Ann Cas. 1914A, 1090.

[2] Jacobs v. New York Cent. R. Co., 186 N. Y. 586, 79 N. E. 1108; Home &c. Co. v. Oregon &c. R. Co., 20 Ore. 569, 26 Pac. 857, 23 Am. St. R. 151; Swarthout v. Chicago &c. R. Co., 49 Wis. 625. See also Lake Erie &c. R. Co. v. Falk, 62 Ohio St. 297, 56 N. E. 1020.

§ 1758 (1234). **Effect of insurance on property burned.**—In a great many cases where property is destroyed by fires set out by railway companies the owner carries insurance policies and is thus enabled to collect the amount of his damage from the insurance company independent of any right of action or recovery against the railway company. In cases of this kind, where the owner has received the amount of his loss from the insurance company, it would seem at first blush that he ought not to be allowed to recover again for the same loss from the railway company, and railway companies in a number of cases have set up this defense. But as the right of action against the railway is based on a wrong done by the company, it is held that it is liable for that wrong, and the mere fact that the owner has collected insurance money from an insurance company will not excuse the railway company, and is a matter in which it has no concern.[3] And the railway company is not entitled to a reduction of damages against it to an amount equal to the amount which the plaintiff has recovered from an insurance company.[4] Where an insurance company has been compelled to pay for

[3] Connecticut &c. R. Co. v. New York &c. R. Co., 25 Conn. 265, 65 Am. Dec. 571;; Ohio &c. R. Co. v. Dickerson, 59 Ind. 317; Cunningham v. Evansville &c. R. Co., 102 Ind. 478, 52 Am. Rep. 683, 23 Am. & Eng. R. Cas. 347; Rockingham &c. Co. v. Bosher, 39 Maine 253, 63 Am. Dec. 618; Hagen v. Chicago &c. R. Co., 86 Mich. 615, 49 Am. & Eng. R. Cas. 670; Peter v. Chicago &c. R. Co., 121 Mich. 324, 80 N. W. 295, 46 L. R. A. 224, 80 Am. St. 500; Weber v. Morris &c. R. Co., 35 N. J. L. 409, 10 Am. Rep. 253; Carpenter v. Eastern &c. R. Co., 71 N. Y. 574; Missouri &c. Ry. Co. v. Jordan (Tex. Civ. App.), 82 S. W. 791 (evidence as to whether insured inadmissible). But a Maine statute limits the recovery to the difference between the amount of the loss and the amount of insurance. Leavitt v. Canadian Pac. R. Co., 90 Maine 153, 37 Atl. 886, 38 L. R. A. 152. So in Massachusetts, Lyons v. Boston &c. R. Co., 181 Mass. 551, 64 N. E. 404, the railroad company was liable only under the statute, however, in the cases cited, and there was no actual negligence on its part to cause a common law liability. See Dyer v. Maine Cent. R. Co., 99 Maine 195, 58 Atl. 994, 67 L. R. A. 416. See as to effect of assignment to insurer. Florence v. Delaware &c. R. Co., 258 Pa. St. 456, 102 Atl. 133.

[4] Regan v. New York &c. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. 306.

property which has been tortiously destroyed by a railroad company, it is usually subrogated to the rights which the owner has against such wrongdoer, and may thus make good its loss.[5] In this way the owner is prevented from securing to himself a double recovery, the insurance company may recover money which it was compelled to pay through the wrong of the railway company, and the railway company is made to answer for the consequences of its negligence. Where there has been a subrogation the suit may usually be brought by the owner for himself and as trustee for the insurance company, by the insurance

[5] Rockingham &c. Co. v. Bosher, 39 Maine 253, 63 Am. Dec. 618; First &c. Society v. Goodrich Transportation Co., 7 Fed. 257; Aetna &c. Co. v. Hannibal &c. R. Co., 3 Dill. (U. S.) 1; St. Louis &c. R. Co. v. Fire Association, 55 Ark. 163, 18 S. W. 43. Where there is a subrogation, however, the insurance company can take no greater rights against the wrongdoer than were possessed by the party to whose rights it is subrogated. Thus, where the insured erected property on a railway company's ground and executed a contract that the railway company should not be liable for fires unless negligently set, although there was a statute in force in the state where the property was situated and where the contract was made, imposing absolute liability for fires independent of negligence, and the property was afterward burned and an insurance company paid the loss, taking a subrogation to the rights of the insured against the wrong-doer, it was held that the insurance company was bound by the stipulation of the insured that the company should be liable only in case of negligence. Savannah &c. R. Co. v. Pelzer &c. Co., 60 Fed. 39. The doctrine is thus stated in the case of Phenix Ins. Co. v. Penn. R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405: "Where property is injured or destroyed by the negligent act or omission of one, under such circumstances as that the owner of the property may maintain an action for such injury or destruction, it seems to be well settled, both upon principle and authority, that if such property is insured, such insurer, if compelled by reason of the policy to make good the loss to the owner, may be subrogated to the rights of the owner, and recover from the wrong-doer a sufficient sum to reimburse him for such outlay, provided the damages are sufficient to equal the sum paid." See where insurance company has paid owner and the railroad thereafter knowingly pays him, Connecticut &c. Ins. Co. v. Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171, but compare Cunningham v. Evansville &c. R. Co., 102 Ind. 478, 52 Am. Rep. 683.

company, or by both.[6] Under a code which provides that a suit shall be brought by "the real party in interest," it has been held that an insurance company which has paid a loss and been subrogated to the rights of the insured against a wrong-doer causing the loss, may maintain suit in its own name.[7] And it seems that where an insurance company has paid the insured the amount of the policy and the insured brings a suit against the railway company and recovers, the amount of the recovery will be held in trust for the benefit of the insurance company to the extent of the amount it paid the insured.[8] If a railroad company, with knowledge that an insurance company has paid the owner of property destroyed the amount of his loss, settles with such owner and takes a release in full from him, it has been held that the insurance company may nevertheless maintain an action against it in the name of the insured, without his consent, to compel it to repay the amount paid under the policy, and the release of the insured to the railway company is no defense to such an action.[9] The insurance company, on account of its contract, being compelled to pay the money because the property was destroyed by the act of a wrong-doer, can not, it is held, by any act of the insured be deprived of its rights to a reimbursement. As we have heretofore said, in those states where the statutes are in force imposing an absolute liability upon railway companies

[6] Ante, § 1757. But it is held in Allen v. Chicago &c. R. Co., 94 Wis. 93, 68 N. W. 873, that the owner can not maintain the suit after the insurer has paid him as the insurer is subrogated to his rights and is the real party in interest. But compare Lake Erie &c. R. Co. v. Falk, 62 Ohio St. 297, 56 N. E. 1020.

[7] Connecticut &c. Ins. Co. v. Erie &c. R. Co., 73 N. Y. 399, 29 Am. Rep. 171. See Phenix Ins. Co. v. Penn. R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Home &c. Co. v. Oregon &c. R. Co., 20 Ore. 569, 26 Pac. 857, 23 Am. St. 151. Even where the objection might be made that there is a defect of parties plaintiff because the insured was not joined the objection will be waived after the insurance company has denied that plaintiff has any claim against it. Chicago &c. R. Co. v. German Ins. Co., 2 Kans. App. 395, 42 Pac. 594.

[8] Home &c. Co. v. Oregon &c. R. Co., 20 Ore. 569, 26 Pac. 857, 23 Am. St. 151.

[9] Monmouth &c. Ins. Co. v. Hutchinson &c. R. Co., 21 N. J. Eq. 108.

for fires set out by them, provision is usually made by which a railway company has an insurable interest in property along its line and may thus protect itself by securing policies on property which is exposed to hazards and likely to be destroyed.[10] But such a provision in such a statute has been held to apply only to cases in which the company is liable under the statute and not to cases in which the liability of the company is caused by its own negligence.[11] This, however, seems contrary to the view taken by other courts, and the case cited has lately been overruled by the same court.[12]

§ 1759 (1235). **Property on right of way.**—It frequently happens that property of third persons located on the railway right of way is destroyed by fire communicated by locomotives of the company using the right of way. In cases of this kind the railway company is sometimes liable and sometimes not. The test of liability is generally whether or not the property situated on the right of way was rightfully there. If the owner of the property is a mere trespasser and placed his property on the right of way without the consent of the railway company he cannot recover for its negligent destruction by fire. Thus, where a person intruded upon the right of way of a railway company and without the consent of the company erected a building which was afterwards destroyed by fire it was held that there could be no recovery.[13] But where a company expressly licenses third persons to erect buildings within the limits of its right of way it will be liable if it negligently destroys such buildings by fire,[14]

[10] Ante, § 1747.

[11] Dyer v. Maine Cent. R. Co., 99 Maine 195, 58 Atl. 994, 67 L. R. A. 416.

[12] Farren v. Maine Cent. R. Co., 112 Maine 81, 90 Atl. 497, 52 L. R. A. (N. S.) 203. See also New England Box. Co. v. New York &c. R. Co., 210 Mass. 465, 97 N. E. 140; Boston Ice Co. v. Boston &c. R. Co., 77 N. H. 6, 86 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914A, 1090.

[13] Philadelphia &c. R. Co. v. Yeiser, 8 Pa. St. 366. See also Alabama &c. R. Co. v. Demoville, 167 Ala. 292, 52 So. 406.

[14] Ingersoll v. Stockbridge &c. R. Co., 8 Allen (Mass.) 438; Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356. See also Sherman v. Maine Central &c. R. Co., 86 Maine 422, 30 Atl. 69; Green &c. Co. v. Atlantic &c. R. Co., 87 S. Car. 258, 69 S. E. 290.

unless it has contracted with the persons erecting such buildings that it shall not be liable if the buildings are destroyed by fire.[15] And where property is placed on the right of way of a railway company by agreement, either express or implied, and such property is negligently destroyed by fire, the company will be liable.[16] The complaint in an action to recover damages for

[15] Griswold v. Illinois Central R. Co., 90 Iowa 265, 57 N. W. 843, 9 Am. Rep. & Corp. R. (Lewis) 697. See also Alabama &c. R. Co. v. Demoville, 167 Ala. 292, 52 So. 406; James Quirk Mill Co. v. Minneapolis &c. R. Co., 98 Minn. 22, 107 N. W. 742, 116 Am. St. 336; Mayfield v. Southern R. Co., 85 S. Car. 165, 67 S. E. 132. Where there is a statute in force making a company liable for fires set by its engines independent of negligence, the company may contract with a party who places buildings on its land that it shall be liable only for fires negligently set, and such contract will be upheld notwithstanding the statute. Savannah &c. R. Co. v. Pelzer &c. Co., 60 Fed. 39. Where a railway company by contract permits buildings to be erected upon its right of way it is not against public policy to provide in such contract that the company shall not be liable if the property on its right of way is destroyed by fire. Such a contract does not relieve the company of liability for failure to perform any duty resting upon it, for no duty rests upon a company to allow buildings to be erected upon its right of way unless that duty be imposed by contract. Hartford Fire Ins. Co. v. Chicago &c. R. Co., 70 Fed. 201, 30 L. R. A. 193.

[16] Pittsburgh &c. R. Co. v. Nelson, 51 Ind. 150; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Pennsylvania &c. R. Co. v. Gallentine, 77 Ind. 322, 7 Am. & Eng. R. Cas. 517; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Texas &c. R. Co. v. Ross, 7 Tex. Civ. App. 653, 27 S. W. 728. See also Green &c. Co. v. Atlantic &c. R. Co., 87 S. Car. 258, 69 S. E. 290. A case in Pennsylvania seems to declare a contrary doctrine. In that case, Post v. Buffalo &c. R. Co., 108 Pa. St. 585, a railway company built a side-track near one of its stations to facilitate the shipment of freight. A lumberman who was in the habit of using the side-track placed a large quantity of lumber near it, partly on the right of way and partly on ground hired for the purpose, in order that the lumber would be ready for shipment as required and as cars were furnished by the railway company, and also for storing and seasoning the lumber. The lumber caught fire in an extremely dry season from sparks from a locomotive running on the road, and was destroyed. In a suit by the owner against the company for damages, a non-suit was entered in the court below, and on appeal it was held that, conceding the loss to have been caused by the negli-

property burned on the right of way, must show that the property was rightfully there.[17]

§ 1760 (1236). **Contracts limiting liability.**—As a general rule contracts which seek to confer upon a person immunity from the consequences of his negligent acts to be performed in the future are held void as being contrary to public policy. But there is some conflict among the authorities and decisions may be found which support a contrary doctrine. Contracts by which railway companies attempt to excuse themselves from liability on account of negligence in the carriage of freight are almost, if not quite universally held void. And in the case of the carriage of gratuitous passengers a provision in the pass on which the person rides that there shall be no liability on account of negligence of the company has been held void although there are cases maintaining a different rule. So far as we have been able to discover there are few cases in the books involving the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that, ordinarily, a contract exempting the company from liability for negligently burning property not on the right of way or premises of the company would be held void.[18] But where property is placed on a railway right of way by virtue of a contract in which the owner releases the railroad company from any and all liability on account of fire, and the property is afterwards destroyed by fire negligently set by the railway company, the contract is not void and the company cannot be held liable.[19] In such a case, as

gence of the railway company, the plaintiff having placed his lumber in a dangerous place with full knowledge of the danger, was guilty of contributory negligence, and the non-suit was properly entered. See also Missouri &c. R. Co. v. Bartlett, 69 Tex. 79, 6 S. W. 549. But these cases are both distinguished and in part disapproved, in Cincinnati &c. R. Co. v. South Fork Coal Co., 139 Fed. 528, which approves the rule stated in the text and applies it where lumber was placed on the right of way with the consent of the company.

[17] Pennsylvania R. Co. v. Gallentine, 77 Ind. 322, 7 Am. & Eng. R. Cas. 517. But see Southern R. Co. v. Wilson, 138 Ala. 510, 35 So. 561.

[18] Griswold v. Illinois Cent. R. Co., 90 Iowa 265, 57 N. W. 843, 9 Am. Rep. & Corp. R. (Lewis) 697.

[19] Griswold v. Illinois Cent. R. Co., 90 Iowa 265, 57 N. W. 843, 9 Am.

placing the property upon the right of way is an inconvenience to the company and increases the danger of fire and as the contract in no way relieves the company from any public duty, it is

R. & Corp. R. (Lewis) 697. In this case the plaintiff, by contract erected on the railway company's right of way the buildings which were destroyed by fire. In the contract was a clause in which the plaintiff as lessee agreed "to protect and save harmless said lessor from all liability for damage by fire, which, in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises." The property having been burned by the negligence of the railway company, suit was brought to recover its value. The court in disposing of the objection that the contract was against public policy, and in upholding its validity, said: "The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence, the provision of section 1289, making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not on his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. . . . The plaintiff had an insurable interest, and could, as he did, protect himself in part, at least, against loss by either accident or negligence. The defendant had no insurable interest, and could only protect itself from the hazard by refusing consent, or by contracting for indemnity, as it did. . . . It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289, or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was. The fact that the defendant acquired

not against public policy, and is therefore binding upon the parties.[20] Where, however, a railway company leased its property and there was a provision in the lease that the company would not be liable to the lessee for property of his destroyed by fire, it was held that the company was liable to an employe of the lessee who had property which was stored on the leased

this right of way, in the exercise of the right of eminent domain, did not preclude it from granting or withholding permission to the plaintiff to build thereon, nor the parties from contracting as to which should bear the hazard incident to the location." See also Savannah &c. Co. v. Pelzer &c. Co., 60 Fed. 39. To the same effect are Hartford Fire Ins. Co. v. Chicago &c. R. Co., 70 Fed. 201, 30 L. R. A. 193; Milton v. Chicago &c. R. Co., 237 Fed. 118; Bartee Tie Co. v. Jackson, 281 Ill. 452, 117 N. E. 1007; Rundell v. Lehigh &c. R. Co., 254 Pa. St. 529, 98 Atl. 1054. See also Slocumb v. Raleigh &c. Ry. Co., 165 N. Car. 338, 81 S. E. 336 (quoting text), and Stephens v. Southern Pac. Co., 109 Cal. 86, 41 Pac. 783.

[20] Janes Quirk Milling Co. v. Minneapolis &c. R. Co., 98 Minn. 742, 107 N. W. 742, 744, citing text and the following authorities: Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; Texas & P. R. Co. v. Watson, 190 U. S. 287, 293, 23 Sup. Ct. 681, 47 L. ed. 1057; Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co., 70 Fed. 201, 30 L. R. A. 193, same case on appeal, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. ed. 84; Stephens v. Southern Pac. R. Co., 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; King v. Southern Pac. R. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; Russell v. Pittsburg &c. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214; Griswold v. Illinois Cent. R. Co., 90 Iowa 265, 57 N. W. 843, 24 L. R. A. 647; Kansas City &c. R. Co. v. Blaker, 68 Kans. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Am. & Eng. Ann. Cas. 883; Greenwich Ins. Co. v. Louisville &c. R. Co., 23 Ky. L. 2014, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. 313; Quimby v. Boston &c. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Mann v. Pere Marquette R. Co., 135 Mich. 210, 97 N. W. 721; Wabash R. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684; Richmond v. New York &c. R. Co., 26 R. I. 225, 58 Atl. 767; Woodward v. Ft. Worth &c. R. Co., 35 Tex. Civ. App. 14, 79 S. W. 896; Osgood v. Central Vermont R. Co., 77 Vt. 334, 60 Atl 137, 70 L. R. A. 930. See also Alabama &c. R. Co. v. Demoville, 167 Ala. 292, 52 So. 406; Blitch v. Central of Ga. R. Co., 122 Ga. 711, 50 S. E. 945; Thomason v. Kansas &c. R. Co., 122 La. Ann. 995, 48 So. 432; Porter v. New York &c. R. Co., 205 Mass. 590, 91 N. E. 875; Mansfield &c. Ins. Co. v. Cleveland &c. R. Co., 74 Ohio St. 30, 77 N. E. 269; German Am. Ins. Co. v. Southern R. Co., 77 S. Car. 467, 58 S. E. 337; Cincinnati &c. R. Co. v. Saulsbury, 115 Tenn. 402, 90 S. W. 624, 5 Ann. Cas. 744.

premises destroyed by fire through the negligence of the railway company.[21]

§ 1761 (1237). Liability where road is operated under lease.— Some of the cases hold that where a railway company leases its line and the same is operated by a lessee the lessor is liable for all the torts of the lessee unless there be a special statutory enactment making the lessee liable and exempting the lessor from liability.[22] But, in most of such cases, the lessee may also be held responsible for any injuries caused by its wrong.[23] Where fires are set by a railway company operating a line of railway under a lease from the company owning the line the lessee is liable for such loss and it cannot set up as a defense that the road is owned by its lessor,[24] or that the lease is invalid. And,

[21] King v. Southern Pac. R. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755. See also J. C. Woolridge & Son v. Ft. Worth &c. R. Co., 38 Tex. Civ. App. 551, 86 S. W. 942; Texas & P. R. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. ed. 1057, to the effect that such a provision is not binding upon one who has no knowledge of it and is not in privity with the lessee. And to this effect likewise is Hutto v. Seaboard &c. R. Co., 81 S. Car. 567, 62 S. E. 835. But compare Graves v. Toledo &c. Ry. Co., 202 Ill. App. 478 (vendee bound by terms of lease by company to his vendor, which provided that the company should not be liable for any damage caused by fire, whether vendee knew of such lease or not).

[22] New York & Md. L. R. R. Co. v. Winans, 17 How. (U. S.) 30, 15 L. ed. 27; Railroad Co. v. Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675; Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; Ohio &c. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291, and note; Pittsburgh &c. R. Co. v. Campbell, 86 Ill. 443; Clary v. Iowa &c. R. Co., 37 Iowa 344; McCluer v. Manchester &c. R. Co., 13 Gray (Mass.) 124, 74 Am. Dec. 624; Wasmer v. Delaware &c. R. Co., 80 N. Y. 212, 36 Am. Rep. 608. But see ante, §§ 530, 534.

[23] Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33; Texas &c. R. Co. v. Ross, 7 Tex. Civ. App. 653, 27 S. W. 728. See also Little Rock &c. R. Co. v. Daniels, 68 Ark. 171, 56 S. W. 874.

[24] Cantlon v. Eastern &c. R. Co., 45 Minn. 481, 48 N. W. 22; Slossen v. Burlington &c. R. Co., 60 Iowa 215, 14 N. W. 244, 7 Am. & Eng. R. Cas. 509, 11 Am. & Eng. R. Cas. 67; Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33. In the last case cited the court said: "If one railroad company operates a railroad under a lease from another, it is responsible for its negligence to persons injured thereby; and the invalidity in law of

according to some of the authorities, unless there be special statutory enactments exempting the lessor from liability and placing it upon the lessee alone, it seems that the lessor is also liable.[25] So, where a company permits another company to run trains over its tracks, knowing that such company's engines are equipped with defective spark arresters, it has been held that it will be liable for fires set by the engines of that company.[26] Where a railway company does not own the ground

the lease is no defense to the lessee company against liability to persons suffering by its negligence. If its possession or operation of the road is, in law, unauthorized, it is no less the author of the injuries its want of care may proximately inflict upon them; and it cannot use one wrong as an excuse for or bar to liability for another which it could not have inflicted but for the first."

[25] Balsley v. St. Louis &c. R. Co., 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784, 25 Am. & Eng. R. Cas. 497; Bean v. Atlantic &c. R. Co., 63 Maine 293; Stearns v. Atlantic &c. R. Co., 46 Maine 95. See also St. Louis &c. R. Co. v. Chappell, 83 Ark. 94, 102 S. W. 893, 10 L. R. A. (N. S.) 1175; Davis v. Providence &c. R. Co., 121 Mass. 134. But it seems to us that where, as is generally true in the case of an authorized lease of the entire road, the injury is caused in the operation of the road over which the lessor has no control, there is good reason for holding that the lessee alone should be held liable. Where a statute was in force making a railway company liable for fires communicated by "its locomotive engines" it was held that such lessor company cannot be held liable where the fires were communicated by the engines of its lessee. Lipfeld v. Charlotte &c. R. Co., 41 S. Car. 285, 19 S. E. 497; Hunter v. Columbia &c. R. Co., 41 S. Car. 86, 19 S. E. 197. But see Pittsburgh &c. R. Co. v. Campbell, 86 Ill. 445; Ingersoll v. Stockbridge &c. R. Co., 8 Allen (Mass.) 438. See ante, § 530 et seq. The lessor or licensor, as well as the lessee or licensee whose engine set the fire, is generally held liable under most of the statutes where the lease is unauthorized or the use of the track is under a mere license or permit. Memphis &c. R. Co. v. Richardson, 126 Ark. 236, 190 S. W. 434; Bryant v. Sampson Lumber Co., 174 N. Car. 360, 93 S. E. 926; Williams v. Northwestern R. Co., 107 S. Car. 523, 93 S. E. 183; Northern Pac. R. Co. v. Mentzer, 214 Fed. 10.

[26] Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Pierce v. Concord &c. R. Co., 51 N. H. 590; Jefferson v. Chicago &c. Ry. Co., 117 Wis. 549, 94 N. W. 289 (citing § 541 ante). See also St. Louis &c. Ry. Co. v. Chappell, 83 Ark. 94, 102 S. W. 893, 10 L. R. A. (N. S.) 1175 (citing ante, § 541) and note citing additional authorities. See also Bellamy v. Coast &. R. Co., 85 S. Car. 450, 67 S. E. 545; Ferdette v. Grand Trunk R. Co. (Quebec), 15 D. L. R. 131.

but has a mere license to maintain its tracks over certain premises, it is its duty to keep such track free from combustible material, and if it negligently fails to do so and the property of third persons is destroyed because of its negligence, it will be liable.[27]

§ 1762 (1238). Contributory negligence of owner.—The decisions as to the effect of the contributory negligence of a property-owner whose property is destroyed by fire negligently set by a railway company on his right to recover are not altogether harmonious. While this lack of harmony is due, in a great measure, to statutory enactments, still, different rules are laid down and enforced independent of any statutes whatever. Where there are statutes in force imposing an absolute liability upon a railway company for fires set by its locomotives, the question of the owner's contributory negligence is generally held to be immaterial and to have no effect on his right to recover.[28] We

[27] Kurz &c. Co. v. Milwaukee &c. R. Co., 84 Wis. 171, 53 N. W. 850, 56 Am. & Eng. R. Cas. 94. In the course of the opinion the court said: "In this case, however, it is insisted that because the railway company had only a naked license to lay its track, and had no interest in the land, it had no control over the premises covered by its rails and ties, and owed no duty to any one to remove combustible material. We have been referred to no case which lays down this principle, and, if there be any, we shall decline to follow it. In our opinion, the duty of the defendant company to take reasonable care of the track to prevent the starting of fires is not lifted from its shoulders by the fact that it did not own the right of way, but was simply a licensee. It built this track, and was using it for its own gain in the freights and tolls which it expected and was entitled to charge the ice companies. The track was rightfully laid. The company had a right to operate it and collect freights so long, at least, as its license was unrevoked. It would be strange to hold that the railroad company possessed all the substantial rights in the way of using the track and collecting its freights, which it would have if it owned the right of way, with none of the duties or liabilities which ordinarily result from such use. . . . With the right which it enjoyed and was exercising for its own gain and profit goes hand in hand a correlative duty to use reasonable care to keep its tracks clear from inflammable material." It is also held to be the duty of the owner to keep the right of way free from such material. Thomas v. Hammer Lumber Co., 153 N. Car. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584, and note.

[28] Laird v. Connecticut &c. R. Co., 62 N. H. 254, 13 Am. St. 564, 43 Am.

do not believe, however, that such a strict rule, even where there is an absolute statutory liability, is entirely just. There may be cases, where, after the property is set on fire by the railway company the owner could by slight effort save the property from destruction, and in such cases, it seems to us that it would be unjust to compel a railway company to pay an owner damages notwithstanding an absolute statutory liability.[29] And where the liability of the defendant rests upon the common law contributory negligence is usually a defense.[30] Where there is

& Eng. R. Cas. 63; West v. Chicago &c. R. Co., 77 Iowa 654, 35 N. W. 479, 42 N. W. 512, 38 Am. & Eng. R. Cas. 340; Peter v. Chicago &c. R. Co., 121 Mich. 324, 80 N. W. 295, 46 L. R. A. 224, 225, 226, 80 Am. St. 500 (citing text). See also Sullivan Timber Co. v. Louisville &c. R. Co., 163 Ala. 125, 50 So. 941; Matthews v. Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802; Erickson v. Pennsylvania R. Co., 170 Fed. 572.

[29] In the case of Union &c. R. Co. v. Williams, 3 Colo. App. 526, 34 Pac. 731, it was said: "Of course, if a party should knowingly or purposely place his property in a situation where sparks from a passing engine would be likely to ignite and burn it, he could not recover in case of its destruction; but such an act would scarcely come within the definition of contributory negligence. It would be a fraud from which its author would not be permitted to derive an advantage. Nothing of this kind is, however, claimed here. The appellant introduced no evidence. The testimony for appellee discloses no negligence on his part, and as the liability of the appellant is fixed by the statute, irrespective of any negligence of its own, and as any negligence of the owner of the property is not to be considered, unless it comes within the doctrine announced in Denver &c. R. Co. v. Morton, 3 Colo. App. 155, 32 Pac. 345, where it was shown that the owner, being present, suffered his property to remain in dangerous proximity to a fire in actual progress, without any effort to remove or protect it." See also the majority and dissenting opinions in Peter v. Chicago &c. R. Co., 121 Mich. 324, 80 N. W. 295, 80 Am. St. 500, 46 L. R. A. 224, 226, 228. Certainly where he intentionally exposes his property for the purpose of having it so destroyed or his conduct is otherwise so grossly negligent as to amount to fraud he cannot recover. Bowen v. Boston &c. R. Co., 179 Mass. 524, 61 N. E. 141; Ide v. Boston &c. R. Co., 83 Vt. 66, 74 Atl. 401.

[30] See case last above cited; also Murphy v. Chicago &c. R. Co., 45 Wis. 222, 30 Am. Rep. 721; Hubbard v. New York &c. R. Co., 72 Conn. 24, 43 Atl. 550; Baltimore &c. R. Co. v. Does, 20 Ind. App. 680, 51 N. E. 368; Cleveland &c. R. Co. v. Hadley, 12 Ind. App. 516, 40 N. E. 760; Ross v. Boston &c. R. Co., 6 Allen (Mass.) 87; Tilley v. St. Louis &c. R. Co.,

a statute merely changing the burden of proof the defense of contributory negligence on the part of the owner is not defeated.[31] The acts on the part of the property-owner which determine whether or not he is guilty of contributory negligence naturally divide themselves into two classes; first, those things which he does or omits to do antecedent to the setting of the fire, and, second, those things which he does or omits to do after the setting of the fire. In reference to the first class the measure of duty resting upon the property-owner is very slight. Where a person owns lands adjoining the right of way of a railway company, he has a right to presume that the railway company will not be guilty of negligence and he is not bound to remove dry and combustible material from his land in anticipation of probable negligence on the part of the company.[32] He has a right

49 Ark. 535, 6 S. W. 8. A few of the statutes also provide that it shall be considered.

[31] Ford v. Chicago &c. R. Co., 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657.

[32] Flynn v. San Francisco &c. R. Co., 40 Cal. 14, 6 Am. Rep. 595, and note; Union Pacific R. Co. v. Arthur, 2 Colo. App. 159, 29 Pac. 1031; Pittsburgh &c. R. Co. v. Jones, 86 Ind. 496, 44 Am. Rep. 334, and note; Chicago &c. R. Co. v. Kern, 9 Ind. App. 505, 36 N. E. 381; Fort Scott &c. R. Co. v. Tubbs, 47 Kans. 630, 28 Pac. 612, 49 Am. & Eng. R. Cas. 685; St. Louis &c. R. Co. v. Stevens, 3 Kans. App. 176, 43 Pac. 434; Lindsay v. Winona &c. R. Co., 29 Minn. 411, 13 N. W. 191, 43 Am. St. 228, 7 Am. & Eng. R. Cas. 488; Mississippi &c. R. Co. v. Louisville &c. R. Co., 70 Miss. 119, 12 So. 156, 54 Am. & Eng. R. Cas. 512; Fitch v. Pacific R. Co., 45 Mo. 322; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Richmond &c. R. Co. v. Medley, 75 Va. 499, 40 Am. Rep. 734; Snyder v. Pittsburgh &c. R. Co., 11 W. Va. 14; Kellogg v. Chicago &c. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Erd v. Chicago &c. R. Co., 41 Wis. 65; Vaughan v. Taff Vale R. Co., 3 H. & N. 747. See also Cleveland &c. R. Co. v. Tate, 104 Ill. App. 615; Blount-Decker Lumber Co. v. Martin (Tex. Civ. App.), 190 S. W. 232. In Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97, it was said: "The conclusion from the case is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence, must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the com-

to use his property in the ordinary and usual way, and so long as he does so he will not be deemed guilty of contributory negligence in that respect.[33] And a property-owner is under no obligation to keep guard over his property or to watch for fires which may be set out by a railway company.[34] As a property-

pany will be guilty of negligence." See also notes in 12 L. R. A. (N. S.) 526, 624. An adjoining property-owner is under no obligation to provide himself with apparatus to extinguish such fires as may be set by the negligence of a railway company. McLaren v. Canada &c. R. Co., 32 U. C. C P. 324; Alabama &c. R. Co. v. Planters' Warehouse &c. Co., 153 Ala. 241, 45 So. 82.

[33] Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; New York &c R. Co. v. Grossman, 17 Ind. App. 652, 46 N. E. 546; Walker v. Chicago &c. R. Co., 76 Kans. 32, 90 Pac. 772, 12 L. R. A. (N. S.) 624; Louisville &c. R. Co. v. Beeler, 31 Ky. L. 750, 103 S. W. 300, 11 L. R. A. (N. S.) 930; Rowell v. Railroad Co., 57 N. H. 132; Kalbfleisch v. Long Island &c. R. Co., 102 N. Y. 520, 7 N. E. 557, 55 Am. Rep. 832, 29 Am. & Eng. R. Cas. 179; Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341, 2 Am. & Eng. R. Cas. 271; Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451; Caswell v. Chicago &c. R. Co., 42 Wis. 193. See also Boston &c. Co. v. Bangor &c. R. Co., 93 Maine 52, 44 Atl. 138, 47 L. R. A. 82, 19 Am. Rep. 618; La Salle v. Central R. Co., 73 Ore. 203, 144 Pac. 414. "It is very well settled that it is not contributory negligence for the occupant of land adjoining a railroad to leave it in its natural state; and a farmer using his premises in the ordinary and customary manner is not guilty of contributory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire happening through the negligence of a railroad company." Gulf &c. R. Co. v. Johnson, 54 Fed. 474.

[34] Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33, 49 Am. & Eng. R. Cas. 603. In that case it was said: "That the plaintiff was not bound to keep guard against the negligence of the defendant, but has the right to enjoy his property in the ordinary manner, and that, while he is charged with the duty of saving his property from destruction, if it can be saved, he is under no obligation to stand guard over it, continuously watching it, to protect it from the negligence of the defendant, is a proposition of law too clearly correct to admit of any controversy, and nothing in the authorities cited by the appellant question it; and the same is true of the charge that the fact that the plaintiff's property was exposed to the reach of sparks of a locomotive engine is no defense to an action of this kind, and the plaintiff has the right to construct his buildings on any part of his property, and to enjoy the same without rendering himself liable to the negligence of the defendant." See also Indiana Clay Co. v. Baltimore &c. R. Co., 31 Ind. App. 258, 67 N. E. 704.

owner has the right to use his property in the ordinary and usual way, he is not guilty of negligence in erecting buildings on his own land near a railway right of way,[35] nor, ordinarily, in stacking his grain or hay near the right of way of a railroad company.[36] So, where buildings are erected near the right of way the owner is not necessarily guilty of contributory negligence in permitting such buildings to remain in the condition caused by the natural deterioration and the usual effect of the elements on them, such as allowing a roof to become old and dry,[37] or a barn to become old and decayed.[38] Where hay or grain is stacked by an owner on his land near a railway right of way, he is ordinarily under no obligation to place out fire breaks and is not to be deemed guilty of contributory negligence as matter of law in failing to do so,[39] but where it is the usual and ordinary custom among farmers to place fire breaks around their stacks of hay and grain to guard against fires, as they do in prairie or open countries, it may be negligence in an owner to fail to put out fire breaks,[40] and it is, at least, a question which should

[35] Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; Grand Trunk &c. R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356; Cincinnati &c. R. Co. v. Barker, 94 Ky. 71, 21 S. W. 347; Cincinnati &c. R. Co. v. Cecil, 28 Ky. L. 830, 90 S. W. 585. It is not negligence per se to build a wooden building near a railway track. Briant v. Detroit &c. R. Co., 104 Mich. 307, 62 N. W. 365. See also Stacy v. Milwaukee &c. R. Co., 85 Wis. 225, 54 N. W. 779; Fero v. Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178.

[36] St. Joseph &c. R. Co. v. Chase, 11 Kans. 47; Cook v. Champlain &c. Co., 1 Denio (N. Y.) 91; Patton v. St. Louis &c. R. Co., 87 Mo. 117, 56 Am. Rep. 446, 23 Am. & Eng. R. Cas. 364; Reed v. Missouri Pacific R. Co., 50 Mo. App. 504; Gulf &c. R. Co. v. Fields, 2 Tex. App. Civ. Cas. 700.

[37] Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97.

[38] Jefferis v. Philadelphia &c. R. Co., 3 Houst. (Del.) 447.

[39] Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Hoffman v. Chicago &c. R. Co., 40 Minn. 60, 41 N. W. 301; Louisville &c. R. Co. v. Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Burlington &c. R. Co. v. Westover, 4 Nebr. 268.

[40] Keese v. Chicago &c. R. Co., 30 Iowa 78, 6 Am. Rep. 643. In this case it was said: "While the owner of land has the right to stack his grain or hay on his premises adjoining to a railway, and thereby only takes the risk of accident by fire not occasioned by the company's

be submitted to the jury.[41] So, where a person places a building or other property in a position exposing it to hazards from railway fires he is bound to take notice of the unusual and increased risk and may be required to exercise more care than if the property were placed in an unexposed position.[42] Thus, where a plaintiff owning a stable which stood two feet from the right of way of the defendant had permitted a large accumulation of straw and inflammable material to collect in a hot and dry season so that when it was set on fire the stable was also destroyed, it was held that the question of his contributory negligence was properly submitted to the jury.[43] And where the owner of the property allowed shavings and hay to accumulate near his building and fire caught in the shavings and hay and destroyed the building, it was held that the question of contributory negligence was one of fact for the jury.[44] Carelessly allowing the windows or doors of buildings near the track, in

negligence; yet, if he is guilty of negligence himself, in not ploughing around the stacks, or in omitting to do such acts as would have protected his property and prevented the loss, then it would be a case of contributory negligence." See West v. Chicago &c. R. Co., 77 Iowa 654, 35 N. W. 479, 42 N. W. 512, 32 Am. & Eng. R. Cas. 339.

[41] Ohio &c. R. Co. v. Shanefelt, 47 Ill. 497, 95 Am. Dec. 504; Kansas &c. R. Co. v. Brady, 17 Kans. 380; Missouri &c. R. Co. v. Kincaid, 29 Kans. 654, 11 Am. & Eng. R. Cas. 83; Ross v. Boston &c. R. Co., 6 Allen (Mass.) 87; Karsen v. Milwaukee &c. R. Co., 29 Minn. 12, 11 N. W. 122; Brown v. Hannibal &c. R. Co., 37 Mo. 298; Gram v. Northern Pacific R. Co., 1 N. Dak. 252, 46 N. W. 972, 45 Am. & Eng. R. Cas. 544; Erie &c. R. Co. v. Dicker, 78 Pa. St. 293; Kellogg v. Chicago &c. R. Co., 26 Wis. 223, 7 Am. Rep. 69.

[42] Kansas City &c. R. Co. v. Owen, 25 Kans. 419; Chicago &c. R. Co. v. Pennell, 94 Ill. 448; Briant v. Detroit &c. R. Co., 104 Mich. 307, 62 N. W. 365; Svea Ins. Co. v. Vicksburg &c. R. Co., 153 Fed. 774. See also Louisville &c. R. Co. v. Sullivan &c. Co., 138 Ala. 379, 35 So. 327; Alabama &c. R. Co. v. Clark, 145 Ala. 459, 39 So. 816. He cannot intentionally have it set afire and recover damages from the company. Bowen v. Boston &c. R. Co., 179 Mass. 524, 61 N. E. 141.

[43] Collins v. New York &c. R. Co., 5 Hun (N. Y.) 499; Omaha Fair Association v. Missouri Pacific R. Co., 42 Nebr. 105, 60 N. W. 330. So where he left the barn door open, knowing of the fire on the right of way. Brown v. Oregon &c. Co., 41 Wash. 688, 84 Pac. 400.

[44] Murphy v. Chicago &c. R. Co., 45 Wis. 222, 30 Am. Rep. 721; Coates v. Missouri &c. R. Co., 61 Mo. 38.

which are stored inflammable and dry materials, to remain open, thus exposing the buildings and their contents to sparks has been held to constitute contributory negligence,[45] although there are some cases which hold that such acts do not amount to negligence on the part of a property-owner.[46] Placing property along the line of a railway right of way for the purpose of shipment, with consent of the company, either express or implied, does not of itself constitute contributory negligence.[47] Even if it be conceded that in no case is a plaintiff bound to take any steps or precautions in anticipation of a fire set by a railway company, yet after a fire is once started and discovered by him the duty resting upon a plaintiff to try to save his property is an imperative one, and if he fails to make reasonable effort to discharge that duty he must bear the loss. He cannot stand by and see his property destroyed, when by a reasonable effort on his part the property could be saved, and then place the loss on another. That there can be no recovery in such cases has been declared again and again.[48] It has been held that if the fire was origin-

[45] Great Western &c. R. Co. v. Haworth, 39 Ill. 346; Brown v. Oregon &c. Co., 41 Wash. 688, 84 Pac. 400; St. Louis &c. R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. 408 (question for jury). But see Campbell v. McGregor, 29 N. B. 644.

[46] Fero v. Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178 and note; Campbell v. McGregor, 29 N. B. 644.

[47] Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Pittsburgh &c. R. Co. v. Nelson, 51 Ind. 150; Gulf &c. R. Co. v. McLean, 74 Tex. 646; Cincinnati &c. R. Co. v. South Fork Coal Co., 139 Fed. 528, 1 L. R. A. (N. S.) 523. Compare Missouri &c. R. Co. v. Bartlett, 69 Tex. 79, 32 Am. & Eng. R. Cas. 343.

[48] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357; Tilley v. St. Louis &c. R. Co., 49 Ark. 535, 6 S. W. 8; Denver &c. R. Co. v. Morton, 3 Colo. App. 155, 32 Pac. 345; Illinois &c. R. Co. v. McClelland, 42 Ill. 355; Toledo &c. R. Co. v. Pindar, 53 Ill. 447, 5 Am. Rep. 57; Chicago &c. R. Co. v. Pennell, 94 Ill. 448; Illinois &c. R. Co. v. McKay, 69 Miss. 139, 12 So. 447; Coates v. Missouri &c. R. Co., 61 Mo. 38; Stewart v. Quincy &c. R. Co., 142 Mo. App. 322, 126 S. W. 1003; Collins v. New York &c. R. Co., 5 Hun (N. Y.) 499; Doggett v. Richmond &c. R. Co., 78 N. Car. 305; Eaton v. Oregon &c. R. Co., 19 Ore. 391, 20 Pac. 415; Hawley v. Sumpter Val. R. Co., 49 Ore. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526 (but he must be in a position to do so); Post v. Buffalo &c. R. Co., 108 Pa. St. 585; Haverly v. State Line &c. R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. 848; McNarra v. Chicago &c. R. Co., 41 Wis. 69; Murphy v. Chicago &c.

ally set by the wrong of a railway company and part of the property was destroyed before the contributory negligence of the owner intervened, he may recover for the damage done up to the time when his negligence intervened, but not for that part of the property afterwards destroyed.[49] But where a fire was started by the negligence of a railway company, it was held erroneous to instruct the jury that a plaintiff could not recover if he made no attempt to extinguish the fire, entirely ignoring the question of the plaintiff's ability to cope with the fire.[50] Where a property-owner licensed the use of an engine on his premises and acquiesced in the use of such engine long after he became aware of its defective condition in the matter of its spark arresting apparatus it was held that he was guilty of such negligence as to preclude a recovery for damages on account of his property being destroyed by fire set by such engine.[51] If such a property-owner makes reasonable complaint it has been held

R. Co., 45 Wis. 222, 30 Am. Rep. 721. See also Louisville &c. R. Co. v. Sullivan &c. Co., 138 Ala. 379, 35 So. 327. The owner is bound to make only ordinary and reasonable efforts to extinguish a fire; extraordinary means or efforts are not required. Bevier v. Delaware &c. R. Co., 13 Hun (N. Y.) 254. The owner of land near the right of way is not bound to anticipate that the railroad company will fail to perform any of its legal duties to prevent the origin or spread of fire, but if he knows that his property is in danger from such a fire which has been negligently caused by the company he is guilty of contributory negligence if he fails to use reasonable effort to save it, provided he could thus have saved it. Baltimore &c. R. Co. v. Peck (Ind. App.), 114 N. E. 475.

[49] Stebbins v. Central Vermont &c. R. Co., 54 Vt. 464, 41 Am. Rep. 855.

[50] Tilley v. St. Louis &c. R. Co., 49 Ark. 535, 6 S. W. 8. See also Baltimore &c. R. Co. v. Peck (Ind. App.), 114 N. E. 475. Where sparks from a railway set fire to plaintiff's awning, and she became frightened and ran away without making any attempt to extinguish the fire and the house was destroyed, it was held that she was not guilty of contributory negligence, it not appearing that she could have extinguished the fire even if she had not run away. Sugarman v. Manhattan &c. R. Co., 16 N. Y. S. 533. See also Chicago &c. R. Co. v. Bautsch, 129 Ill. App. 23; St. Louis &c. R. Co. v. League, 71 Kans. 79, 80 Pac. 46; Clark v. Kansas City &c. R. Co., 129 Fed. 341; Hartford F. Ins. Co. v. Central R. Co., 74 Ore. 144, 144 Pac. 417; Franey v. Illinois Cent. R. Co., 104 Ill. App. 499.

[51] Marquette &c. R. Co. v. Spear, 44 Mich. 169, 6 N. W. 202, 38 Am. Rep. 242.

that he will not be held guilty of negligence.[52] The question as to whether a property-owner has been guilty of contributory negligence in suffering his property to be destroyed by fire is usually one to be submitted to the jury under all the circumstances of the case.[53]

§ 1763 (1239). **Measure of damages for property destroyed by fire.**—In determining the measure of damages which a person whose property is negligently burned by a railway company is entitled to recover, the difficult question is not so much the measure of that damage as the method of arriving at the proper measure. Stated abstractly the rule is that an owner is entitled to recover just compensation for the property destroyed, or, in other words, such an amount as will restore him to the same property status that which he occupied before his property was burned.[54] How to arrive at such compensation is the question to be determined, and the method adopted for determining such compensation will depend on the nature of the property destroyed, its location and other attendant circumstances. There are two kinds of property which may be destroyed or injured, personal and real, and where real property is destroyed or injured the property may be such a part of the real estate as to have a separate and independent value

[52] Kendrick v. Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. 526.

[53] Macon &c. R. Co. v. McConnell, 27 Ga. 481; Great Western &c. R. Co. v. Haworth, 39 Ill. 346; Illinois Central R. Co. v. Nunn, 51 Ill. 78; Missouri &c. R. Co. v. Cornell, 30 Kans. 35, 1 Pac. 312, 11 Am. & Eng. R. Cas. 56; Coates v. Missouri &c. R. Co., 61 Mo. 38; Haverly v. State Line &c. R. Co., 135 Pa. St. 50, 19 Atl. 1013, 20 Am. St. 848, 43 Am. & Eng. R. Cas. 31; St. Louis &c. R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. 408; Gibbons v. Wisconsin &c. R. Co., 66 Wis. 161, 28 N. W. 170, 25 Am. & Eng. R. Cas. 479; Mills v. Chicago &c. R. Co., 76 Wis. 422.

[54] Jacksonville &c. R. Co. v. Peninsular &c. R. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33, 49 Am. & Eng. R. Cas. 603, 644. See also Pacific Express Co. v. Lasker &c., 81 Tex. 81, 16 S. W. 792. Where timber land was burned over it is proper to consider in estimating the damages and the increased cost of cutting the timber owing to timber blown down because the roots of the trees had been burned away. Gordon v. Grand Rapids &c. R. Co., 103 Mich. 379, 61 N. W. 540.

of itself,[55] or it may be such that its value can only be determined by taking into consideration the entire value of the real estate of which it forms a part. Where the thing destroyed is personal property or such a part of realty that it has a value separate and apart from the soil on which it stands or with which it is connected the rule for determining the measure of damages is generally the same. In such cases if the property is totally destroyed the measure of damages is its market value at the time and place of its destruction,[56] and if only partially

[55] "For the purpose of actions for injuries through negligence, many things which are attached to the realty, and a part of it, such as fruit trees, houses, timber, etc., are considered separate and distinct from it because they have a value which is distinct from the value of the land. Therefore, where buildings, trees, crops, etc., are destroyed or injured, the proper measure of damages is not the difference in the value of the land before and after injury, but of the buildings, trees, etc., themselves; and where buildings are destroyed by fire, the proper measure of damages is the value of the buildings when destroyed." 2 Thompson Neg. 1262. See also Thomp. Neg. (2nd ed.) § 7228 et seq.; Western &c. R. Co. v. Tate, 129 Ga. 526, 59 S. E. 266; Atchison &c. R. Co. v. Huitt, 1 Kans. App. 781, 41 Pac. 1049; Hammond v. New York &c. R. Co., 211 Mass. 549, 98 N. E. 582; Mathews v. Missouri &c. R. Co., 142 Mo. 645, 44 S. W. 802; Cooley v. Kansas City &c. R. Co., 149 Mo. 487, 51 S. W. 101.

[56] Parrott v. Housatonic &c. R. Co., 47 Conn. 575; Donald v. St. Louis &c. R. Co., 44 Iowa 157; Ward v. Carson River &c. Co., 13 Nev. 44; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; White v. Chicago &c. R. Co., 1 S. Dak. 326, 47 N. W. 146, 9 L. R. A. 824 and note, 45 Am. & Eng. R. Cas. 565; Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; Galveston &c. R. Co. v. Horne, 69 Tex. 643, 35 Am. & Eng. R. Cas. 238; Galveston &c. R. Co. v. Rheiner (Tex. Civ. App.), 25 S. W. 441 and 971; Gulf &c. R. Co. v. Reagan (Tex. Civ. App.), 32 S. W. 846; Chapman v. Chicago &c. R. Co., 26 Wis. 295, 7 Am. Rep. 81. This is the true rule as to fruit trees whose value can be determined independently of the realty on which they are grown where the owner sues for the value of the trees. Whitback v. New York &c. Co., 36 Barb. (N. Y.) 644; Norfolk &c. R. Co. v. Bohannan, 85 Va. 293, 7 S. E. 236. See also Galveston &c. R. Co. v. Warnecke, 43 Tex. Civ. App. 83, 95 S. W. 600, and cases there cited; Kansas City &c. R. Co. v. Perry, 65 Kans. 792, 70 Pac. 876; Atchison &c. R. Co. v. Geiser, 68 Kans. 281, 75 Pac. 68; Kansas City &c. R. Co. v. Rogers, 48 Nebr. 653, 67 N. W. 602; Missouri Pac. R. Co. v. Tipton, 61 Nebr. 49, 84 N. W. 416; Bailey v. Chicago &c. R. Co., 3 S. Dak. 531, 54 N. W. 596, 19 L. R. A. 653 and note; Ducktown &c. Co. v. Barnes (Tenn.), 60 S. W. 593.

destroyed the measure of damages is the difference between the market value and its value after the injury.[57] The cost of replacing the property is not usually the correct measure of damages for its destruction.[58] Where property of the kind destroyed has a market value at the time and place of the destruction the measure of damages is very easily determined for mere proof of the market value is all that is required. But it often happens that the kind of property destroyed has no market value and it would be impossible to prove a market value. In such cases instead of taking the market value as a standard for determining the measure of damages the real and ordinary value is taken,[59] and to enable a jury to determine

Testimony as to their value may show the difference in the value of the land before and after the fire. Dent v. South Bound R. Co., 61 S. Car. 329, 39 S. E. 527; and this view may, perhaps, reconcile many of the cases, although another distinguishing feature would seem to be the form of action; that is, whether it is for injury to the trees, or the like, alone, or for injury to the realty. But ordinarily fruit trees have not a value separate and apart from the real estate on which they stand. Dwight v. Elmira &c. Co., 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612 and note, 28 Am. St. 563. Where forest or matured trees are injured the measure of damages is the difference in value before and after the fire. Atkinson v. Atlantic &c. Co., 63 Mo. 367. As standing timber. Union Pac R. Co. v. Murphy, 76 Nebr. 545, 107 N. W. 757. In Clarke v. New York &c. R. Co., 26 R. I. 59, 58 Atl. 245, the plaintiff was held entitled to damages to the soil and standing timber, although he had given a license to another to remove it.

[57] Atkinson v. Atlantic &c. R. Co., 63 Mo. 367; Bevier v. Delaware &c. R. Co., 13 Hun (N. Y.) 254; Texas &c. R. Co. v. Levi, 59 Tex. 674, 13 Am. & Eng. R. Cas. 464.

[58] Pacific &c. R. Co. v. Lasker, Real Estate Assn., 81 Tex. 81, 16 S. W. 792; Pacific &c. R. Co. v. Smith (Tex.), 16 S. W. 998; Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; Watt v. Nevada &c. R. Co., 23 Nev. 154, 44 Pac. 423, 62 Am. St. 772 and note; Jacksonville &c. R. Co. v. Peninsular &c. R. Co., 27 Fla. 1, 9 So. 661, 16 L. R. A. 631 and note. But see Wiggins v. St. Louis &c. R. Co., 119 Mo. App. 492, 95 S. W. 311; Vermilya v. Chicago &c. R. Co., 66 Iowa 606, 55 Am. Rep. 279; Cincinnati &c. R. Co. v. Falconer, 30 Ky. L. 152, 97 S. W. 727.

[59] Fremont &c. R. Co. v. Crum, 30 Nebr. 70, 46 N. W. 217; International &c. R. Co. v. Searight, 8 Tex. Civ. App. 593, 28 S. W. 39; Missouri &c. R. Co. v. Neiser, 54 Tex. Civ. App. 460, 118 S. W. 166. See also Texas &c. R. Co. v. Prude (Tex. Civ. App.), 86 S. W. 1046;

such real or ordinary value and to arrive at a fair valuation all facts connected with such property, such as its cost, the uses to which it has been put, its age, its condition, location and the like are admissible.[60] The opinions of witnesses acquainted with the standard value of such property are also competent.[61] So, where buildings are destroyed and they have a separate and independent value apart from the soil on which they stand, but no market value, it has been held proper to admit evidence of the cost of their construction as an element in determining the measure of damages.[62] Where the property

McMahon v. Dubuque, 107 Iowa 62, 77 N. W. 517; Pittsburgh &c. R. Co. v. Indiana &c. Co., 154 Ind. 322, 56 N. E. 766; Highland v. Houston &c. R. Co. (Tex. Civ. App.), 65 S. W. 649.

[60] Atchison &c. R. Co. v. Stanford, 12 Kans. 354, 15 Am. Rep. 362; Pittsburgh &c. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285. See also Toledo &c. R. Co. v. Fenstermaker, 163 Ind. 534, 72 N. E. 561; Castner v. Chicago &c. R. Co., 126 Iowa 581, 102 N. W. 499; Wiggins v. St. Louis &c. R. Co., 119 Mo. App. 492, 95 S. W. 311; Jacksonville &c. R. Co. v. Peninsular Land &c. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33; Wall v. Platt, 169 Mass. 398, 48 N. E. 270; Denver &c. R. Co. v. Frame, 6 Colo. 382. Where the property was so badly damaged by the fire as to have no market value at the place where the injury occurred, it is proper to take into account, in estimating the measure of damages, the cost of preparing it for a market and shipping it thereto. Texas &c. R. Co. v. Levi, 59 Tex. 675, 13 Am. & Eng. R. Cas. 464. As affecting the measure of damages for the destruction it is competent to show the age of the meadow, and to prove, also, that as the meadow became older the quantity and quality of the hay increased. Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534. Evidence is also admissible in an action for injuries to grass lands that they were burned over the two years previous. Gulf &c. R. Co. v. Saddler, 8 Tex. Civ. App. 300, 27 S. W. 904. Where land is injured by fire evidence is admissible to show the capacity of the land to produce crops before and after the fire. Chicago &c. R. Co. v. Burden, 14 Ind. App. 572, 43 N. E. 155.

[61] Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Lafayette &c. R. Co. v. Winslow, 66 Ill. 219; Matthews v. Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802; Fremont &c. R. Co. v. Marley, 25 Nebr. 138, 13 Am. St. 482; Stertz v. Stewart, 74 Wis. 160. But their opinion as to the amount of damage, which is the ultimate question to be decided by the jury, is inadmissible in many jurisdictions. Wiggins v. St. Louis &c. Ry. Co., 119 Mo. App. 492, 95 S. W. 311.

[62] Cleland v. Thornton, 43 Cal. 437; Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1, 9 So. 661,

destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached, that it has no value separate and independent of the real estate, or the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it.[63]

17 L. R. A. 33 and note. See also Cincinnati &c. R. Co. v. Falconer, 30 Ky. L. 152, 97 S. W. 727.

[63] Louisville &c. R. Co. v. Spencer, 149 Ill. 97, 36 N. E. 91; Baltimore &c. R. Co. v. Countryman, 16 Ind. App. 139, 44 N. E. 265; Rowe v. Chicago &c. R. Co., 102 Iowa 286, 71 N. W. 409, 411 (quoting text); Bradley v. Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996; Atchison &c. R. Co. v. Arthurs, 63 Kans. 404, 65 Pac. 651; Kansas &c. Ry. Co. v. Hoover (Kans. App.), 43 Pac. 854; Carner v. Chicago &c. R. Co., 43 Minn. 375; Hayes v. Chicago &c. R. Co., 45 Minn. 17, 47 N. W. 260; Estabrook v. Erie R. Co., 51 Barb. (N. Y.) 94; Missouri &c. R. Co. v. Ayers (Tex.), 8 S. W. 538; Missouri &c. R. Co. v. Fulmore (Tex.), 29 S. W. 688; Fort Worth &c. R. Co. v. Hogsett, 67 Tex. 685, 9 S. W. 440; Galveston &c. R. Co. v. Horne, 69 Tex. 643, 35 Am. & Eng. R. Cas. 238; Fort Worth &c. R. Co. v. Wallace, 74 Tex. 581, 40 Am. & Eng. R. Cas. 248; Missouri &c. R. Co. v. Goode, 7 Tex. Civ. App. 245, 26 S. W. 441. Where plaintiff's cranberry marsh was destroyed by fire it was held that he had a right, as affecting the measure of damages, to introduce evidence showing the natural advantages of the marsh as to the accumulation of water from adjoining lands, thereby making the marsh more valuable and productive. Moore v. Chicago &c. R. Co., 78 Wis. 120, 47 N. W. 273. In Dwight v. Elmira &c. R. Co., 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612, and note, 28 Am. St. 563, the court said: "It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the free-hold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. Ensley v. Mayor, 2 Baxt. (Tenn.) 144; Striegel v. Moore, 55 Iowa 88, 7 N. W. 413; Longfellow v. Quimby, 33 Maine 457; Foote v. Merrill, 54 N. H. 490, 20 Am. St. 151. . . . In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed a part, as indeed he should not have been, as such value was little or nothing, so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury; and as this rule was not followed, but rejected, on the trial, and a method of proving damages adopted not recognized nor

The authorities, however, are not entirely harmonious, especially when it comes to the application of the general rule, and much may depend upon the circumstances of the particular case, and there are cases in which the rental value of the land or cost of replacing the property, or its actual value, or the like has been held to properly measure the damages.[64] While

permitted by the courts, the judgment should be reversed." In Vermilya v. Chicago &c. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279, 23 Am. & Eng. R. Cas. 108, where a meadow was destroyed by the negligent setting out of fire by a railway company, it was held that the measure of damages was the cost of restoring the meadow. See St. Louis &c. R. Co. v. Jones, 59 Ark. 105, 26 S. W. 595. And where plaintiff's fencing was injured and destroyed it was held that he was entitled to recover the cost of restoring to as good a condition as before the fire. Central &c. R. Co. v. Murray, 93 Ga. 256, 20 S. E. 129. See also as to damages to fence, Wiggins v. St. Louis &c. R. Co., 119 Mo. App. 492, 95 S. W. 311. In the case of Ward v. Chicago &c. R. Co., 61 Minn. 449, 63 N. W. 1104, the court said: "An action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle such an action can not be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. The proof in an action to recover for trees destroyed is all directed to an ascertainment of the difference in the market value of the real property immediately before the injury and immediately after its infliction, this difference being the measure of damages. The proof in a case to recover for injuries to a growing crop is, or should be, confined to estimating the value of the crop when destroyed; such being the measure of damages. . . . The measure of damages in this case must be ascertained by inquiring into the difference in the market value of the real property immediately before the injury and its value immediately after its infliction, and in ascertaining this difference evidence that another crop of some character and value may be grown on the land the same growing period, of the average yield of like crops, of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased and diminished the value of the farm, may be considered."

[64] See generally Black v. Minneapolis &c. R. Co., 122 Iowa 32, 96 N. W. 984; Kansas City &c. R. Co. v. Pirtle, 67 Ark. 617, 55 S. W. 940; Krejci v. Chicago &c. R. Co., 117 Iowa 344, 90 N. W. 708; Cooley v. Kansas City &c. R. Co., 149 Mo. 487, 51 S. W. 101; Knight Bros. v.

there are some authorities which deny the right of an owner to interest on the amount of his recovery,[65] the general rule is that interest may be allowed on the amount of damage done from the date of the injury to the date of the recovery.[66] Where

Chicago &c. R. Co., 122 Mo. App. 38, 98 S. W. 81; Jamieson v. New York &c. R. Co., 162 N. Y. 630, 57 N. E. 1113, affirming 42 N. Y. S. 915. Rental value and cost of residing held the proper measure where injury not permanent. St. Louis &c. R. Co. v. Jones, 59 Ark. 112, 26 S. W. 595; Ft. Scott &c. R. Co. v. Tubbs, 47 Kans. 630. "Stumpage" held the proper measure where timber is destroyed, in Gorden v. Grand Rapids &c. R. Co., 103 Mich. 379, 61 N. W. 549. For destruction of growing trees the measure of damages is usually their value with reference to the land prior to the damage, less their value afterwards. Louisville &c. R. Co. v. Kohlruss, 124 Ga. 250, 52 S. E. 166; Union Pac. R. Co. v. Murphy, 76 Nebr. 545, 107 N. W. 757. Value of fruit trees independent of the land and value of land before and after fire was permitted to be shown in St. Louis &c. R. Co. v. Noland, 75 Kans. 691, 90 Pac. 273.

[65] Atkinson v. Atlantic &c. R. Co., 63 Mo. 367; De Steiger v. Hannibal &c. R. Co., 73 Mo. 33, 7 Am. & Eng. R. Cas. 492.

[66] Parrott v. Housatonic &c. R. Co., 47 Conn. 575; Union Pac. R. Co. v. Ray, 46 Nebr. 750, 65 N. W. 773; Wilson v. Atlanta &c. R. Co., 16 S. Car. 587; Texas &c. R. Co. v. Levi, 59 Tex. 674; Texas &c. R. Co. v. Tankersley, 63 Tex. 57; Galveston &c. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 440, 35 Am. & Eng. R. Cas. 238; Gulf &c. R. Co. v. Sheperd (Tex. Civ. App.), 76 S. W. 800; Norfolk &c. R. Co. v. Bohannan, 85 Va. 293, 7 S. E. 236; Chapman v. Chicago &c. R. Co., 26 Wis. 295, 7 Am. Rep. 81. See also Black v. Minneapolis &c. R. Co., 122 Iowa 32, 96 N. W. 984. It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such, for instance, as assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods, at the time of their destruction, of the interest from that time to the date of the judgment." Regan v. New York &c. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. 306, 49 Am. & Eng. R. Cas. 590. But it is said that this should be left to the discretion of the jury. 6 Thomp. Neg. (2nd ed.), § 7261, and cases there cited.

after a fire had been negligently set by a railway company the owner could have saved part of the property from destruction but failed to do so, the defendant may prove the value of the property so negligently failed to be saved by the owner.[67] In some states there are statutory enactments which allow a plaintiff to recover, in addition to his actual damages, attorney's fees.[68]

§ 1764 (1240). **Pleading—Parties.**—A suit brought to recover damages on account of property destroyed by fire should be brought, as a general rule, by the owner of that property.[69] But where property which has been destroyed was insured and the insurance company has paid the insurance and been subrogated to the rights, if any, of the insured against a wrongdoer causing the loss, it has been held that suit may be brought in either the name of the insured, the insurer, or both.[70] And where the injury was caused by a company operating the line under a lease the action may, according to some of the authorities, be brought against either lessee or lessor unless there is a statute expressly exempting the lessor from liability.[71]

§ 1765 (1241). **Pleading—Sufficiency of complaint.**—What will be sufficient to constitute a good complaint against a

[67] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357, 9 Am. & Eng. R. Cas. 222.

[68] § 1773, infra. Double damages may be recovered under the Michigan statute. Mink v. Grand Rapids &c. R. Co., 194 Mich. 324, 160 N. W. 535.

[69] See Fort Worth &c. R. Co. v. Wallace, 74 Tex. 581, 12 S. W. 227, 40 Am. & Eng. R. Cas. 248. Buildings situated on the land of another, with the right of removal, are personal property, and the owner is the proper person to sue for their destruction. Laird v. Connecticut &c. R. Co., 62 N. H. 254, 13 Am. St. 564, 43 Am. & Eng. R. Cas. 63. See generally as to parties: International &c. R. Co. v. Timmermann, 61 Tex. 660; Eddy v. Lafayette, 49 Fed. 807; Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Ohio &c. R. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812; Bullis v. Chicago &c. R. Co., 76 Iowa 680, 39 N. W. 245; Logan v. Wabash Western R. Co., 43 Mo. App. 71; Gulf &c. R. Co. v. Smith, 3 Tex. Civ. App. 483, 23 S. W. 89; Cleveland v. Grand Trunk R. Co., 42 Vt. 449.

[70] Ante, § 1758. See also Jacobs v. New York Cent. &c. R. Co., 107 App. Div. (N. Y.) 134, 94 N. Y. S. 954.

[71] Ante, § 1761.

railway company for negligently burning property depends on what it is necessary to show to constitute a good cause of action. And as the facts which a plaintiff is bound to show vary in different jurisdictions it necessarily follows that there will be a corresponding difference in the pleadings. Ownership of the property destroyed must generally be averred in an action to recover its loss.[72] Where there are statutes in force imposing an absolute liability it need not be alleged that the fire was negligently set out,[73] but where no such statute exists and a recovery can only be had on proof of negligence of the company, facts constituting negligence must be alleged and the particular kind of negligence on which the recovery is based should be shown.[74] Thus, where the action is based on the use of defec-

[72] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357, 9 Am. & Eng. R. Cas. 222. Where it appears that land damaged by fire was owned by plaintiff and his children, and it is not shown how many children there are or the extent of plaintiff's injury, a non-suit is proper. Comer v. Newman, 95 Ga. 434, 22 S. E. 634. As to what is sufficient title and proof thereof, see generally, Ohio &c. R. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812; Metzgar v. Chicago &c. R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. 224; Johnson v. Chicago &c. R. Co., 77 Iowa 666, 42 N. W. 512; McClellan v. St. Paul &c. R. Co., 58 Minn. 104, 59 N. W. 978; Rood v. New York &c. R. Co., 18 Barb. (N. Y.) 80; Ridell v. New York Cent. &c. R. Co., 73 N. Y. 618; Pacific Exp. Co. v. Dunn, 81 Tex. 85, 16 S. W. 792; Spurlock v. Port Townsend &c. R. Co., 13 Wash. 29, 42 Pac. 520; Reed v. Chicago &c. R. Co., 71 Wis. 399, 37 N. W. 225.

[73] Campbell v. Missouri &c. R. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. 530 and note; Martin v. New York &c. R. Co., 62 Conn. 331, 25 Atl. 239.

[74] See Flint River &c. R. Co. v. Maples, 10 Ga. App. 573, 73 S. E. 957; Van Dyker v. Grand Trunk R. Co., 84 Vt. 212, 78 Atl. 958, Ann. Cas. 1913A, 640. Where a statute provided that no formal pleadings should be required in a justice's court, but only a "statement of the facts constituting the cause of action upon which the suit is founded," a statement in a suit for damages caused by a railway fire which did not allege that the fire was negligently set was held sufficient on objection raised after verdict. Polhans v. Atchison &c. R. Co., 115 Mo. 535, 22 S. W. 478. For complaint held sufficiently certain, see Pittsburg &c. R. Co. v. Wise, 36 Ind. App. 59, 74 N. E. 1107. Great particularity is not ordinarily required. New York &c. R. Co. v. Roper, 176 Ind. 497, 96 N. E. 468; Wyatt v. Seaboard &c. R. Co., 156

tive appliances negligence in that respect must be shown and where the action is based on negligence in suffering a fire to escape from the right of way it must be alleged that the fire was negligently suffered to escape.[75] Where property which had been placed on the right of way of a railway company was destroyed by fire it was held in an action to recover its value that a complaint which did not allege that the property was rightfully on the right of way was not sufficient to withstand a demurrer.[76] Where a complaint contained no allegation as to the unskillfulness of the engineer or fireman but charged the company with negligence in permitting the engine to be out of "repair and carelessly and negligently used," it was held that the allegation was not sufficient to justify a charge submitting to the jury the question of skillfulness of the engineer and fireman.[77] Where a complaint is based on the negligence of the company in setting fire directly from an engine the complaint should describe, as definitely as possible, the locomotive setting the fire so that the defendant may have an opportunity to identify the engine and examine into its condition at the time of the fire as well as the conduct of its agents and servants at that time.[78] As a general rule the complaint

N. Car. 307, 72 S. E. 383; St. Louis &c. R. Co. v. Wilbanks (Tex. Civ. App.), 113 S. W. 318.

[75] Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111; Louisville &c. R. Co. v. Ehlert, 87 Ind. 339; Indiana &c. R. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5, 34 Am. & Eng. R. Cas. 127; Lake Erie &c. R. Co. v. Miller, 9 Ind. App. 192, 36 N. E. 428; Louisville &c. R. Co. v. Palmer, 13 Ind. App. 161, 39 N. E. 881; Louisville &c. R. Co. v. Roberts, 13 Ind. App. 692, 42 N. E. 247; Chicago &c. R. Co. v. Burden, 14 Ind. App. 647, 43 N. E. 155. For complaint held sufficient, see Pittsburg &c. R. Co. v. Wise, 36 Ind. App. 59, 74 N. E. 1107.

[76] Pennsylvania R. Co. v. Gallentine, 77 Ind. 322, 7 Am. & Eng. R. Cas. 517; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110, 7 Am. & Eng. R. Cas. 524.

[77] Babcock v. Chicago &c. R. Co., 72 Iowa 197, 33 N. W. 628. Compare Bullis v. Chicago &c. R. Co., 76 Iowa 680, 39 N. W. 245.

[78] Koontz v. Oregon &c. R. Co., 20 Ore. 3, 23 Pac. 820, 43 Am. & Eng. R. Cas. 11; Missouri Pac. R. Co. v. Merrill, 40 Kans. 404. See also Allen v. Chicago &c. R. Co., 145 Wis. 263, 129 N. W. 1094. But failure to identify the particular engine may not make the complaint bad on demurrer, especially when it avers that the plaintiff is

must allege the particular negligence which it is intended to prove for an allegation of negligence in one particular is not sufficient to admit evidence of negligence in another particular.[79] Thus, where it was alleged that a company was guilty of negligence in operating its locomotives evidence tending to show negligence in permitting combustibles to accumulate is inadmissible.[80] But in many jurisdictions negligence may be charged somewhat generally, at least unless the defendant asks to have the complaint made more specific. And where it was alleged that an engine was operated with a defective flue, proof that it had no flue at all was held not to be a fatal variance.[81] A complaint which alleged that the railway company "negligently allowed its engine to scatter fire" has been held broad enough to admit evidence as to the condition of the engine and the manner of its operation.[82] The pleader should allege facts to charge the defendant with knowledge that the result charged might be reasonably expected to follow directly and naturally from the burning.[83]

§ 1766 (1242). **Burden of proof—Presumption of negligence.** —Where a fire is caused by inflammable material on the right of way or by fire spreading from the right of way the authorities are pretty well agreed that the burden of proving negligence rests upon the plaintiff. In such cases it is but just that the burden should rest upon the plaintiff for the means of proof are

unable to describe it more definitely. See Florida &c. R. Co. v. Welch, 53 Fla. 145, 44 So. 250; Lake Erie &c. R. Co. v. Ford, 167 Ind. 205, 78 N. E. 969; Norfolk &c. R. Co. v. Thomas, 110 Va. 622, 66 S. E. 817.

[79] Miller v. Chicago &c. R. Co., 76 Iowa 318, 41 N. W. 28. See also St. Louis &c. R. Co. v. Moss, 37 Tex. Civ. App. 461, 84 S. W. 281.

[80] Carter v. Kansas City &c. R. Co., 65 Iowa 287, 21 N. W. 607; Miller v. Chicago &c. R. Co., 66 Iowa 364, 23 N. W. 756.

[81] Denver &c. R. Co. v. Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537.

[82] Weber v. Winona &c. R. Co., 63 Minn. 66, 65 N. W. 93. See also Alabama Great Southern R. Co. v. Sanders, 145 Ala. 449, 40 So. 402; Norwich Ins. Co. v. Oregon R. Co., 46 Ore. 123, 78 Pac. 1025. Compare Lake Erie &c. R. Co. v. Ford, 167 Ind. 205, 78 N. E. 969.

[83] Atlantic Coast Line R. Co. v. Benedict Pineapple Co., 52 Fla. 165, 42 So. 529.

as equally available to the plaintiff as to the defendant. The gist of the action in such cases is negligence in suffering the fire to escape and the burden in showing negligence in that respect rests upon the plaintiff. But where a fire is set directly by sparks from a locomotive and the action is predicated on negligence of the company in using a locomotive with defective apparatus or equipments or in negligently and unskillfully managing a locomotive, the authorities are in direct conflict as to which party has the burden of proof. The plaintiff must, of course, assume the burden of proving that there was a fire and that it was set by a locomotive.[84] But after it has been shown that there was a fire and it was set by a locomotive before there can be a recovery, in the absence of absolute statutory liability, it still remains to be shown that the company was guilty of some act of negligence. Here the authorities are in decided conflict. There are a great many authorities which maintain and enforce the rule that when it has once been proved that a fire was set by a locomotive a presumption of negligence[85] at once arises and the burden is on the defendant

[84] Inman v. Elberton &c. R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. 232; Smart v. Missouri Pac. R. Co., 80 Kans. 438, 102 Pac. 253; Union &c. R. Co. v. Keller, 36 Nebr. 189, 54 N. W. 420; Missouri &c. R. Co. v. Morgan (Tex. Civ. App.), 146 S. W. 336; Niskern v. Chicago &c. R. Co., 22 Fed. 811.

[85] Eddy v. Lafayette, 49 Fed. 807; Louisville &c. R. Co. v. Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. 66; Louisville &c. R. Co. v. Smith, 163 Ala. 141, 50 So. 241; Tilley v. St. Louis &c. R. Co., 49 Ark. 535, 6 S. W. 8, 32 Am. & Eng. R. Cas. 324; St. Louis &c. R. Co. v. Coombs, 76 Ark. 132, 88 S. W. 595, 596 (citing text); Burroughs v. Housatonic &c. R. Co., 15 Conn. 124, 38 Am. Dec. 64; East Tennessee &c. R. Co. v. Hesters, 90 Ga. 11, 15 S. E. 828; Osburn v. Oregon R. &c. Co., 15 Idaho 478, 98 Pac. 627, 19 L. R. A. (N. S.) 742; Illinois Central R. Co. v. Mills, 42 Ill. 407; Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Rose v. Chicago &c. R. Co., 72 Iowa 625, 34 N. W. 450; Seska v. Chicago &c. R. Co. 77 Iowa 137, 41 N. W. 596; Greenridge &c. R. Co. v. Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755; Jones v. Michigan &c. R. Co., 59 Mich. 437, 26 N. W. 662; Woodson v. Milwaukee &c. R. Co., 21 Minn. 60; Karsen v. Milwaukee &c. R. Co., 29 Minn. 12, 11 N. W. 122; Johnson v. Chicago &c. R. Co., 31 Minn. 57; Fitch v. Pacific &c. R. Co., 45 Mo. 322; Coates v. Missouri &c. R. Co.,

to overcome that presumption before it can escape liability. In a number of states this rule prevails as a result of statutory

61 Mo. 38; Kinney v. Hannibal &c. R. Co., 70 Mo. 243; Wise v. Joplin &c. R. Co., 85 Mo. 178; Reed v. Missouri &c. R. Co., 50 Mo. App. 504; Burlington &c. R. Co. v. Westover, 4 Nebr. 268; Longabaugh v. Virginia City &c. R. Co., 9 Nev. 271; Case v. Northern Central &c. R. Co., 59 Barb. (N. Y.) 644; Ellis v. Portsmouth &c. R. Co., 2 Ired. (N. Car.) L. 138; Anderson v. Cape Fear &c. Co., 64 N. Car. 399; Johnson v. Northern &c. R. Co., 1 N. Dak. 354, 48 N. W. 227, 45 Am. & Eng. R. Cas. 554; Smith v. Northern &c. R. Co., 3 N. Dak. 17, 53 N. W. 173; Koontz v. Oregon &c. R. Co., 20 Ore. 3, 23 Pac. 820, 43 Am. & Eng. R. Cas. 11; Brown v. Atlanta &c. R. Co., 19 S. Car. 39; Cronk v. Chicago &c. R. Co., 3 S. Dak. 93, 52 N. W. 720, 54 Am. & Eng. R. Cas. 525; Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; International &c. R. Co. v. Timmermann, 61 Tex. 660; Gulf &c. R. Co. v. Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. 74; Galveston &c. R. Co. v. Dolores &c. R. Co. (Tex. Civ. App.), 26 S. W. 79; Edwards v. Campbell, 12 Tex. Civ. App. 236, 33 S. W. 761; Anderson v. Wasatch &c. R. Co., 2 Utah 518; Cleveland v. Grand Trunk &c. R. Co., 42 Vt. 449; Kimball v. Borden, 95 Va. 203, 28 S. E. 207, 208 (citing text); Columbia &c. R. Co. v. Farrington, 1 Wash. 202, 23 Pac. 413; Aglionby v. Norfolk &c. Ry. Co., 80 W. Va. 687, 93 S. E. 812; Spaulding v. Chicago &c. R. Co., 30 Wis. 110, 11 Am. Rep. 550; Smith v. London &c. R. Co., L. R. 6 C. P. 14; Piggott v. Eastern &c. R. Co., 3 C. B. 229; Aldridge v. Great Western &c. R. Co., 15 C. B. (N. S.) 582; Moxley v. Canada &c. R. Co., 14 Ont. App. 309, 32 Am. & Eng. R. Cas. 304; Gibson v. South Eastern &c. R. Co., 1 F. & F. 23. See also Louisville &c. R. Co. v. Marbury Lumber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. 917 and note; Piggott v. Eastern Counties R. Co., 3 C. B. 229, 54 Eng. Com. L. 228; McCullen v. Chicago &c. R. Co., 101 Fed. 66, 49 L. R. A. 642. "But there are cases where negligence will be presumed from proof of the accident and the injury, and fires caused by steam engines seem to come within this class. This is a presumption arising from necessity, and that justice may not be defeated. Fire escapes from an engine and destroys property. The owner only knows that his property is gone, and that the fire causing its destruction came from the engine. He might not know, or be able to prove, from what particular engine on the line of the railroad the fire escaped, or who at the time was in charge of it, or whether it was properly constructed, and so not be able to prove negligence, when, in fact, it did exist. All this proof is in possession of the railroad company, and it has the power of rebutting the charge of negligence,

enactment.[86] But in a great many states, it is held that no presumption of negligence arises from a mere setting of a fire, and that something further must be shown by the plaintiff before he can recover.[87] Those authorities which hold that the burden

if none, in fact existed." Diamond v. Northern &c. R. Co., 6 Mont. 580, 13 Pac. 367, 29 Am. & Eng. R. Cas. 117. In the case of Galveston &c. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 440, 35 Am. & Eng. R. Cas. 238, the court said: "There is a conflict in the decisions of England and America, as to whether the escape of sparks from a passing engine is prima facie evidence of negligence on the part of the company running the engine. . . . The employes know the condition of the engine, and of the appliances used to prevent the escape of fire, and they should be informed as to whether these were sufficient for that purpose. The injured party would not, as a general thing, be possessed of any such information, and he could not ordinarily obtain it. To require him to make the proof would in most instances be a denial of justice, and would allow the party doing the wrong to escape by concealing the facts which brought it about. Hence, the courts have adopted the salutary rule of presuming the existence of negligence against the party who has the means of disproving it, and fails to make use of them."

[86] East Tennessee &c. R. Co. v. Hesters, 90 Ga. 11, 15 S. E. 828; Tallulah Falls R. Co. v. Stribling, 20 Ga. App. 353, 93 S. E. 161; Chicago &c. R. Co. v. Clampit, 63 Ill. 95; Chicago &c. R. Co. v. Pennell, 110 Ill. 435; Garrett v. Chicago &c. R. Co., 36 Iowa 121; Small v. Chicago &c. R. Co., 50 Iowa 338; Babcock v. Chicago &c. R. Co., 62 Iowa 593, 11 Am. & Eng. R. Cas. 64, 13 Am. & Eng. R. Cas. 477; Missouri &c. R. Co. v. Merrill, 40 Kans. 404; Atchison &c. R. Co. v. Gibson, 42 Kans. 34; Baltimore &c. R. Co. v. Dorsey, 37 Md. 19; Annapolis &c. R. Co. v. Gantt, 39 Md. 115; Karsen v. Milwaukee R. Co., 29 Minn. 12, 14, 11 N. W. 122; Daly v. Chicago &c. R. Co., 43 Minn. 319, 45 N. W. 611; Louisville &c. R. Co. v. Natchez &c. Co., 67 Miss. 399; Smith v. Northern &c. R. Co., 3 N. Dak. 17, 53 N. W. 173; McLavish v. Great Northern R. Co., 8 N. Dak. 333, 79 N. W. 443, 446; Cleveland v. Grand Trunk &c. R. Co., 42 Vt. 449. Under statutes such as those in Minnesota and North and South Dakota, it is said that the sole office of such a presumption is to change the burden of proof, that it then becomes functus officio and can not be used, after evidence of the facts has been adduced to raise an issue for a jury which the evidence itself does not present. Woodward v. Chicago &c. R. Co., 145 Fed. 577, 580.

[87] Garrett v. Southern R. Co., 101 Fed. 102, 49 L. R. A. 645; Cincinnati &c. R. Co. v. South Fork Coal Co., 139 Fed. 528, 537; Henry

of proof should rest upon the plaintiff justify the rule on the ground that the company, being engaged in a lawful business, should not be made to respond in damages without being shown to have been guilty of negligence.[88] Those authorities which hold that the burden of disproving negligence should rest upon the defendant proceed upon the theory that the mere fact that a fire is set out indicates negligence and that the evidence necessary to show negligence is peculiarly within the reach of the defendant and often not available to the plaintiff, and that no hardship is imposed upon the defendant in requiring it to produce that evidence.[89] The tendency of modern judicial decision

v. Southern &c. R. Co., 50 Cal. 176; Burroughs v. Housatonic &c. R. Co., 15 Conn. 124, 38 Am. Dec. 64 and note; Jefferis v. Philadelphia &c. R. Co., 3 Houst. (Del.) 447; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Pittsburgh &c. R. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285, 32 Am. & Eng. R. Cas. 150; Chicago &c. R. Co. v. Ostrander, 116 Ind. 259, 15 N. E. 227; Baltimore &c. R. Co. v. O'Brien, 38 Ind. App. 143, 77 N. E. 1131; Meyer v. Vicksburg &c. R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. 408; Lowney v. New Brunswick &c. R. Co., 78 Maine 479, 7 Atl. 381; Ruffner v. Cincinnati &c. R. Co., 34 Ohio St. 96; Philadelphia &c. R. Co. v. Yerger, 73 Pa. St. 121; Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. 652; Bernard v. Richmond &c. R. Co., 85 Va. 792, 8 S. E. 785, 17 Am. St. 103. See also Babbitt v. Erie R. Co., 108 App. Div. 74, 95 N. Y. S. 429.

[88] The most cogent reasons given for the support of this rule are, that a railroad company which is authorized by law to operate its trains by steam is not an insurer against accidents by fire, and is not liable for injuries caused by the use of fire in generating steam, if the right is exercised in a lawful manner and with reasonable care and skill; and the owner of adjacent property assumes all risks incident to a lawful and proper use of the road; that negligence is the gist of the liability, without proof of which an action can not be maintained, and by the general rule in actions founded on negligence, the plaintiff must aver it, and the burden of proof rests upon him, and in no case does the mere fact of injury prove negligence." Louisville &c. R. Co. v. Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. 66.

[89] The reason of the rule is thus stated in the case of Spaulding v. Chicago &c. R. Co., 30 Wis. 110, 11 Am. Rep. 550. "The reasons given for requiring the companies to show that this duty has been performed on their path are, that agents and employes of the road know, or are at least bound to

and authority is, probably, in favor of casting the burden of disproving negligence on the company, but, as experience has demonstrated that it is almost, if not quite, impossible to operate an engine without the emission of sparks and as negligence may be proved by circumstantial evidence equally accessible to the plaintiff we are inclined to think that, upon principle, this should not constitute an exception to the general rule that the burden is upon the plaintiff.[90]

§ 1767 (1243). **Proof that company set out fire.**[90a]—While in a great number of cases the plaintiff is not required to prove that the defendant was guilty of negligence in setting out a fire it is always incumbent on the plaintiff, where his property is directly set on fire, to show that the fire was set by a locomotive of the defendant.[91] As there are few, if any, cases where persons

know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and can not be obtained by them, without great trouble and expense." See also Cincinnati &c. R. Co. v. Falconer (Ky.), 97 S. W. 727; Louisville &c. R. Co. v. Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. 66.

[90] See Cincinnati &c. R. Co. v. South Fork Coal Co., 139 Fed. 528, 537; also Louisville &c. R. Co. v. Haggard, 161 Ky. 317, 170 S. W. 956. In other cases it is held that, while it devolves upon the company to rebut the prima facie case, the burden does not shift so as to require the company to do so by a preponderance of the evidence. St. Louis &c. R. Co. v. Hooser, 44 Tex. Civ. App. 229, 97 S. W. 708; Toledo &c. R. Co. v. Star Flouring Mills, 146 Fed. 953. See also Woodward v. Chicago &c. R. Co., 145 Fed. 577. According to most of the authorities, however, although there is much conflict of authority, the presumption carries the case to the jury. Note to Continental Ins. Co. v. Chicago &c. R. Co., 97 Minn. 467, 107 N. W. 548, in 5 L. R. A. (N. S.) 99. See also Chenoweth v. Southern Pac. R. Co., 53 Ore. 111, 99 Pac. 86.

[90a] This action is cited in International &c. Co. v. Chicago &c. R. Co., 186 Iowa 86, 172 N. W. 471, 485.

[91] Niskern v. Chicago &c. R. Co., 22 Fed. 811; Inman v. Elberton &c. R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. 232; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Fitch v. Pacific &c. R. Co., 45 Mo.

see the fire directly communicated, proof of communication must necessarily be more or less circumstantial.[92] But, even though circumstantial evidence is sufficient to establish liability, where the evidence is such that it is a mere conjecture as to whether or not the company set the fire it is proper to nonsuit the plaintiff.[93] Where, however, it is shown that there

322; Union &c. R. Co. v. Keller, 36 Nebr. 189, 54 N. W. 420; Sheldon v. Hudson River &c. R. Co., 14 N. Y. 218, 67 Am. Dec. 155; White v. New York &c. R. Co., 85 N. Y. S. 497, affirmed in 181 N. Y. 577, 74 N. E. 1126; Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618. See also Clark v. Grand Trunk &c. R. Co., 149 Mich. 400, 112 N. W. 1121; Wyatt v. Seaboard &c. R. Co., 156 N. Car. 307, 72 S. E. 383; Phillips v. Southern R. Co., 109 Va. 436, 63 S. E. 998.

[92] Union &c. R. Co. v. DeBusk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. 221, 3 L. R. A. 350; Osburn v. Oregon &c. R. Co., 15 Idaho 478, 98 Pac. 627, 19 L. R. A. (N. S.) 742; Cleveland &c. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448; Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691, 40 N. E. 26; St. Louis &c. R. Co. v. Noland, 75 Kans. 691, 90 Pac. 273; Union Pacific R. Co. v. Keller, 36 Nebr. 189, 54 N. W. 420; Sheldon v. Hudson River &c. R. Co., 14 N. Y. 218, 67 Am. Dec. 155; St. Louis &c. R. Co. v. Shannon, 25 Okla. 754, 108 Pac. 401. "The origin of fires is often proved by circumstances. It is not necessary to prove it by direct or positive evidence. No witness may have testified that the fire was started by an engine operated by appellant, and yet the evidence may have fully justified the inference that it was so started." Ohio &c. R. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812. See also St. Louis &c. R. Co. v. Coombs, 76 Ark. 132, 88 S. W. 595; Marande v. Texas & P. R. Co., 184 U. S. 173, 193, 22 Sup. Ct. 340, 46 L. ed. 487; Monte Ne R. Co. v. Phillips, 80 Ark. 292, 96 S. W. 1060; E. Swindell & Co. v. Alabama &c. R. Co., 123 Ga. 311, 51 S. E. 386; Illinois Cent. R. Co. v. Scheible, 162 Ky. 469, 172 S. W. 910 (distinguishing Chesapeake &c. R. Co. v. Sadieville Milling Co., 137 Ky. 568, 126 S. W. 118 and Louisville &c. R. Co. v. Hamburg &c. Ins. Co., 152 Ky. 510, 153 S. W. 745); Brooks v. Missouri Pac. R. Co., 98 Mo. App. 166, 71 S. W. 1083; Kelly v. Wabash R. Co., 151 Mo. App. 307, 131 S. W. 718; Minard v. West Jersey &c. R. Co. (N. J.), 64 Atl. 1054; Mellinger v. Penna. R. Co., 229 Pa. St. 122, 78 Atl. 66; Smith v. Vermont Cent. R. Co., 80 Vt. 208, 67 Atl. 535.

[93] Funk v. Quincy &c. R. Co., 123 Mo. App. 169, 100 S. W. 504; Megow v. Chicago &c. R. Co., 86 Wis. 466, 56 N. W. 1099. See also Pfeffer v. Missouri Pac. R. Co., 98 Mo. App. 291, 71 S. W. 1073; Denver &c. R. Co. v. De Graff, 2 Colo. App. 42, 29 Pac. 664; Lake Erie &c. R. Co. v. Gossard,

was no probable cause for the fire except the railway locomotives it may be sufficient to fasten it upon the company.[94] It is not necessary that the plaintiff should produce evidence to exclude every other possible cause of the fire.[95] The plaintiff is not always required to show that any particular engine set out the fire, and evidence that other engines of the company, similar in general construction to that supposed to have set out the fire, set out fire about the time of the injury has often been held admissible.[96] As tending to show that the fire was set by

14 Ind. App. 244, 42 N. E. 818; Louisville &c. R. Co. v. Hamburg Ins. Co., 152 Ky. 510, 153 S. W. 745; Minneapolis &c. Co. v. Great Northern &c. R. Co., 83 Minn. 370, 86 N. W. 451; Thorguierson v. Northern Pac. R. Co., 64 Wash. 500, 117 Pac. 406.

[94] Baltimore &c. R. Co. v. Shipley, 39 Md. 251; Field v. New York &c. R. Co., 32 N. Y. 339; Johnson v. Chicago &c. R. Co., 77 Iowa 666, 42 N. W. 512; Karsen v. Milwaukee &c. R. Co., 29 Minn. 12, 11 N. W. 122, 7 Am. & Eng. R. Cas. 501; Smith v. London &c. R. Co., L. R. 6 C. P. 14. Where it was shown that a fire sprang up just after a train passed, that there was no other fire on the premises before and no other apparent cause for the fire, it was held that the evidence was sufficient to warrant a finding that it was set by the passing train. Union &c. R. Co. v. De Busk, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. 221, 38 Am. & Eng. R. Cas. 321. To the same effect also are Louisville &c. R. Co. v. Sherrill, 152 Ala. 213, 44 So. 631; Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Baltimore &c. R. Co. v. O'Brien, 38 Ind. App. 143, 77 N. E. 1131; Whitehurst v. Atlantic &c. R. Co., 146 N. Car. 588, 60 S. E. 648. See Union &c. R. Co. v. Jones, 9 Colo. 379. See also St. Louis &c. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27; Monte Ne R. Co. v. Phillips, 80 Ark. 292, 96 S. W. 1060; St. Louis &c. R. Co. v. Coombs, 76 Ark. 132, 88 S. W. 595, 596 (citing text). But compare Birmingham R. &c. Co. v. Hunter, 158 Ala. 470, 48 So. 546; Wallace v. New York &c. R. Co., 208 Mass. 16, 94 N. E. 306; Northwestern &c. Fire Assur. v. Northern Pac. R. Co., 68 Wash. 292, 123 Pac. 468.

[95] Monte Ne R. Co. v. Phillips, 80 Ark. 292, 96 S. W. 1060; Crist v. Erie R. Co., 58 N. Y. 638.

[96] Northern Pacific R. Co. v. Lewis, 51 Fed. 658; Chicago &c. R. Co. v. Gilbert, 52 Fed. 711; Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Chicago &c. R. Co. v. Zimmerman, 12 Ind. App. 504, 40 N. E. 703; Crocker v. McGregor, 76 Maine 282, 46 Am. Rep. 611, and note; Thatcher v. Maine &c. R. Co., 85 Maine 502; Annapolis &c. R. Co. v. Gantt, 39 Md. 115; Loring v. Worcester &c. R. Co., 131 Mass. 469; Campbell v. Missouri Pacific R.

the defendant, it has also been held competent to prove that at various times before the fire occurred the engines of the company set out fires along its line in the vicinity.[97] Proof that fires were set along the line of the railway is not admissible unless it is shown that they were set by the railway company.[98]

Co., 121 Mo. 340, 25 L. R. A. 175, 42 Am. St. 530 and note; Smith v. Boston &c. R. Co., 63 N. H. 25; Koontz v. Oregon &c. R. Co., 20 Ore. 3, 23 Pac. 820, 43 Am. & Eng. R. Cas. 11; Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. 652, 48 Am. & Eng. R. Cas. 16; Hoskison v. Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24; Stertz v. Stewart, 74 Wis. 160, 42 N. W. 214. See also McMahon v. Hetchhetchy R. Co., 2 Cal. App. 400, 84 Pac. 350; Osburn v. Oregon R. &c. Co., 15 Idaho 478, 98 Pac. 627, 19 L. R. A. (N. S.) 742; Cincinnati &c. R. Co. v. Sadieville Milling Co., 137 Ky. 568, 126 S. W. 118; Higgins v. Long Island R. Co., 129 App. Div. 415, 114 N. Y. S. 262; Missouri &c. R. Co. v. Gentry, 31 Okla. 579, 122 Pac. 537; Texas &c. R. Co. v. Wooldridge, 59 Tex. Civ. App. 384, 126 S. W. 603. Where plaintiff's building which was destroyed was 125 feet from the railway track it was proper for the plaintiff to show, as tending to rebut the presumption that defendant's engines did not set the fire, that property in a direct line, but farther away had been set on fire. Hoskison v. Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24.

[97] Grand Trunk &c. R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356; Steele v. Pacific Coast R. Co., 74 Cal. 323, 32 Am. & Eng. R. Cas. 333; Field v. New York &c. R. Co., 32 N. Y. 339; Webb v. Rome &c. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Koontz v. Oregon &c. R. Co., 20 Ore. 3, 23 Pac. 820, 43 Am. & Eng. R. Cas. 11; Hawley v. Sumpter Ry. Co., 49 Ore. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526; LaSalle v. Central R. Co., 73 Ore. 203, 144 Pac. 414; Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 16 L. R. A. 299, 27 Am. St. 652, 48 Am. & Eng. R. Cas. 16. Some of the authorities holding such evidence admissible seem to us to go to the extreme. Where the particular engine which set the fire is known and designated, proof that it set other fires is admissible, but not proof that other engines set out fires. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Cleveland &c. R. Co. v. Loos, 38 Ind. App. 1, 77 N. E. 948; Ireland v. Cincinnati &c. R. Co., 79 Mich. 163; Bradley v. Chicago &c. R. Co., 90 Nebr. 28, 132 N. W. 725. See also Shelly v. Philadelphia &c. R. Co., 211 Pa. St. 160, 165, 60 Atl. 581, 582. But compare Asplund v. Great Northern R. Co., 63 Wash. 164, 114 Pac. 1043.

[98] St. Louis &c. R. Co. v. Jones, 59 Ark. 105, 26 S. W. 595; Oakdale Baking Co. v. Philadelphia &c. Ry. Co., 244 Pa. St. 463, 91 Atl. 358. Where evidence is admissible of

But it has been held competent to show that coals of fire had previously been dropped or been found on the track at or near the place where the injury occurred.[99] Where the plaintiff seeks to confine the setting of the fire to a single engine, proof that the same engine set other fires is admissible.[1] But in such case proof that other engines set out fires at different times has been held inadmissible.[2] Evidence is not admissible to show that the railway company settled with other persons for loss caused by the same fire.[3]

other fires it must appear that the fires were not very remote from the fire causing the damage. If the fires are remote in time it must appear that the machinery and appliances remained in the same condition of repair or the evidence will not be admitted. Collins v. New York &c. R. Co., 109 N. Y. 243, 32 Am. & Eng. R. Cas. 366. "Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence." Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. 652.

[99] Longabaugh v. Virginia City &c. R. Co., 9 Nev. 271; Smith v. Old Colony &c. R. Co., 10 R. I. 22; St. Joseph &c. R. Co. v. Chase, 11 Kans. 47. See also LaSalle v. Central R. Co., 73 Ore. 203, 144 Pac. 414; Gorham &c. Co. v. New York &c. R. Co., 27 R. I. 35, 60 Atl. 638.

[1] Hendricks v. Southern R. Co., 123 Ga. 342, 51 S. E. 415; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660; Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691, 40 N. E. 26; Atchison &c. R. Co. v. Bales, 16 Kans. 252; Louisville &c. R. Co. v. Guttman, 148 Ky. 235, 146 S. W. 731; Patton v. St. Louis &c. R. Co., 87 Mo. 117, 56 Am. Rep. 446, 23 Am. & Eng. R. Cas. 364; Austin v. Penna. R. Co., 82 N. J. L. 416, 81 Atl. 739; Jacobs v. New York &c. R. Co., 186 N. Y. 586, 79 N. E. 1108. See also A. F. Johnson & Son v. Atlantic Coast Line R. Co., 140 N. Car. 581, 53 S. E. 362; Hartford F. Ins. Co. v. Central R. Co., 74 Ore. 144, 144 Pac. 417; St. Louis &c. R. Co. v. Eccles & Co., 53 Tex. Civ. App. 125, 115 S. W. 648.

[2] St. Louis &c. R. Co. v. Jones, 59 Ark. 105, 26 S. W. 595. See also McFarland v. Gulf &c. Ry. Co. (Tex. Civ. App.), 88 S. W. 450; Shelly v. Philadelphia &c. R. Co., 211 Pa. St. 160, 165, 60 Atl. 581, 582, and authorities cited in notes to next following section, and ante, note 97.

[3] The rule is thus stated in Louisville &c. R. Co. v. Roberts, 13 Ind. App. 692, 42 N. E. 247: "On the trial court, over appellant's objection, permitted the appellee to prove that appellant had paid other land-owners for loss sustained by them caused by the same fire. The evidence was introduced as tend-

§ 1768 (1243a). **Evidence of emission of sparks or setting of fires by the same or other engines.**—It is difficult to reconcile all the decisions upon the subject of evidence of the emission of sparks or the setting of fires on other occasions, as appears from the preceding section, but the question is discussed, and the authorities are reviewed, and what seems to be the true doctrine, is stated by us in another work[4] as follows: "If but one of the defendant's engines passed the place about the time of the fire, and it is known, or if it is otherwise identified as the one which must have caused the fire, if any did, evidence is admissible, within reasonable limits, to show that the same engine has, on other occasions and under similar conditions emitted burning sparks which have been carried to a great distance[5] and set other fires along the line.[6] But in such a case, that is, where the only engine that could have caused the fire is identified, testimony that other engines at other times and places set fires or threw igniting sparks is, on principle, irrelevant and inadmissible unless, at least, evidence is introduced showing that they were in the same condition as the engine in

ing to prove that appellant recognized its liability for the losses occasioned by the fire in question. This was error. The fact that appellant had paid such losses of others was not admissible in evidence as tending to prove that appellant was liable to appellee."

[4] Elliott Ev. § 188.

[5] Taylor v. Louisville &c. R. Co., 19 Ky. L. 717, 41 S. W. 551; Ross v. Boston &c. R. Co., 6 Allen (Mass.) 87; Baltimore &c. R. Co. v. Tripp, 175 Ill. 251, 51 N. E. 833; Hinds v. Barton, 25 N. Y. 544, and authorities cited in last preceding section.

[6] Henry v. Southern Pac. R. Co., 50 Cal. 176; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660; Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691, 40 N. E. 26; Chicago &c. R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033; Slossen v. Burlington &c. R. Co., 60 Iowa 215; Atchison &c. R. Co. v. Bales, 16 Kans. 252; Green Ridge R. Co. v. Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755; Patton v. St. Louis &c. R. Co., 87 Mo. 117, 56 Am. Rep. 446. In most of these authorities there appears to have been no evidence of similarity of conditions. But see Collins v. New York &c. R. Co., 109 N. Y. 243, 16 N. E. 50; Wheeler v. New York &c. R. Co., 67 Hun (N. Y.) 639; Hoyt v. Jeffers, 30 Mich. 181; Menominee &c. Co. v. Milwaukee &c. R. Co., 91 Wis. 447, 65 N. W. 176; and recent authorities cited in last preceding section.

question, or similarly constructed and operated, and there are well-considered authorities to this effect,[7] although this distinction is not always drawn, and there are other authorities that seem to countenance such evidence in any event.[8] We think, however, that very few of them actually so decide, and the leading case[9] upon which most of them are based does not do so, for in that case the engine that caused the fire was not identified. In a Missouri case it is said that where the question

[7] Lesser Cotton Co. v. St. Louis &c. R. Co., 114 Fed. 133; Crissey &c. Co. v. Denver &c. R. Co., 17 Colo. App. 275, 68 Pac. 670; First Nat. Bank v. Lake Erie &c. R. Co., 174 Ill. 36, 50 N. E. 1023; Baltimore &c. R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72; Ireland v. Cincinnati &c. R. Co., 79 Mich. 163, 44 N. W. 426; Smith v. Hannibal &c. R. Co., 37 Mo. 287; Coale v. Hannibal &c. R. Co., 60 Mo. 227, 233; Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. 652, 16 L. R. A. 299; San Antonio &c. R. Co. v. Home &c. Ins. Co. (Tex. Civ. App.), 70 S. W. 999; Gibbons v. Wisconsin &c. R. Co., 58 Wis. 335, 339, 17 N. W. 132; Allard v. Chicago &c. R. Co., 73 Wis. 165, 40 N. W. 685. See also Boyce v. Cheshire R. Co., 42 N. H. 97; Hubbard v. Androscoggin &c. R. Co., 39 Maine 506; Robinson v. Fitchburg &c. R. Co., 7 Gray (Mass.) 92; Haseltine v. Concord R. Co., 64 N. H. 545, 15 Atl. 143; Phelps & Co. v. Conant & Co., 30 Vt. 277; Hoskison v. Central Vt. R. Co., 66 Vt. 618, 30 Atl. 24; Malton v. Nesbit, 1 Car. & P. 70, and authorities cited in last preceding section. The Maryland case has been considered as virtually overruled in more recent cases of Annapolis &c. R. Co. v. Gantt, 39 Md. 115, and Green R. Co. v. Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755, and one of the Missouri cases is expressly overruled in Hoover v. Missouri &c. R. Co. (Mo.), 16 S. W. 480, but the distinction between an identified and an undentified engine is not noticed in the latter case, and we think the Maryland cases do not overrule the earlier decision.

[8] Northern Pacific R. Co. v. Lewis, 51 Fed. 658; Evansville &c. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296; Louisville &c. R. Co. v. Lange, 13 Ind. App. 337, 41 N. E. 609 (but see Chicago &c. R. Co. v. Gilmore, 22 Ind. App. 466, 53 N. E. 1078); Atchison &c. R. Co. v. Stanford, 12 Kans. 354, 15 Am. Rep. 362; Thatcher v. Maine &c. R. Co., 85 Maine 502, 27 Atl. 519; Ross v. Boston &c. R. Co., 6 Allen (Mass.) 87 (in rebuttal); Hoover v. Missouri &c. R. Co. (Mo.), 16 S. W. 480; Sheldon v. Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155; Koontz v. Oregon &c. Co., 20 Ore. 3, 23 Pac. 820 (reasons for the rule).

[9] Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356.

is simply as to whether an engine of the defendant caused the fire, evidence of other fires along the lines from other engines of the defendant within a reasonable time is admissible, but if the engine is identified and the only question is as to negligence, such evidence is not admissible.[10] If the particular engine can not be identified, evidence is admissible that other engines of the defendant similarly constructed and operated set fires or threw igniting sparks equally far at other times, within a reasonable period, and at other places in the vicinity along the line, and the great weight of authority appears to be to the effect that such evidence is admissible without proof on the part of the plaintiff that the engines were similarly constructed and operated and without confining it to the exact time or day of the fire in question.[11] But some of these cases, in permitting negligence to be shown in this way go to the extreme, and others hold that evidence of other fires months before or after

[10] Campbell v. Missouri &c. R. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. 530 and note. See also Chicago &c. R. Co. v. Gilbert, 52 Fed. 711; Louisville &c. R. Co. v. Miller, 109 Ala. 500, 19 So. 989; Smith v. Old Colony &c. R. Co., 10 R. I. 22; St. Louis &c. R. Co. v. Jones, 59 Ark. 105, 111, 26 S. W. 595; Piggott v. Eastern &c. R. Co., 3 C. B. 229, 241, 54 E. C. L. 241. Where the only engine which would have caused the fire is identified, and its spark arrester shown to be without holes, punched in at the time of the fire, evidence to show a habit of the defendant's engineers to punch holes in spark arresters of their engines is not admissible. Lesser Cotton Co. v. St. Louis &c. R. Co., 114 Fed. 133.

[11] Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356; Alabama &c. R. Co. v. Johnson, 128 Ala. 283, 29 So. 771; Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33; Inman v. Elberton &c. R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. 232; Chicago &c. R. Co. v. Gilmore, 22 Ind. App. 466, 53 N. E. 1078; Thatcher v. Maine &c. R. Co., 85 Maine 502, 27 Atl. 519; Loring v. Worcester &c. R. Co., 131 Mass. 469; Matthews v. Missouri &c. R. Co., 142 Mo. 645, 44 S. W. 802; Longabaugh v. Virginia &c. R. Co., 9 Nev. 271; Webb v. Rome &c. R. Co., 49 N. Y. 420, 10 Am. Rep. 389 and note; Koontz v. Oregon &c. Co., 20 Ore. 3, 23 Pac. 820; Van Steuben v. Central R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577; Burke v. Louisville &c. R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; Cleveland v. Grand Trunk R. Co., 42 Vt. 449; Hoskison v. Central Vt. R. Co., 66 Vt. 618, 30 Atl. 24.

the fire in question ought not to be received, at least without some evidence of similar conditions.[12] Where negligence is charged in permitting combustible material upon the right of way and permitting fires to spread therefrom, evidence of other fires set to such material about the same place some time before is admissible."[13] But where the negligence charged is in the negligent operation of the engine by using too much steam it has been held that the connection between the use of too much steam and the escape of sparks must be shown, and that mere evidence of other fires set by the locomotive is insufficient to do it.[14]

§ 1769 (1244). **Proof that company negligently set out fire.** —In jurisdictions in which a presumption of negligence arises on proof that the fire was set by the locomotives of the defendant much less evidence may be required on the part of the plaintiff than in those cases where no such presumption arises. Of course, before the plaintiff can secure the benefit of such a presumption he must show that the company set the fire, and, when he has done this, it has been held that he has made out a prima facie case,[15] and may recover unless the defendant suc-

[12] Babcock v. Chicago &c. R. Co., 62 Iowa 593, 13 N. W. 740; Davidson v. St. Paul &c. R. Co., 34 Minn. 51, 24 N. W. 324; Collins v. New York &c. R. Co., 109 N. Y. 243; Henderson v. Philadelphia &c. R. Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. 652; Dillingham v. Whitaker (Tex. Civ. App.), 25 S. W. 723; Menominee &c. Co. v. Milwaukee &c. R. Co., 91 Wis. 447, 65 N. W. 176. But see Field v. New York &c. R. Co., 32 N. Y. 339.

[13] Pittsburgh &c. R. Co. v. Indiana &c. Co., 154 Ind. 322, 56 N. E. 766; Texas &c. R. Co. v. Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825; Abrams v. Seattle &c. R. Co., 27 Wash. 507, 68 Pac. 78. So held where the accumulations of combustibles and fires were at other places. Wabash R. Co. v. Miller, 158 Ind. 174, 61 N. E. 1005. But see Lake Erie &c. R. Co. v. Miller, 24 Ind. App. 662, 666, 57 N. E. 596.

[14] Louisville &c. R. Co. v. Vinyard, 39 Ind. App. 628, 79 N. E. 384.

[15] Reed v. Missouri Pacific R. Co., 50 Mo. App. 504; St. Louis &c. R. Co. v. Strotz, 47 Ill. App. 342; Niskern v. Chicago &c. R. Co., 22 Fed. 811; St. Louis &c. Ry. Co. v. Coombs, 76 Ark. 132, 88 S. W. 595, 596. See also Toledo &c. R. Co. v. Velodin, 109 Ill. App. 132; Erickson v. Pennsylvania R. Co., 170

cessfully overcomes the presumption of negligence against it. But, in those cases where no such presumption arises and the burden is on the plaintiff to show negligence as well as the setting of the fire, it necessarily follows that the plaintiff must produce more evidence than in the former class of cases. The evidence necessary to prove setting of the fires is the same in either case, for what would prove that the fire was set by the company in one case would prove that the fire was set by the company in another similar case, although in one case the burden of proof of negligence may be on the plaintiff while in the other case the defendant may be presumptively negligent. And it often happens that negligence cannot be directly proved, but must be proved by circumstantial evidence. That such evidence is admissible is settled both by reason and authority.[16] Since the question of negligence is ordinarily one for the jury, and, as some juries might infer negligence from a state of facts from which other juries might fail to find negligence, it necessarily follows that there will be some conflict in the authorities as to what is sufficient evidence to show negligence. But, as to what tends to show, or, is competent as tending to show negligence, the authorities are pretty well agreed. Negligence may be inferred where property is set on fire by a locomotive which is shown to have been without a spark arrester. The absence of a spark arrester is prima facie evidence of negligence.[17] So, where fire is shown to have originated from a worn-out and defective spark arrester a prima facie case of negligence is made out.[18] And where an engine emits sparks of large and unusual

Fed. 572; Carter v. Maryland &c. R. Co., 112 Md. 599, 77 Atl. 301; Shipman v. Chicago &c. R. Co., 78 Nebr. 43, 110 N. W. 535; Goodman v. Lehigh Val. R. Co., 78 N. J. L. 317, 74 Atl. 519; Chenowith v. Southern Pac. R. Co., 53 Ore. 111, 99 Pac. 86; Anderson v. Oregon R. Co., 45 Ore. 211, 77 Pac. 119.

[16] Atchison &c. R. Co. v. Bales, 16 Kans. 252; Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341; Jacksonville &c. R. Co. v. Peninsula &c. Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 47; McDoel v. Gill, 23 Ind. App. 630, 53 N. E. 956; Caswell v. Chicago &c. R. Co., 42 Wis. 193; ante § 1767.

[17] Lackawanna &c. R. Co. v. Doak, 52 Pa. St. 379, 91 Am. Dec. 166.

[18] Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691, 40 N. E. 26 and cases cited; Ryan v. Gross,

size it may be inferred that it is not provided with a proper spark arrester,[19] or where sparks are thrown to a great height or far from the track.[20] And proof that an engine frequently set fires has been held competent as tending to show negligence on the part of the company.[21] It is also proper to show, as

68 Md. 377, 12 Atl. 115, 16 Atl. 302, 11 Cent. R. 502. See also Byers v. Baltimore &c. R. Co., 222 Pa. St. 547, 72 Atl. 245.

[19] Henry v. Southern &c. R. Co., 50 Cal. 176; Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; Toledo &c. R. Co. v. Kingman, 49 Ill. App. 43; Jackson v. Chicago &c. R. Co., 31 Iowa 176, 7 Am. Rep. 120; Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182, 21 Am. Rep. 97; Pennsylvania R. Co. v. Watson, 81 Pa. St. 293; Penn. R. Co. v. Lacey, 89 Pa. St. 458; Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341; Herring v. Wilmington &c. R. Co., 10 Ired. L. 402, 51 Am. Dec. 395. Evidence of experts that such sparks could not be thrown from a properly constructed engine in proper repair is held admissible in Peck v. New York &c. R. Co., 165 N. Y. 347.

[20] Huyett v. Philadelphia &c. R. Co., 23 Pa. St. 373; Missouri &c. Co. v. Texas &c. R. Co., 41 Fed. 917; Chicago &c. R. Co. v. Ostrander, 116 Ind. 259, 19 N. E. 110; Cincinnati &c. R. Co. v. Smock, 133 Ind. 411, 33 N. E. 108.

[21] Gandy v. Chicago &c. R. Co., 30 Iowa 420, 56 Am. Rep. 682; Atchison &c. R. Co. v. Stanford, 12 Kans. 354, 15 Am. Rep. 362; Hull v. Sacramento &c. R. Co., 14 Cal. 387, 73 Am. Dec. 656; St. Joseph &c. R. Co. v. Chase, 11 Kans. 47; Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1 and 157, 9 So. 661, 17 L. R. A. 33. "If engines in good repair and properly constructed do not ordinarily set out fires, defects in an engine, or negligence in running them, may be inferred from the frequent escape of fire therefrom. Circumstances of this kind may be considered by the jury." Slossen v. Burlington &c. R. Co. (Iowa), 10 N. W. 860, 7 Am. & Eng. R. Cas. 509. In Jacksonville &c. R. Co. v. Peninsular &c. Co., 27 Fla. 1 and 157, 17 L. R. A. 33, the court said: "The authorities hold that, where it is shown, as it is in this case, that the fatal fire had been set out from a designated engine, it is admissible to introduce evidence of other fires previously set out by the same engine, but not by any other engine of the defendant company. Ireland v. Cincinnati &c. R. Co., 79 Mich. 163; Coale v. Hannibal &c. R. Co., 60 Mo. 227; Brighthope R. Co. v. Rogers, 76 Va. 443; Gibbons v. Wisconsin Valley R. Co., 58 Wis. 335; Slossen v. Burlington, C. R. & N. R. Co., 60 Iowa 215, 14 N. W. 244; Lanning v. Chicago, B. & Q. R. Co., 68 Iowa 502, 27 N. W. 478; Baltimore & S. R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72. Former fires by the same engine are admissible as evidence tending to prove its defective condition or

tending to prove negligence on the part of the company, that it ran its train at a great and unusual speed,[22] that wood was being used for fuel in a locomotive constructed for burning coal,[23] and that the engine emitted large quantities of sparks while standing near combustible material at a time when a strong wind was blowing.[24] Where the alleged negligence of the company consisted in permitting inflammable material to accumulate, proof of the accumulation and that it was discovered on fire shortly after the passage of a train has been held sufficient to support a verdict for the plaintiff.[25] Other decisions as to evidence sufficient to show negligence on the part of the company are reviewed in the opinion in the case cited below.[26] Where the only evidence to establish the

construction, or improper management, and those put out by other engines are excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive."

[22] Alabama &c. R. Co. v. Clarke, 145 Ala. 459, 39 So. 816; Gandy v. Chicago &c. R. Co., 30 Iowa 420, 6 Am. Rep. 682; Martin v. Western &c. R. Co., 23 Wis. 437, 99 Am. Dec. 189. See also Van Nostrand v. Railway Co., 79 Hun 550, 29 N. Y. S. 625; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 660; DeCamp v. Omaha &c. Ry. Co., 62 Minn. 207, 64 N. W. 392. Evidence of unusual speed has been held not admissible, however, unless it be shown that such speed would make the danger from fires greater. Brusberg v. Milwaukee &c. R. Co., 50 Wis. 231, 6 N. W. 821.

[23] Chicago &c. R. Co. v. Ostrander, 116 Ind. 266, 38 Am. & Eng. R. Cas. 346; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; St. Joseph &c. R. Co. v. Chase, 11 Kans. 47. See also Abbott v. Chicago &c. R. Co., 88 Nebr. 727, 130 N. W. 438.

[24] Fero v. Buffalo &c. R. Co., 22 N. Y. 209, 78 Am. Dec. 178 and note.

[25] Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534.

[26] Continental Ins. Co. v. Chicago &c. R. Co., 97 Minn. 467, 107 N. W. 548, 551, from which we quote as follows: "Negligence may be affirmatively proved by the emission of cinders unusual in quantity or size, or carried to an unusual height or distance. Anderson v. Railway Co., 45 Ore. 211, 77 Pac. 119, collecting cases at page 122; Jacksonville &c. R. Co. v. Peninsular Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33; Bedell v. Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688. Although such circumstantial evidence is not of the most satisfactory or conclusive character the jury should weigh it. Johnson v. Chicago R. Co., 31 Minn. 59, 16 N. W. 488; O'Neill v. New York R. Co., 115 N. Y. 583, 22

defendant's responsibility was proof that it had settled with another party for property destroyed by the same fire, it was held that no negligence was shown.[27]

§ 1770 (1245). Evidence to rebut presumption of negligence.—Where a presumption of negligence arises from mere proof of setting the fire the burden is upon the defendant to prove that it was guilty of no negligence before it can escape liability. As tending to rebut a presumption of negligence the defendant may show that its engines were equipped with

N. E. 217, 5 L. R. A. 591; Henry v. Southern Pac. R. Co., 50 Cal. 176; Great Western R. v. Haworth, 39 Ill. 346; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Texas &c. R. Co. v. Insurance Co. (Tex. Civ. App.), 73 S. W. 1088; Glanz v. Chicago &c. R. Co., 119 Iowa 611, 93 N. W. 575. In Huyett v. Philadelphia &c. R. Co., 23 Pa. 373, Lowry, J., said: 'When we find fires started by a locomotive at distances from 80 to 150 feet from the road, how can we say that there is no evidence of negligence.' That a fire was started at a distance of 60 feet (Chicago &c. R. Co. v. McCahill, 56 Ill. 29), of 63 feet (Louisville &c. R. Co. v. Malone, 109 Ala. 509, 20 So. 33), of 65 feet (L. E. &c. R. Co. v. Black, 54 Ill. App. 85), or of 100 feet (Illinois Cent. R. Co. v. McClellan, 42 Ill. 355), has been held to be substantive and independent evidence of defendant's negligence to be considered by the jury. And see Hull v. Sacramento &c. R. Co., 14 Cal. 388, 73 Am. Dec. 656; Anderson v. Oregon R. Co., 45 Ore. 211, 77 Pac. 122; Sibilrud v. Minneapolis &c. R. Co., 29 Minn. 58, 11 N. W. 146. On the other hand, in Smith v. Northern Pac. R. Co., 3 N. D. 17, 24, 53 N. W. 173, it is held that the mere fact that sparks set fire out at a distance of 118 feet from the track, in a heavy wind, is not affirmative evidence of negligence. That case has been severely criticised (2 Thomp. Neg. 796), and is not in harmony with the weight or the better reason of the authorities." See also Cincinnati &c. R. Co. v. South Fork Coal Co., 139 Fed. 528; Cleveland &c. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448; Whitehurst v. Atlantic &c. R. Co., 146 N. Car. 588, 60 S. E. 648. Where there is nothing to show that fire could have been set by a passing engine or train or escaped from the right of way, and the wind for hours has been blowing from plaintiff's land towards the track, a peremptory instruction should be given for the defendant. Illinois Cent. R. Co. v. Day, 163 Ky. 357, 173 S. W. 809.

[27] Missouri &. R. Co. v. Fulmore (Tex.), 29 S. W. 688; Dillingham v. Whitaker (Tex.), 25 S. W. 723. Indeed, we think such evidence is inadmissible.

approved apparatus for preventing the escape of sparks and that such apparatus was in good repair. But the mere use of good machinery is not always enough to relieve a defendant for it may be guilty of negligence in operating such machinery and there are authorities which hold, when this is also alleged, that the defendant must show in addition to the use of improved machinery that it was guilty of no negligence in operating the machinery.[28] And although it is shown that the machinery was properly operated it must also appear that the machinery was in good repair before the plaintiff's prima facie case will be overcome.[29] If the defendant makes it appear that its locomotives were equipped with approved contrivances to

[28] Chicago &c. R. Co. v. Zimmerman, 12 Ind. App. 504, 40 S. E. 703; Johnson v. Northern Pacific R. Co., 1 N. Dak. 354, 48 N. W. 227, 45 Am. & Eng. R. Cas. 554; St. Louis &c. R. Co. v. Lindley (Tex.), 29 S. W. 1101; Missouri &c. R. Co. v. Kelley (Tex.), 30 S. W. 488; Martin v. Texas &c. R. Co., 87 Tex. 117, 26 S. W. 1052; Texas &c. R. Co. v. Levine, 87 Tex. 437, 29 S. W. 466. Much, however, may depend upon the theory of the complaint. The rule is thus stated in Gulf &c. Railway v. Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. 74: "When property situate contiguous to the right of way of a railroad company is burned by sparks emitted from the company's locomotive engine passing over the road, which ignite the dry grass on the right of way, and injury results therefrom, in a suit for damages brought by the injured party, the burden of proof is on the railway company to show that there was no negligence. This burden of proof is, however, satisfied when the company shows by undisputed evidence that it was using at the time, and upon the very engine in question, the best and most approved mechanical appliances known and in use to prevent the escape of fire from its engine, and sparks from the smokestack, and that the same were in good repair and condition, and were operated by a skillful engineer in a careful manner." This statement of the law is adopted and followed in the case of Missouri &c. R. Co. v. Texas &c. R. Co., 41 Fed. 917. See generally Continental Ins. Co. v. Chicago &c. R. Co., 97 Minn. 467, 107 N. W. 548, 5 L. R. A. (N. S.) 99, and cases there reviewed in note.

[29] Texas &c. R. Co. v. Gaines (Tex.), 26 S. W. 873. See also Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968, and authorities cited in case and annotation referred to in last preceding note. But where the mismanagement of the engine which set the fire is the only negligence alleged, the defendant need not show that the engine was in good repair. Atchison &c. R. Co. v. Ayers, 56 Kans. 176, 42 Pac. 722.

prevent fires, that they were in good order, and that the engines were carefully and skilfully managed, it is held the plaintiff cannot recover unless he alleges and shows negligence in some other respect, notwithstanding the fires were set out by the company.[30] But the authorities are not harmonious

[30] Menominee &c. R. Co. v. Milwaukee &c. R. Co., 91 Wis. 447, 65 N. W. 176; New York &c. R. Co. v. Baltz, 141 Ind. 661, 36 N. E. 414; Galveston &c. R. Co. v. Rheiner (Tex.), 25 S. W. 971; Missouri &c. R. Co. v. Stafford (Tex.), 31 S. W. 319; Savannah &c. R. Co. v. Pelzer &c. Co., 60 Fed. 39. The rule is thus stated in a recent case: "We recognize also the wisdom and sound policy of the act of the legislature in requiring a screen to be used, the best possible contrivance known to science, and in general use; that railroads should be held to strict diligence in the use of same, seeing that it is in good order, perfect condition, and without defect, and even leaving the burden of evidence on the railroad to show this care and diligence and sufficiency of the machine used in the place of the old one first noticed or prescribed by the legislature. And yet, when a railroad has brought itself clearly and conclusively within the line indicated, then it results that, under the law in Kentucky, they are not responsible if, by accident, fire does escape, and causes serious damage, even as claimed in this case. If any further obligation or responsibility is to be imposed on such company, it must be by legislative authority, and not by the courts. Whatever may be our sympathy for a sufferer by the loss of his property, if it was shown to have been destroyed by fire from a railroad engine (as we think this was not), we are unauthorized to adjudge his compensation out of the property of another, who is clearly within the requirements of the law." Louisville &c. R. Co. v. Mitchell, 17 Ky. L. 977, 29 S. W. 860. See also Spaulding v. Chicago &c. R. Co., 33 Wis. 582. But compare Southern Ry. Co. v. Hanna, 21 Ky. L. R. 850, 53 S. W. 1; Louisville &c. R. Co. v. Home Ins. Co., 146 Ky. 281, 142 S. W. 398. Evidence that an engine could not be operated without small cinders escaping is admissible. German Ins. Co. v. Chicago &c. R. Co., 128 Iowa 386, 104 N. W. 361. And see generally as to what is sufficient rebuttal, Horton v. Louisville &c. R. Co., 161 Ala. 107, 49 So. 423; Chicago &c. R. Co. v. Neilson, 118 Ill. App. 343; Westing v. Chicago &c. R. Co., 87 Nebr. 655, 127 N. W. 1076; Gulf &c. R. Co. v. Blakeney &c. Co., 48 Tex. Civ. App. 443, 106 S. W. 1140; Huntley v. Rutland R. Co., 83 Vt. 180, 74 Atl. 1000. As to evidence on the part of the plaintiff to meet that of defendant, see Georgia &c. R. Co. v. Summer, 133 Ga. 134, 65 S. E. 381; Duplissy v. Maine Cent. R. Co., 112 Maine 263, 91 Atl. 983; Whitehurst v. Atlantic &c. R. Co., 146 N. Car. 588, 60 S. E. 648.

upon the general subject. If the plaintiff does not attempt to charge the setting of the fire to any particular locomotive it has been held that the defendant may introduce evidence showing that all its engines were provided with the most approved appliances,[31] but where the fire is attributed to a particular engine evidence as to the condition of other engines would seem to be incompetent. It is also competent for the defendant to show that its engines had been regularly and carefully inspected and found in good condition.[32]

§ 1771 (1245a). Evidence to rebut presumption—Conflicting authorities.—As intimated in the last preceding section the decisions are not harmonious upon the subject of what is necessary to rebut the prima facie case or presumption of negligence, especially when the presumption is created by statute. It is held in many cases in effect that it is for the jury to weigh the statutory presumption of negligence against the defendant's

[31] Haley v. St. Louis &c. R. Co., 69 Mo. 614. And see generally as to what defendant may show Smith v. Ogden &c. R. Co., 33 Utah 129, 93 Pac. 185.

[32] Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Baltimore &c. R. Co. v. Shipley, 39 Md. 251; Cleveland v. Grand Trunk R. Co., 42 Vt. 449. See also Horton v. Louisville &c. R. Co., 161 Ala. 107, 49 So. 423. In the recent case of Woodward v. Chicago &c. R. Co., 145 Fed. 577, it is also held that evidence of the condition of the devices upon a locomotive for arresting sparks and preventing the escape of fire at various times within a month preceding the setting of the fire in controversy is not too remote; that evidence that for years the railway company had required the firemen of its passenger trains, and that it had been their custom, to inspect the dampers, ash-pans and dump-grates of their locomotives before they started on their trips, to see that they were clean and in good order, and that the company had required both firemen and engineers to report what, if anything, was needed, is competent upon the issue of the negligence of the company; and that one who knows that, if an act had been done by him or his department, it would have been recorded upon a book or paper which he had at the time, and which he identifies, may testify that he knows it was not done, from the absence from the record of any note of it, although he has no independent recollection and this fact does not refresh his memory, and the record and such testimony are competent evidence of the fact that the act was not performed.

evidence in rebuttal.[33] But many other decisions are to the effect that proof that the engine was properly constructed, equipped, maintained and managed is as broad as the presumption of negligence and justifies the court in directing a verdict for the defendant.[34] The authorities upon both sides are re-

[33] Great Northern R. Co. v. Coates, 115 Fed. 452; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; St. Louis &c. R. Co. v. Funk, 85 Ill. 460; West Side &c. Co. v. Railway Co. (Iowa), 95 N. W. 193; Babcock v. Chicago &c. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909, Id. 72 Iowa 197, 28 N. W. 644, 38 N. W. 628; Greenfield v. Chicago &c. R. Co., 83 Iowa 270, 49 N. W. 95; Hemmi v. Chicago &c. R. Co., 102 Iowa 25, 70 N. W. 746; Glanz v. Railway Co., 119 Iowa 611, 93 N. W. 575; Atchison &c. R. Co. v. Bales, 16 Kans. 252; Atchison &c. R. Co. v. Geiser, 68 Kans. 281, 75 Pac. 68; Hagan v. Chicago &c. R. Co., 86 Mich. 615, 49 N. W. 509; Palmer v. Railway Co., 76 Mo. 217; Sappington v. Missouri Pac. R. Co., 14 Mo. App. 86, 90; Huff v. Missouri &c. R. Co., 17 Mo. App. 356; 2 Thomp. Neg. (2nd ed.) § 2288. In the recent case of Great Northern R. Co. v. Coates, 115 Fed. 452 (followed in Atchison &c. R. Co. v. Geiser, 68 Kans. 281, 75 Pac. 68), a majority of the court took this view, but a strong dissenting opinion was filed, and the authorities and arguments upon both sides are well presented in that case. And in the still more recent case of Woodward v. Chicago &c. Ry. Co., 145 Fed. 577, the judge who wrote the dissenting opinion in the former case wrote the opinion of the whole court, holding that the presumption created by the Minnesota statute and similar statutes merely changed the burden of proof, and could not be used as evidence, and that the court might direct a verdict in a proper case. So, unless the presumption made by the statute is different from the ordinary presumption, it does not seem strictly correct to say that it may be weighed as evidence by the jury when the evidence is all in.

[34] Rosen v. Chicago &c. R. Co., 83 Fed. 300; Louisville &c. R. Co. v. Marbury Lumber Co., 125 Ala. 237, 50 L. R. A. 620, 28 So. 438; Alabama &c. R. Co. v. Taylor, 129 Ala. 238, 29 So. 673; Indiana &c. R. Co. v. Craig, 14 Ill. App. 407; Daly v. Railway Co., 43 Minn. 319, 45 N. W. 611; Johnson v. Northern Pacific R. Co., 1 N. D. 354, 48 N. W. 227; Smith v. Northern Pac. R. Co., 3 N. D. 17, 23, 53 N. W. 173; Anderson v. Oregon &c. R. Co., 45 Ore. 211, 77 Pac. 119; Gulf &c. R. Co. v. Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. 74; Missouri &c. Co. v. Stafford (Tex. Civ. App.), 31 S. W. 319; Kurz &c. Ice Co. v. Milwaukee &c. R. Co., 84 Wis. 171, 53 N. W. 850; Menominee Co. v. Milwaukee &c. R. Co., 91 Wis. 447, 65 N. W. 176. See also Louisville &c. R. Co. v. Marbury Lumber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. 917; Southern R. Co. v. Pace, 114 Ga.

viewed in a Minnesota case, where the latter doctrine is approved, but it is said: "Such rebuttal proof must conform, as to character and extent, to the standard, by which in ordinary cases is measured the propriety of a holding by a trial court that a defendant, against whom a prima facie case of negligence has been made, is free from fault as a matter of law. The adequacy of such proof by a defendant must also be determined in view of any other facts appearing in the testimony in addition to those sufficient to give rise to the statutory presumption, which tend to show negligence. Unless the rebutting evidence as to both the facts and the inference reasonably to be drawn from them is conclusive, the question is for the jury."[35]

§ 1772 (1245b). **Instructions to juries.**—In comparatively recent decisions the following holdings on the subject of instructions in this connection are found: It has been held that the rule against instructions on the weight of the evidence was not violated by an instruction, that if the jury believed the sparks escaped from one of the defendant's engines and set the fire and the plaintiff did not contribute thereto they should find for the plaintiff. The instruction was not open to the construction that it assumed that the setting of the fire by sparks established negligence.[36] Another court in the same jurisdiction has held this

712, 40 S. E. 723; Olmsted v. Oregon &c. R. Co., 27 Utah 515, 76 Pac. 557; Woodward v. Chicago &c. R. Co., 145 Fed. 577.

[35] Continental Ins. Co. v. Chicago &c. Ry. Co., 97 Minn. 467, 107 N. W. 548, 550, 5 L. R. A. (N. S.) 99. The court held the rebuttal evidence insufficient to justify the direction of a verdict for the defendant because the plaintiff had introduced affirmative evidence of negligence in addition to the facts raising the statutory presumption, and the credibility of defendant's witnesses was for the jury, and consisted mainly of the testimony of experts, which was inconsistent in itself and based on too narrow an hypothesis. To the effect that where there was other affirmative evidence of negligence the question was for the jury, the court cited Preece v. Rio Grande &c. R. Co., 24 Utah 493, 68 Pac. 413. Authorities as to testimony of interested parties and experts not being conclusive in such cases are also cited, and the authorities on both sides of the general question are collected and reviewed in the note to the case from which we have quoted in 5 L. R. A. (N. S.) 99-104.

[36] Texas &c. R. Co. v. Wooldridge (Tex. Civ. App.), 63 S. W. 905.

rule not violated by an instruction that if the fire was caused by sparks from the engine, such fact would prima facie establish negligence of the defendant.[37] But the court in the latter case held that the rule was violated by an instruction that the act of the railroad company in permitting the accumulation of dry and inflammable matter on its right of way, and in allowing it to remain there, was such negligence on the defendant's part as to make it liable for any damages occasioned thereby.[38] The rule against argumentative instructions was held violated by an instruction that the jury had no right to speculate as to how the fire arose, and that before they could find for the plaintiff, the evidence must satisfy them that the fire arose from a spark from the defendant's engine, and was communicated to the plaintiff's property in one of the methods alleged in the complaint, and that, if the evidence failed on both or either of these points, the verdict should be for the defendant.[39] An instruction that the word "originate" means that the fire must have originated in the grass or combustible matter on the defendant's right of way and must have originated therein by sparks from the defendant's engine, was held not open to criticism on the ground that it imposed on the plaintiff the duty of proving, by more than a preponderance of evidence, that the fire originated in combustible matter on the defendant railroad's right of way from sparks emitted from its engine, and was communicated to his land.[40] An instruction that defendant railroad company must keep its track and right of way free from combustible material liable to communicate fire to the premises of others, and if it failed to discharge this duty and permitted fire to escape to plaintiff's land whereby his stacks were destroyed, the defendant was liable, was held to require too high a degree

[37] Gulf &c. R. Co. v. Jordan, 25 Tex. Civ. App. 82, 60 S. W. 784.

[38] Gulf &c. R. Co. v. Jordan, 25 Tex. Civ. App. 82, 60 S. W. 784.

[39] Louisville &c. R. Co. v. Sullivan Timber Co., 138 Ala. 379, 35 So. 327. Where there was evidence that the fire might have resulted from a cause not attributable to the railroad company an instruction that the verdict should be for the company if the probabilities were equal, was held proper. Clark v. St. Louis &c. R. Co., 132 Ark. 257, 201 S. W. 111.

[40] Jackson v. Missouri &c. R. Co. (Tex. Civ. App.), 78 S. W. 724.

of care.[41] Another instruction condemned as imposing too high a degree of care told the jury to find for defendant if it had exercised "all reasonable care and caution" to keep its spark arrester in repair.[42] An instruction imposing on the railroad company the duty of "the actual adoption of the most approved and best-known spark arresters and appliances" was held faulty in using the word "adoption" instead of the word "procuring."[43]

§ 1773 (1246). **Attorney's fees.**—In some states by statute the plaintiff is permitted to recover, in addition to the damage actually done, a reasonable fee for his attorney. Such a statute is in force in the state of Kansas.[44] But before a recovery of such a fee will be decreed the plaintiff must demand the same in his complaint or petition and then submit the question to the court or jury trying the case upon the merits.[45] Where an insurance company which had paid part of the owner's loss on account of fire alleged to have been negligently set by defendant was joined as a party plaintiff it was held proper to include an attorney's fee in the judgment where the only interest the insurance company had was the right of subrogation to the insured's interest in the judgment.[46]

§ 1774 (1247). **Personal and other injuries caused by fires.**—It sometimes happens that personal and other injuries, aside from the mere burning of property, are caused by fires set out

[41] Ft. Worth &c. R. Co. v. Dial (Tex. Civ. App.), 85 S. W. 22. See also Stewart v. Illinois Cent. R. Co., 184 Ill. App. 412.

[42] St. Louis Southwestern R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. 408.

[43] Anderson v. Oregon R. Co., 45 Ore. 211, 77 Pac. 119. Among other decisions in regard to instructions in such cases, are the following recent cases: Chicago &c. R. Co. v. Ohio City Lumber Co., 214 Fed. 751; Harts v. Chicago &c. R. Co., 184 Ill. App. 123; Texas &c. R. Co. v. Cook (Tex. Civ. App.), 167 S. W. 158.

[44] St. Louis &c. R. Co. v. Hoover (Kans.), 43 Pac. 854.

[45] Ft. Scott &c. R. Co. v. Tubbs, 47 Kans. 630, 28 Pac. 612, 49 Am. & Eng. R. Cas. 685; Fort Scott &c. R. Co. v. Karracker, 46 Kans. 511, 26 Pac. 1027; Missouri Pacific R. Co. v. Merrill, 40 Kans. 404.

[46] Atchison &c. R. Co. v. Huitt, 1 Kans. App. 781, 41 Pac. 1051.

by railway companies. In such cases where the injuries are a direct and proximate result of the railway company's negligence it will be liable to one who is free from contributory negligence for damages on account of such injuries. Thus, a railway company has been held liable for the death of a person caused by the explosion of a powder mill which had been ignited by sparks negligently permitted to escape from a locomotive.[47] And where a person was injured while acting with reasonable prudence in attempting to save from destruction the property of another in danger on account of fire negligently set out by a railway company, it was held that the company setting out the fire would be liable for the injuries such person had sustained.[48] But a different view was taken in another and more recent case where a municipal fireman injured in attempting to put out a fire set by a railroad company was held not entitled to recover from the company either on the theory that the company owed him a duty as a volunteer rescuer of property of another endangered by the negligence of the company or a duty as one whose contract of employment brought him into a legal relation with it.[49] Where loss of life is caused by a fire negligently set without any contributory negligence on the part of the person bringing an action or his intestate, the company setting the fire may be liable.[50] But where a person voluntarily exposes himself to danger and is injured by the fire there can usually be no recovery.[51] Where fences are destroyed by fires negligently

[47] Babcock v. Fitchburg R. Co., 19 N. Y. S. 774.

[48] Liming v. Illinois Central R. Co., 81 Iowa 246, 47 N. W. 66, 45 Am. & Eng. R. Cas. 581. See also 63 S. E. 1123 (citing text). But see Logan v. Wabash R. Co., 96 Mo. App. 461, 70 S. W. 734. It is so held in Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819, where the owner was killed in attempting to save his own property.

[49] Clark v. Boston &c. R. Co., 78 N. H. 428, 101 Atl. 795, L. R. A. 1918A, 518.

[50] Rajnowski v. Detroit &c. R. Co., 74 Mich. 20, 41 N. W. 847, 78 Mich. 681, 44 N. W. 335. See also Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819; Glanz v. Chicago &c. R. Co., 119 Iowa 611, 93 N. W. 575; Berg v. Great Northern R. Co., 70 Minn. 272, 73 N. W. 648, 68 Am. St. 524.

[51] Pike v. Grand Trunk &c. R. Co., 39 Fed. 255, 38 Am. & Eng. R.

set and as a proximate result of such destruction animals escape and are lost,[52] or crops are destroyed,[53] the company may be liable. In a recent case, where a residence was negligently destroyed by fire it was held that the damages might include such as accrued to the occupants by being compelled to flee at night insufficiently clothed, but not damages from sleeping on a neighbor's floor after the residence was destroyed.[54]

§ 1775 (1247a). **Negligence of persons using fire about cars by permission of railroad company.**—Under the broad principle that a railroad company cannot, without legislative sanction, delegate its functions to other persons or corporations so as to escape liability for their negligent performance, it has been held that a railroad company charged with the duty to heat cars used for the transportation of perishable articles, which entrusted that duty to a shipper, was liable for loss to a neighboring building from a fire caused by the shipper's negligence.[55]

§ 1776 (1247b). **Liability for fire set out on lands of railroad company let to other persons.**—It is elementary that a person who lets the use of his premises to another person for a lawful purpose not inherently dangerous or noxious to his neighbors or their property, and reserves or exercises no supervision over the manner in which the business is conducted is not liable for damages arising from the mere negligent acts of the occupant. This rule has been applied to exonerate a railroad company from liability for fire where it permitted a city to use low lying ground not used by it for a public dumping ground and the railroad

Cas. 336; Logan v. Wabash R. Co., 96 Mo. App. 461, 70 S. W. 734; Seale v. Gulf &c. R. Co., 65 Tex. 274, 57 Am. Rep. 602. See also Pegram v. Seaboard &c. R. Co., 139 N. Car. 303, 51 S. E. 975.

[52] St. Louis &c. R. Co. v. McKinsey, 78 Tex. 298, 14 S. W. 645, 22 Am. St. 54. See also Highland v. Houston &c. R. Co. (Tex. Civ. App.), 65 S. W. 649.

[53] Miller v. St. Louis &c. R. Co., 90 Mo. 389, 2 S. W. 439, 29 Am. & Eng. R. Cas. 172 and 254.

[54] Serafina v. Galveston &c. R. Co. (Tex. Civ. App.), 42 S. W. 142. See also Louisville &c. R. Co. v. Haggard, 161 Ky. 317, 170 S. W. 956.

[55] Rolfe v. Boston &c. R. Co., 69 N. H. 476, 45 Atl. 251.

company retained no substantial control over the conduction of the work and gave no consent for the setting out of fire on the ground. It was held that neither the railroad company's ownership of the ground nor the fact that on one occasion it had made suggestions as to the filling, and had twice assisted in subduing fire which had broken out in the dump, was sufficient to render the railroad company liable for damages for fire communicated from a fire originating in the dump.[56]

§ 1777 (1247c). **Liability where a railroad is operated by purchaser at foreclosure sale, mortgage trustees in possession, receivers.**—The purchasers of railroad property at a foreclosure sale are not liable for injuries from fire before the sale, unless a statute existing at the time of the purchase makes them liable or unless such liability is imposed by the decree under which the sale is made.[57] But it has been held that the trustees for the bondholders in a railroad mortgage taking possession of the road on default in the payment of the principal or interest of such bonds and operating it for the benefit of the bondholders, are liable to the owners of property along the line injured by the negligent operation of the road, and this would, of course, include injuries from fire.[58] There is, however, authority holding them not liable, but this is based on a statute expressly limiting their liability as trustees to moneys received and their personable liability to malfeasance or fraud.[59] So, it has been held that an action for loss from fire may, with the permission of the court, be maintained against the receivers of the railroad company, although the cause of action accrued before the receivers were appointed.[60]

[56] Denver &c. R. Co. v. Porter, 126 Fed. 288. But see St. Louis &c. R. Co. v. Chappell, 83 Ark. 94, 102 S. W. 893, 10 L. R. A. (N. S.) 1175; Thomas v. Hammer Lumber Co., 153 N. Car. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584; Northern Pac. Ry. Co. v. Mentzer, 214 Fed. 10.

[57] Hammond v. Port Royal &c. R. Co., 15 S. Car. 10; Stratton v. European &c. R. Co., 74 Maine 422.

[58] Lockhart v. Little Rock &c. R. Co., 40 Fed. 631; Ballou v. Farnum, 91 Mass. 47.

[59] Stratton v. European &c. R. Co., 74 Maine 422.

[60] Grant v. Omaha &c. R. Co., 94 Mo. App. 312, 68 S. W. 91. See also ante, § 1724.

CHAPTER LIV.

INJURIES TO TRESPASSERS, LICENSEES AND STRANGERS.

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§ 1785 (1248). **Who are licensees.**—It is sometimes extremely difficult to distinguish a license from an invitation on the one hand and from mere sufferance or acquiescence on the other.

License implies permission or authority, and is, therefore, more than mere sufferance, but it does not imply an invitation. Thus, one who occasionally uses a railroad track or the like, without objection, and by the mere sufferance or passive acquiescence of the company, is not a licensee unless he has either express or clearly implied permission or authority so to do.[1] So, on the other hand, one may have permission to do a certain thing for his own sole benefit, and yet not be invited to do so. A license will be much more readily implied in some cases than in others. Thus, continuous use by many persons may give rise to the implication of a

[1]Finlayson v. Chicago &c. R. Co., 1 Dill. (U. S.) 579; Memphis &c. R. Co. v Womack, 84 Ala. 149, 4 So. 618; Carrington v. Louisville &c. R. Co., 88 Ala. 472, 6 So. 910, 41 Am. & Eng. R. Cas. 543; Glass v. Memphis &c. R. Co., 94 Ala. 581, 10 So. 215; Central R. Co. v. Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42; Blanchard v. Lake Shore &c. R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. 630; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719; Palmer v. Chicago &c. R. Co., 112 Ind. 250, 14 N. E. 70; Lingenfelter v. Baltimore &c. R. Co., 154 Ind. 52, 55 N. E. 1021 (citing text); Morrow v. Sweeney, 10 Ind. App. 626, 38 N. E. 187; Louisville &c. R. Co. v. Redmon's, 28 Ky. L. 1293, 91 S. W. 722; Brown v. Louisville &c. R. Co., 97 Ky. 228, 30 S. W. 639; Parker v. Portland &c. R. Co., 69 Maine 173, 31 Am. Rep. 262; Baltimore &c. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Bancroft v. Boston &c. R. Co., 97 Mass. 275; Akers v. Chicago &c. R. Co., 58 Minn. 540, 60 N. W. 589; Egan v. Montana Cent. R. Co., 24 Mont. 569, 63 Pac. 831; Devoe v. New York &c. R. Co., 63 N. J. L. 276, 43 Atl. 899; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Anderson v. Chicago &c. R. Co., 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203. See also Southern R. Co. v. Stewart, 164 Ala. 171, 51 So. 324; Gainesville &c. R. Co. v. Peck, 55 Fla. 403, 46 So. 1019 (licensee defined); Illinois Cent. R. Co. v. Eicher, 202 Ill. 556, 67 N. E. 376; Bartlett v. Wabash R. Co., 220 Ill. 163, 77 N. E. 96; Cannon v. Cleveland &c. R. Co., 157 Ind. 682, 62 N. E. 8; Pittsburgh &c. R. Co. v. Simons (Ind. App.), 76 N. E. 883 (citing text, but holding invitation in the particular case); Marion v. Lake Erie &c. R. Co., 40 Ind. App. 569, 80 N. E. 166; Martin v. Louisville &c. Bridge Co., 41 Ind. App. 493, 84 N. E. 360, 462 (citing text); LeDuc v. New York Cent. &c. R. Co., 92 App. Div. 107, 87 N. Y. S. 364; Atchison &c. Ry. Co. v. Cogswell, 23 Okla. 181, 99 Pac. 923, 924, (citing and approving text but holding that one going to meet a passenger is not a bare licensee); St. Louis &c. R. Co. v. Shiflet, 98 Tex. 326, 83 S. W. 677; Huff v. Chesapeake &c. R. Co., 48 W. Va. 45, 35 S. E. 866.

license where merely occasional use by one or few persons would not do so, and a license to cross a track may be implied where a license to use it longitudinally would not be implied. One who goes upon the premises of another, without permission, express or implied, although no objection is made, may nevertheless be a trespasser. If he has permission he will, as a general rule at least, be deemed to be a licensee, and if he is invited he is more than a licensee and a higher duty is due him.[2] One who goes upon the premises of a railroad company merely to speak to an employe and not upon any business with the company is a mere licensee.[3] The same has been held to be true of one who went to a mine to seek employment.[4] And city firemen and policemen are likewise held to be mere licensees, under ordinary circumstances, even when upon another's premises in the discharge of their duties.[5] One

[2]In Colorado &c. R. Co. v. Sonne, 34 Colo. 206, 83 Pac. 383, it is held that "a railroad company owes to a person in its yards on lawful business the duty of having its premises in a reasonably safe condition, and to prevent injury to him from any unusual danger; but this obligation does not require it to make the place absolutely safe," and a person in a railroad yard on the invitation of the company is not relieved from the exercise of reasonable care to avoid injury to himself. Compare Watson v. Manitou &c. R. Co., 41 Colo. 138, 92 Pac. 17, 17 L. R. A. (N. S.) 916 and note. See also Pittsburgh &c. R. Co. v. Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133. But compare Santa Fe &c. R. Co. v. Ford, 10 Ariz. 201, 85 Pac. 1072. As to duty and liability of those invited to a park, or the like, owned by the company, see Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909, and cases there cited.

[3]Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; Wright v. Rawson, 52 Iowa 329, 3 N. W. 106, 35 Am. Rep. 275; Illinois Cent. R. Co. v. Willis' Adm'r, 29 Ky. L. 1187, 97 S. W. 21; Lachat v. Lutz, 94 Ky. 287, 22 S. W. 218; Galveston Oil Co. v. Morton, 70 Tex. 400, 7 S. W. 756; Woolwine v. Chesapeake &c. R. Co., 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. 859. See also Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119; Northwestern El. R. Co. v. O'Malley, 107 Ill. App. 599.

[4]Larmore v. Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718. See also Illinois Cent. R. Co. v. Willis, 29 Ky. L. 1187, 97 S. W. 21; Illinois Cent. R. Co. v. Lucas, 89 Miss. 411, 42 So. 607; Peterson v. South &c. R. Co., 143 N. Car. 260, 55 S. E. 618.

[5]Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 36 Am. St. 376; Pennsylvania R. Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Blatt v. McBarrom, 161 Mass. 21, 36 N. E. 468, 42 Am.

who comes upon the premises of a railroad company, in the usual course of business with it, for the purpose of loading and unloading, or delivering and receiving freight is not a mere licensee, but is entitled to the care due one who is invited to come upon the premises of another.[6] And this is true of an employe of one railroad company who is engaged in delivering cars to another railroad company upon the latter's tracks, in the usual course of business between the two companies.[7] Thus, in a recent case an employe of one company operating its cars under a traffic contract on the track of another was held entitled to recover from

St. 385; Behler v. Daniels, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. 790. Compare Learoyd v. Godfrey, 138 Mass. 315; Creeden v. Boston &c. R., 193 Mass. 280, 79 N. E. 344; Parker v. Barnard, 135 Mass. 116, 46 Am. Rep. 450; Low v. Grand Trunk R. Co., 72 Maine 313, 39 Am. Rep. 331. A militiaman guarding the premises during the strike has been held to be there by invitation. O'Hara v. New York Cent. &c. R. Co., 92 Hun 56, 36 N. Y. S. 567, 153 N. Y. 690, 48 N. E. 1106. Quarantine guard held not to be a trespasser in Louisville &c. R. Co. v. Goulding, 52 Fla. 327, 42 So. 854.

[6]Railroad Co. v. Hanning, 15 Wall. (U. S.) 649, 21 L. ed. 220; Chicago &c. R. Co. v. Fillmore, 57 Ill. 265; Toledo &c. R. Co. v. Hauck, 8 Ind. App. 367, 35 N. E. 573; St. Louis &c. R. Co. v. Ridge, 20 Ind. App. 547, 49 N. E. 828; Southern R. Co. v. Goddard, 28 Ky. L. 323, 89 S. W. 675; Campbell v. Portland &c. R. Co., 62 Maine 552, 16 L. R. A. 503; Chadderdon v. Michigan Cent. R. Co., 100 Mich. 293, 58 N. W. 998; New Orleans &c. R. Co. v. Bailey, 40 Miss. 395; DeBolt v. Kansas City &c. Railway Co., 123 Mo. 496, 27 S. W. 575; Lovell v. Kansas City &c. R. Co., 121 Mo. App. 466, 97 S. W. 193; Conlan v. New York &c. R. Co., 74 Hun 115, 26 N. Y. S. 659; Newson v. New York &c. R. Co., 29 N. Y. 383; International &c. R. Co. v. Hall (Tex. Civ. App.), 25 S. W. 52. See also Arkansas &c. R. Co. v. Graves, 96 Ark. 638, 132 S. W. 992; O'Callaghan v. Bode, 84 Cal. 489; International &c. R. Co. v. Neira (Tex. Civ. App.), 28 S. W. 95; Chicago &c. R. Co. v. Dignan, 56 Ill. 487; Christianson v. Illinois Cent. R. Co., 140 Iowa 345, 118 N. W. 387; Harvey v. Louisiana &c. R. Co., 114 La. Ann. 1065, 38 So. 859 (so as to employe of express company); Dixon v. New York &c. R. Co., 207 Mass. 126, 92 N. E. 1030; Chicago &c. R. Co. v. Cox, 145 Fed. 157. And the same is held as to a public weigher on a railroad platform in the course of his duty. Missouri &c. R. Co. v. Kinslow (Tex. Civ. App.), 172 S. W. 1124, 1128 (citing text and distinguishing Southern v. Ft. Worth &c. R. Co., 50 Tex. Civ. App. 613, 118 S. W. 666).

[7]Turner v. Boston &c. R. Co., 158 Mass. 261, 33 N. E. 520.

the latter company for injury caused by its negligence in operating a switch and failing to keep it closed and locked.[8] But where a shipper and his employes take an empty car which they find upon a side-track and push it up to a chute and load it, all "without notice to, or the knowledge of the company," they are, "at best, mere licensees, if not trespassers."[9] And one who, for his

[8]Chicago Terminal &c. Co. v. Vandenberg, 164 Ind. 470, 73 N. E. 990, 993 (citing text). See also Sullivan v. Tioga &c. R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. 793; Phillips v. Chicago &c. R. Co., 64 Wis. 475, 25 N. W. 544; Illinois Cent. R. Co. v. Frelka, 110 Ill. 498; Chicago &c. R. Co. v. Dinius, 180 Ind. 596, 103 N. E. 652.

[9]Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641, 37 N. E. 720. See also Oatts v. Cincinnati &c. R. Co., 15 Ky. L. 87, 22 S. W. 330; Chattanooga Station Co. v. Harper, 138 Tenn. 562, 199 S. W. 394. But in Santa Fe &c. R. Co. v. Ford, 10 Ariz. 201, 85 Pac. 1072, 1073, where the plaintiff and his brother were consignees of ice which was transported in the caboose of defendant's freight train, and being at the station to receive it, the conductor told them that they would have to unload it themselves, as he was short of help, and they boarded the train and proceeded to unload the ice, and as they were doing so plaintiff was thrown from the car and injured by the jar of the train, caused by the negligent making of a coupling, the court said: "Under the facts, as stated, resolving conflicting testimony in favor of plaintiff, plaintiff was not a licensee; he was an invitee, the consignee of freight, interested in its removal from the caboose, engaged at the request of the agent in charge of the defendant's train, to wit, the conductor, in removing from the train merchandise consigned to him. As such he was entitled to protection against carelessness and negligence of the defendant through its servants, whereby injury might result to him. McIntire Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803; Eason v. Sabine &c. R. Co., 65 Tex. 577, 57 Am. Rep. 606; Welch v. Maine Central R. Co., 86 Maine 552, 30 Atl. 116, 25 L. R. A. 658; Jacobson v. St. Paul R. Co., 41 Minn. 206, 42 N. W. 932; Toledo &c. R. Co. v. Hauck, 8 Ind. App. 367, 35 N. E. 573; Illinois &c. R. Co. v. Hoffman, 67 Ill. 287. In support of this assignment of error, however, it is urged that no testimony was given to show that the conductor of the train had authority to deliver freight directly to the consignee or to authorize the consignee to remove freight from his train. Whether the conductor had or had not such authority is immaterial. The plaintiff was present in his own interest, seeking to obtain from the defendant freight to the delivery of which he was entitled. If the defendant's representative, in charge of that freight, requested plaintiff to remove the consignment from the car, plaintiff, acting in his own interest, was justified in removing it, and was entitled to protection

own convenience in unloading freight erects a movable platform on the right of way is a mere licensee, and the company is not bound to see that the platform is so placed as not to be struck by a train.[10] So, employes of a coal company weighing cars on scales on a railroad company's right of way have been held mere licensees in walking along the track from the scales to the office.[11] One who comes upon the premises of a railroad company by implied invitation will become no more than a licensee if he remains upon the premises, without excuse, an unreasonable time after his business is completed, and this rule has been applied to one who came to a station to take a certain train, and, having missed it, remained in the depot a long time without any business there.[12] So, although a railroad company is in the habit of stopping its trains to allow passengers to get on and off at other places than stations, whenever signaled to do so the license to others than employes engaged in the performance of their duties to use the right of way extends only to those who come thereon for the purpose of boarding or alighting from the trains.[13] And the im-

from carelessness or negligence on behalf of defendant's employes. It was not incumbent upon him, before acting as his self-interest dictated, to ascertain the defendant's rules governing the conductor's authority. What would be the effect of knowledge by him or notice to him of a limitation upon the conductor's authority is a question which does not here arise; and the rule laid down by us must be limited by this fact." See also Louisville &c. R. Co. v. Smith, 27 Ky. L. 257, 84 S. W. 755; Bachant v. Boston &c. R. Co., 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408. In Chicago &c. R. Co. v. Pettit, 111 Ill. App. 172, a local custom under which the company required shippers to repair leaks was held admissible to show that a shipper was not a trespasser or mere licensee while so doing.

[10]McCabe v. Chicago &c. R. Co., 88 Wis. 531, 60 N. W. 260. For a case in which the plaintiff was held guilty of contributory negligence see Chicago &c. R. Co. v. Pettit, 209 Ill. 452, 70 N. E. 591. But compare St. Louis &c. Ry. Co. v. Kennemore (Tex. Civ. App.), 81 S. W. 802.

[11]Nashville &c. R. Co. v. Lovejoy, 138 Tenn. 492, 198 S. W. 61. See also Allen v. Aroostook Valley R. Co., 115 Maine 361, 98 Atl. 1027.

[12]Heinlein v. Boston &c. R. Co., 147 Mass. 136, 9 Am. St. 676. See also Armstrong v. Medbury, 67 Mich. 250, 34 N. W. 566, 11 Am. St. 585; Hern v. Southern Pac. Co., 29 Utah 127, 81 Pac. 902 (became a trespasser). But compare Elgin &c. R. Co. v. Thomas, 215 Ill. 158, 74 N. E. 109.

[13]Matson v. Port Townsend &c. R. Co., 9 Wash. 449, 37 Pac. 705.

plied invitation to one having business with the company to go upon the premises where it transacts such business does not extend to other parts of the premises obviously not adapted or intended for it.[14]

§ 1786 (1249). **Difference between invitation and license.**— We have shown that the mere sufferance or failure to object is not sufficient to constitute a license unless under such circumstances that a license should be inferred, and we have also stated that there is a difference between a license and an invitation. It is frequently said that while mere permission is no more than a license, yet if the owner or occupant of the lands, by any enticement, allurement or inducement, causes others to come upon the same, he owes a duty to such persons to use reasonable care to see that the premises are safe for that purpose and is liable for injuries caused by the violation of such duty to one who is free from contributory negligence.[15] There is, however, no invariable

[14]Price v. Pecos Val. &c. R. Co., 15 N. Mex. 348, 110 Pac. 565, L. R. A. 1915B, 827. See also Diebold v. Penna. R. Co., 50 N. J. L. 478, 14 Atl. 576; Louthian v. Ft. Worth &c. R. Co., 50 Tex. Civ. App. 613, 111 S. W. 665. But compare Pauckner v. Wakem, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118.

[15]Bennett v. Louisville &c. R. Co., 102 U. S. 577, 26 L. ed. 235; Pennsylvania R. Co. v. Atha, 22 Fed. R. 920; St. Louis &c. Ry. Co. v. Dooley, 77 Ark. 561, 92 S. W. 789; Evansville &c. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Pittsburgh &c. R. Co. v. Simmons (Ind App.), 76 N. E. 883, 886, 887 (citing text); note to Howe v. Omhart, 7 Ind. App. 32, 33 N. E. 466, 2 Am. L. Reg. & Rev. (N. S.) 196; Campbell v. Portland Sugar &c. Co., 62 Maine 552, 16 Am. Rep. 503; Quimby v. Boston &c. R. Co., 69 Maine 340; Sweeny v. Old Colony &c. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Zoebisch v. Tarbell, 10 Allen (Mass.) 385, 87 Am. Dec. 660 and note; Coombs v. New Bedford &c. Co., 102 Mass. 572, 3 Am. Rep. 102; Grand Rapids &c. Co. v. Martin, 41 Mich. 667, 3 N. W. 173; Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; Gillis v. Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317; Kay v. Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Scott v. London Docks Co., 11 L. T. Rep. (N. S.) 383; Corby v. Hill, 4 Com. B. (N. S.) 556; Hounsell v. Smith, 7 Com. B. (N. S.) 731; Binks v. South Yorkshire &c. R. Co., 32 L. J. (N. S.) Q. B. 26; Hardcastle v. South Yorkshire &c. R. Co., 4 Hurl. & N. 67. See King v. Central of Georgia R. Co., 107 Ga. 754, 33 S. E. 839, 841 (citing text).

test that can be stated in general terms. That of mutuality, as announced by the Supreme Court of Massachusetts seems to be the best that has been suggested. It is stated in the following words: "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant."[16] It is believed that the decisions in the cases cited in the preceding section could well have been based upon this ground, although, in some of them, it was not expressly mentioned. But this test fails where the railroad company, by its conduct has induced the public to use a crossing in the belief that it is a public crossing which it will protect them in using, as for instance, where it constructs and opens the crossing and keeps a flagman there, who signals travelers to cross. In such a case the traveler is not invited to come upon business connected with the company, but he is invited and induced to cross by the conduct of the company, and the "inducement" test stated in the first part of this section applies.[17] Illustrative cases of those deemed to have

[16]Bennett v. Louisville &c. R. Co., 102 U. S. 577, 26 L. ed. 235; Railway Co. v. Ferguson, 57 Ark. 16, 20 S. W. 545, 18 L. R. A. 110, 38 Am. St. 217; Benson v. Baltimore &c. Co., 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. 436; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. 463; Hart v. Cole, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; O'Connor v. Illinois Cent. R. Co., 44 La. Ann. 339, 10 So. 678, note in 2 Am. L. Reg. & Rev. (N. S.) 196; Indermaur v. Dames, L. R. 1 C. P. 274; 1 Thomp. Neg. (2d ed.) § 968 et. seq. See also Chicago &c. R. Co. v. Payne, 103 Ark. 226, 146 S. W. 487, 39 L. R. A. (N. S.) 217, 219 (citing text); King v. Central of Ga. Ry. Co., 107 Ga. 754, 33 S. E. 839; Illinois Cent. R. Co. v. Hopkins, 200 Ill. 122, 65 N. E. 656; Pauckner v. Wakem, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118.

[17]Sweeny v. Old Colony &c. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644. See also Murphy v. Boston &c. R. Co., 133 Mass. 121; St. Louis &c. R. Co. v. Dooley, 77 Ark. 561, 92 S. W. 789; Hansen v. Southern Pac. R. Co., 105 Cal. 379, 38 Pac. 957; Pomponio v. New York &c. R. Co., 66 Conn. 528, 34 Atl. 491, 32 L. R. A. 530, 50 Am. St. 124; Chicago &c. R. Co. v. Murowski, 179 Ill. 77, 53 N. E. 572; Pittsburgh &c.

been invited are referred to in the last preceding section, and other decisions as to what constitutes an invitation and as to the duty of the company are cited below.[18]

§ 1787 (1250). **Duty to licensees—Generally no special duty to make safe.**—It is said that the licensor owes a duty to his licensee to give him notice of hidden dangers or traps.[19] Expressions to this effect are found in some of the decided cases, but we think that they do not accurately state the law. Doubtless a land-owner cannot lawfully shoot a licensee under ordinary circumstances or set spring guns or traps for him,[20] and it may be that if the licensor makes the premises more dangerous after

Ry. Co. v. Simons (Ind. App.), 76 N. E. 883, 886, 887 (citing text); Clampit v. Chicago &c. R. Co., 84 Iowa 71, 50 N. W. 673; Davis v. Central Cong. Soc., 129 Mass. 367, 37 Am. Rep. 368; Holmes v. Drew, 151 Mass. 578, 25 N. E. 22; Sites v. Knott, 197 Mo. 684, 96 S. W. 206; Byrne v. New York &c. R. Co., 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; Midland Val. R. Co. v. Shores, 40 Okla. 75, 136 Pac. 157, 49 L. R. A. (N. S.) 814 and note; Taylor v. Delaware &c. R. Co., 113 Pa. St. 162, 8 Atl. 43, 57 Am. Rep. 446; Johnson v. Lake Superior &c. R. Co., 86 Wis. 64, 56 N. W. 161. Ante, § 1647.

[18]Employes of contractors repairing the way, and the like: Chicago &c. R. Co. v. Goebel, 20 Ill. App. 163; Chicago &c. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Erickson v. St. Paul &c. R. Co., 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786 and note; Interstate &c. R. Co. v. Fox, 41 Kans. 715, 21 Pac. 797. Mail clerks and parlor-car employes: Chicago &c. R. Co. v. Kelly, 182 Ill. 267, 54 N. E. 979; Young v. New York Cent. &c. R. Co., 13 Daly (N. Y.) 294. Employes of railroad companies having a joint or common use of tracks: Louisville &c. R. Co. v. Burke, 11 Ala. 496, 66 So. 885, and other cases cited in first note to § 1810, post. Passengers and the like: Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Louisville &c. R. Co. v. Hirsch, 69 Miss. 126, 13 So. 244; Grand Trunk R. Co. v. Anderson, 28 Can. Sup. Ct. 541; Mason v. Chicago &c. R. Co., 89 Wis. 151, 61 N. W. 300. Notes in 33 L. R. A. (N. S.) 198, 855, 20 L. R. A. (N. S.) 837, 28 L. R. A. (N. S.) 311, and in L. R. A. (1915) 828-833. See also Tutt v. Illinois Cent. R. Co., 104 Fed. 741; Kentucky &c. R. Co. v. Sydor, 119 Ky. 18, 82 S. W. 989, 68 L. R. A. 183; Chicago &c. R. Co. v. Stephenson, 33 Ind. App. 95, 69 N. E. 270; Etchison v. Lusk, 195 Mo. App. 188, 190 S. W. 345, 349 (citing text).

[19]2 Am. L. Reg. & Rev. (N. S.) 197.

[20]Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198, 204.

the license is granted in such a way that the increased danger is not open to observation it is his duty to notify the licensee,[21] but we do not believe that he is bound to notify him of ordinary dangers incident to the condition and use of the premises at the time the license was granted.[22] The better rule is that the licensee takes his license subject to its concomitant perils,[23] and the licensor, as a general rule, owes him no duty except to refrain from wilfully or wantonly injuring him,[24] or to exercise ordinary

[21]See Norfolk &c. R. Co. v. Wheeler, 91 Va. 700, 22 S. E. 514, 29 L. R. A. 825; McKone v. Michigan Cent. R. Co., 51 Mich. 601, 47 Am. Rep. 596; New Orleans &c. R. Co. v. Hanning, 15 Wall. (U. S.) 649, 21 L. ed. 220; Corby v. Hill, 4 C. B. (N. S.) 556.

[22]Watson v. Manitou &c. R. Co., 41 Colo. 138, 92 Pac. 17, 17 L. R. A. (N. S.) 916, 922, (quoting text).

[23]Grethen v. Chicago &c. R. Co., 22 Fed. 609; Schmidt v. Bauer, 80 Cal. 556, 22 Pac. 256, 5 L. R. A. 580 and note; Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. 376; Evansville &c. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; Lingenfelter v. Baltimore &c. R. Co., 154 Ind. 49, 55 N. E. 1021, 1022 (citing text); Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; Atchison &c. R. Co. v. Fuller, 72 Kans. 527, 84 Pac. 140; Sweeny v. Old Colony R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644 and note; Schreiner v. Great Northern R. Co., 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75; Diebold v. Pennsylvania Co., 50 N. J. L. 478; Matthews v. Bensel, 51 N. J. L. 30, 16 Atl. 195; Sutton v. New York &c. R. Co., 66 N. Y. 243; Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509, 64 N. E. 582, 587, 90 Am. St. 602 (citing text); Woolwine v. Chesapeake &c. R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. 859, 16 L. R. A. 271; Holmes v. Northeastern R. Co., L. R. 4 Exch. 255; Sullivan v. Waters, 14 Ir. C. L. R. 460; Blackmore v. Toronto &c. R. Co., 38 Up. Can. Q. B. 172. See also Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65; Baltimore &c. R. Co. v. Sherman, 30 Gratt. (Va.) 602; Baltimore &c. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Gillis v. Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317; Akers v. Chicago &c. R. Co., 58 Minn. 540, 60 N. W. 669, 60 Am. & Eng. R. Cas. 30; Spavin v. Lake Shore &c. R. Co., 130 Mich. 579, 90 N. W. 325, 328 (citing text and holding plaintiff guilty of contributory negligence).

[24]Cleveland &c. R. Co. v. Tartt, 64 Fed. 823; St. Louis &c. Co. v. Fairbairn, 48 Ark. 491, 4 S. W. 50; Central R. Co. v. Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42; Illinois Cent. R. Co. v. Godfrey, 71 Ill.

and reasonable care after discovering him to be in peril.[25] "In the language of continental jurisprudence there is no question of culpa between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the license applies. Nothing short of 'dolus' will make the licensor liable."

500, 22 Am. Rep. 112; Illinois Cent. R. Co. v. Hetherington, 83 Ill. 510; Heater v. Chicago &c. R. Co., 200 Ill. App. 331; McClaren v. Indianapolis &c. R. Co., 83 Ind. 319; Parker v. Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Baltimore &c. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Johnson v. Boston &c. R. Co., 125 Mass. 75; Wright v. Boston &c. R. Co., 142 Mass. 296, 7 N. E. 866; June v. Boston &c. R. Co., 153 Mass. 79, 26 N. E. 238; Nicholson v. Erie R. Co., 41 N. Y. 525, 530; Spicer v. Chesapeake &c. R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385n; Morrissey v. Eastern R. Co., 126 Mass. 377, 30 Am. Rep. 686, and authorities cited in last note supra. See also Rosenthal v. New York &c. R. Co., 112 App. Div. 431, 98 N. Y. S. 476; Means v. Southern Cal. R. Co., 144 Cal. 473, 77 Pac. 1001; Illinois Cent. R. Co. v. Lee, 71 Miss. 895, 16 So. 349; Carr v. Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874; Shultz v. Chicago &c. R. Co., 83 Nebr. 272, 119 N. W. 463 (citing text); McCabe v. Chicago &c. R. Co., 88 Wis. 531, 60 N. W. 260. It certainly owes him no duty of active vigilance under ordinary circumstances to make the place safe for him. Walsh v. Fitchburg R. Co., 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. 615, 27 L. R. A. 724. See also St. Louis &c. R. Co. v. Lucka, 95 Ark. 190, 129 S. W. 541; Bralley v. Norfolk &c. R. Co., 66 W. Va. 462, 66 S. E. 653; Delaware &c. R. Co. v. Wilkins, 153 Fed. 845; Schmidt v. Pennsylvania R. Co., 181 Fed. 83. Even where it is held that a lookout must be kept at places where licensees are to be expected, it is held that the company owes no duty to licensees using its track for their own benefit to keep a bridge in repair. McConkey v. Oregon R. &c. Co., 35 Wash. 55, 76 Pac. 526. So, in Williamson v. Southern R. Co., 104 Va. 146, 51 S. E. 195, it is held that, while it is the duty of the company to use reasonable care to discover, and not to injure, licensees to be expected on its track at a certain point, the company was under no duty to prepare for them in advance, and that its failure to have a light on its engine was not negligence as to such licensees. Compare Seaboard &c. R. Co. v. Vaughn, 104 Va. 113, 51 S. E. 452. But see Heavener v. North Carolina R. Co., 141 N. Car. 245, 53 S. E. 513.

[25] Scharf v. Spokane &c. R. Co., 92 Wash. 561, 159 Pa. 797, 799 (quoting text). This sentence is also quoted in Fleppen-Prather Realty Co. v. Mather (Tex. Civ. App.), 207 S. W. 121, 124 (but the jury was held warranted in finding an invitation under the evidence in the case).

But as shown in the next section there is conflict among the authorities as to some phases of the question.

§ 1788. **Duty to licensees—Conflicting views.**—It is held by some of the courts that if a railroad company licenses or acquiesces in the use of its track or premises by others it must exercise reasonable care not only to avoid injuring them after they are discovered to be in danger but also to keep a careful lookout to discover and avoid injury to all who may be expected to be upon their right of way or premises.[26] This rule, especially

[26]Lynch v. St. Joseph &c. Co., 111 Mo. 601, 19 S. W. 1114; Chicago &c. R. Co. v. Wilgus, 40 Nebr. 660, 58 N. W. 1125; Troy v. Cape Fear &c. R. Co., 99 N. Car. 298, 6 S. E. 77, 6 Am. St. 521; Smith v. Norfolk &c. R. Co., 114 N. Car. 728, 19 S. E. 863, 923 and note, 25 L. R. A. 287; St. Louis &c. R. Co. v. Crosnoe, 72 Tex. 79, 10 S. W. 342, 37 Am. & Eng R. Cas. 313; Leakle v. San Pedro &c. R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486, 489 (citing text and taking this view rather than that suggested by us as the better one); Johnson v. Lake Superior &c. R. Co., 86 Wis. 64, 56 N. W. 161 (but see Anderson v. Chicago &c. R. Co., 87 Wis. 195, 58 N. W. 79, 83, 23 L. R. A. 203). See also Daley v. Norwich &c. R. Co., 26 Conn. 591, 68 Am. Dec. 413 (but see Nolan v. New York &c. R. Co., 53 Conn. 461, 4 Atl. 106); Murphy v. Chicago &c. R. Co., 45 Iowa 661; Larashonsky v. Illinois Cent. R. Co., 139 Iowa 709, 117 N. W. 1074; Kansas &c. R. Co. v. Pointer, 9 Kans. 620; Chamberlain v. Missouri Pac. R. Co., 133 Mo. 587, 33 S. W. 437, 34 S. W. 842; Brown v. Hannibal &c. R. Co., 50 Mo. 461, 11 Am. Rep. 420; Fiedler v. St. Louis &c. R. Co., 107 Mo. 645, 18 S. W. 847; Pickett v. Wilmington &c. R. Co., 117 N. Car. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. 611; International &c. R. Co. v. Lee (Tex.), 34 S. W. 160, 161; St. Louis &c. R. Co. v. McCauley, (Tex. Civ. App.) 134 S. W. 798; Missouri &c. R. Co. v. Malone, 102 Tex. 269, 115 S. W. 1158; St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123. See also Roth v. Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; Northern Pac. R. Co. v. Curtz, 196 Fed. 367; Trivette v. Chesapeake &c. R. Co., 212 Fed. 641; Moody v. St. Louis &c. R. Co., 89 Ark. 103, 115 S. W. 400, 131 Am. St. 75; Florida R. Co. v. Sturkey, 56 Fla. 196, 48 So. 34; Frye v. St. Louis &c. R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069; Doyle v. Portland &c. Ry. Co., 71 Ore. 576, 143 Pac. 623; Jones v. Charleston &c. R. Co., 61 S. Car. 556, 39 S. E. 758; Lamb v. Southern R. Co., 86 S. Car. 106, 67 N. E. 958, 138 Am. St. 1030; Gilligan v. Denver &c. R. Co., 43 Utah 543, 136 Pac. 953, 5 L. R. A. (N. S.) 1191; Norfolk &c. R. Co. v. Overton, 111 Va. 716, 69 S. E.

when applied in favor of those who walk along a railroad track between crossings, notwithstanding much may be said in its favor, seems to us to be not only contrary to the weight of authority but also impracticable and in violation of the true principle that should govern such cases. If it be true, as generally conceded, that a licensee takes his license subject to the "concomitant risks and perils," he must surely take it subject to the use of the road in the manner in which it was used at the time the license was granted, that is, subject to the running of trains in the ordinary manner without any special reference to him, and he occupies, therefore, to this extent, substantially the position of a trespasser. In other words the company owes him no duty of active vigilance to specially look out for and protect him, for he must know that his license is subject to all risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted and that the company assumes no new obligation or duty. Indeed, it seems to us that he is bound to know that a railroad company has no power to license the use of its tracks in such a manner as to interfere with its duties to the public as a common carrier. If it owes a duty to every bare licensee to run its trains with reference to him, to look out for him, to signal, to slow up and, perhaps to stop wherever it has reason to expect him, it can do little else, its trains cannot be on time and the traveling public must suffer.[27] It certainly is not obliged to patrol its tracks from one end to the other to keep off trespassers and to prevent those who use it longitudinally from claiming a license on the ground of acquiescence. It seems to us, therefore, that the only duty which it owes to such persons, whether they are trespassers or bare licensees, is not to wilfully or wantonly injure them but to use reasonable care to avoid injury to them after their danger is discovered. It seems to us also that some of the courts beg the question when they say that the company must keep a lookout and use care to

1060; McConkey v. Oregon R. &c. Co., 35 Wash. 55, 76 Pac. 526. And see post, § 1795. See for Kentucky rule and review of Kentucky cases, Louisville &c. R. Co. v. Vaughans Adm'r, 183 Ky. 829, 210 S. W. 938.

[27] The text is cited and this reasoning is approved in Illinois Cent. R. Co. v. Eicher, 202 Ill. 556, 67 N. E. 376, 378.

discover and protect persons on the track where they may be expected, although not at a crossing or the like. Is the company bound to expect them at any such place, and to run its trains with reference to them? Is not the assumption that such a duty rests upon the company an undue assumption? The just and reasonable assumption would seem to be that they will not be on the track when trains are passing or, if they are, that, as they take their license subject to "concomitant perils," they will look out for their own safety without special warning or change by the company in the manner of using its road, and that it may act on this assumption until it discovers their danger.[28] Where there is an invitation by "inducement" or the like a different element enters into the case.

§ 1789 (1251). **Liability for injuries to licensees.**—We have endeavored to show in the preceding section that there is, ordinarily, no duty to a bare licensee without invitation or inducement except to refrain from wilful or wanton injury to him and to use reasonable care to prevent injury to him after discovering his danger.[29] If there is no duty to the plaintiff or no violation of such duty there is, of course, no liability.[30] If wilfulness is relied

[28]The text is quoted and the reasoning approved in Cannon v. Cleveland &c. R. Co., 157 Ind. 682, 688, 62 N. E. 8; also in Huff v. Chesapeake &c. R. Co., 48 W. Va. 45, 35 S. E. 866, 868. And see Garrett v. Illinois Cent. R. Co., 126 Fed. 406; Whitney v. New York &c. R. Co., 87 Conn. 623, 89 Atl. 269; Baltimore &c. R. Co. v. Welch, 114 Md. 536, 80 Atl. 170; O'Brien v. Union Freight Co., 209 Mass. 449, 95 N. E. 861; Wanderholin v. Chicago &c. R. Co., 96 Nebr. 764, 148 N. W. 935; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509, 64 N. E. 582; Midland Val. R. Co. v. Littlejohn, 44 Okla. 8, 143 Pac. 1.

[29]Hortenstine v. Virginia &c. R. Co., 102 Va. 914, 47 S. E. 996. See also Long v. Pacific R. Co., 74 Ore. 502, 144 Pac. 462, 145 Pac. 1068. This and the two preceding sections are cited in Thomas v. Chicago &c. R. Co., 103 Iowa 649, 72 N. W. 783, 786, 39 L. R. A. 399, as stating the general rule sustained by the weight of authority, but the court said that it was already committed to a different doctrine, at least under the circumstances. The text is also cited in Atchison &c. R. Co. v. Cogswell, 23 Okla. 181, 99 Pac. 923, 924, and quoted in Watson v. Manitou &c. R. Co., 41 Colo. 138, 92 Pac. 17, 17 L. R. A. (N. S.) 916, 924.

[30]Thiele v. McManus, 3 Ind. App 132, 28 N. E. 327; Morrow v. Sweeney, 10 Ind. App. 626, 38 N. E. 187;

upon, the complaint must, in most jurisdictions, proceed upon that theory and not upon the theory of mere negligence.[31] But, in such a case contributory negligence of the plaintiff is no defense.[32] If negligence is relied upon, negligence of the plaintiff which proximately contributes to his injury will constitute a good defense.[33] The theory of some of the decisions, however, is that,

Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; Gilson v. Delaware &c. R. Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. 802 and note 813; 1 Thomp. Neg. (2d ed.) § 227 et seq. See also Feeback v. Missouri Pacific R. Co., 167 Mo. 206, 66 S. W. 965, 967.

[31]Where the complaint is for wilfulness there can be no recovery for mere negligence, and vice versa. Highland Ave. &c. R. Co. v. Winn, 93 Ala. 306, 9 So. 509; Louisville &c. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130; Verner v. Alabama &c. R. Co., 103 Ala. 574, 15 So. 872; Levin v. Memphis &c. R. Co., 109 Ala. 332, 19 So. 395; Chicago &c. R. Co. v. Dickson, 88 Ill. 431; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301, 30 Am. Rep. 185 and note; Pennsylvania R. Co. v. Smith, 98 Ind. 42; Louisville &c. R. Co. v. Bryan, 107 Ind. 51, 7 N. E. 807; Belt R. &c. Co. v. Mann, 107 Ind. 89, 7 N. E. 893; Parker v. Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; Coleman v. Kentucky Cent. R. Co., 17 Ky. L. 1145, 33 S. W. 945. See also Tognazzini v. Freeman, 18 Cal. 468, 123 Pac. 540. As to the distinction between wilfulness and negligence, see 1 Thomp. Neg. (2d ed.) § 21. Bolin v. Chicago &c. R. Co., 108 Wis. 333, 84 N. W. 446. Many of the decisions, however, fail to make this distinction, and a recovery for what is called wilful or wanton negligence has frequently been allowed under a complaint for damages on account of alleged negligence.

[32]Central R. Co. v. Vaughan, 93 Ala. 209, 9 So. 468, 30 Am. St. 50 and note; Florida &c. R. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. 17 and note; Neice v. Chicago &c. R. Co., 254 Ill. 595, 98 N. E. 989; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301, 30 Am. Rep. 185; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286, 12 Am. & Eng. R. Cas. 77; Indianapolis &c. R. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551; Kansas Pacific R. Co. v. Whipple, 39 Kans. 531, 18 Pac. 730; Derby v. Kentucky Cent. R. Co., 9 Ky. L. 153, 4 S. W. 303; Carroll v. Minnesota &c. R. Co., 13 Minn. 30, 97 Am. Dec. 221; Kellny v. Missouri Pac. R. Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783 and note; International &c. R. Co. v. Tabor, 12 Tex. Civ. App. 283, 33 S. W. 894. See also Togazzini v. Freeman, 18 Cal. 468, 123 Pac. 540.

[33]Chicago &c. R. Co. v. Pettit, 209 Ill. 452, 70 N. E. 591; Christiansen v. Illinois Cent. R. Co., 140 Iowa 345, 118 N. W. 387; Burton v. Cincinnati &c. R. Co. (Ky.), 113 S. W. 442; Spavin v. Lake Shore &c. R. Co., 130 Mich. 579, 90 N. W. 325; Nichols v. Gulf &c. R. Co., 83 Miss. 126, 36 So. 192; Muse v. Seaboard Air Line R. Co., 149 N. Car. 443, 63 S. E. 102;

even where there is no wilfulness, the failure of the company to use ordinary care after the discovery of the plaintiff's danger, or even if it ought to have been discovered, when the exercise of such care would have prevented the injury, is the proximate cause rather than the original negligence of the plaintiff in going into a place of danger without exercising reasonable care.[34] This subject will be more fully discussed, however, when we come to consider the liability to trespassers and persons on railroad tracks.[35] One who is wrongfully ejected from a train has no right to travel on the railroad track if there is another safe and convenient route from the premises, and the company is not ordinarily liable for injury to him while so doing, in the absence

19 L. R. A. (N. S.) 453; Texas Midland R. Co. v. Byrd, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429; Gulf &c. Ry. Co. v Hall, 34 Tex. Civ. App. 535, 80 S. W. 133; Chicago &c. R. Co. v. Martin, 35 Tex. Civ. App. 186, 79 S. W. 1101; Chesapeake &c. R. Co. v. Farrow's Adm'x, 106 Va. 137, 55 S. E. 569. But see, under a Mississippi statute, Yazoo &c. R. Co. v. Metcalf, 64 Miss. 243, 36 So. 259.

[34]Smith v. Norfolk &c. R. Co., 114 N. Car. 728, 19 S. E. 923, 25 L. R. A. 287 and note; Farmer v. Wilmington &c. R. Co., 88 N. Car. 564, 30 Am. & Eng. R. Cas. 481; Keefe v. Chicago &c. R. Co., 92 Iowa 182, 60 N. W. 503. Many of such cases usually, however, fall within the rule against wilful or wanton injury, because the conduct of an engineer in recklessly running over a child or person whose danger he has discovered in time evinces a willingness to inflict the injury (see Sloniker v. Great Northern R. Co., 76 Minn. 306, 79 N. W. 168), although there is neither negligence nor wilfulness where the person on the track is apparently able to take care of himself and the circumstances are such that the engineer has a right to presume he will get off in time. There are also cases, however, in which it is held that even as to a trespasser the company is liable, not only if its employes actually saw him, but also if they could have seen him in time to have avoided injury by the exercise of ordinary care. Koegel v. Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905; St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123; Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88, 79 S. W. 505; Deans v. Wilmington &c. R. Co., 107 N. Car. 686, 12 S. E. 77, 22 Am. St. 902; Pickett v. Wilmington &c. R. Co., 117 N. Car. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. 611; post, § 1795. But in the first case cited notices were posted, and it did not appear that the trainmen had any reason to anticipate him, or that he appeared to be actually in peril, and it was also held that he was guilty of contributory negligence, so that a recovery was denied.

[35]See post, §§ 1791, 1792, 1795.

of wilfulness or failure to exercise ordinary care after discovering his danger.[36] But he does not become a trespasser and is not necessarily guilty of contributory negligence unless he fails to get off the track at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized.[37] One who attempts to cross a platform at a railroad station for his own convenience as a short-cut from one street to another is a mere licensee and cannot recover for an injury received by falling into a hole in such platform although the railroad company had passively permitted the plaintiff and the public generally to so use it.[38] So, an employe who goes upon the track or elsewhere upon the company's premises not in the line or discharge of his duty, and without any invitation, express or implied, is at most a mere licensee to whom the company owes no duty to keep such place safe.[39]

[36]Verner v. Alabama &c. R. Co., 103 Ala. 574, 15 So. 872. See also Bedell v. Berkey, 76 Mich. 435, 43 N. W. 308, 15 Am. St. 370 and note; Forsyth v. Boston &c. R. Co., 103 Mass. 510; Van Schaick v. Hudson River &c. R. Co., 43 N. Y. 527.

[37]Ham v. Delaware &c. Canal Co., 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682. So where it is dark and he is unfamiliar with the locality, or the like, he may not be a trespasser or guilty of contributory negligence as matter of law in walking on the track instead of seeking a highway. See Southern R. Co. v. Lynn, 128 Ala. 297, 29 So. 573 (wrongfully ejected). Indianapolis &c. R. Co. v. Barnes, 35 Ind. App. 485, 74 N. E. 583; New York &c. R. Co. v. Doane, 115 Ind. 435, 17 N. E. 913, 7 Am. St. 451, Filburg v. Northern Cent. R. Co., 217 Pa. St. 618, 66 Atl. 846. See Nichols v. Washington &c. R. Co., 83 Va. 99, 5. S. E. 171, 5 Am. St. 257.

[38]Redigan v. Boston &c. R. Co., 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. 520 and note. See also Illinois Cent. R. Co. v. Beard, 49 Ill. App. 232; Lingenfelter v. Baltimore &c. R. Co., 154 Ind. 49, 55 N. E. 1021; Cincinnati &c. R. Co. v. Aller, 64 Ohio St. 183, 60 N. E. 205. So held where part of the roof of a building blew off and injured the plaintiff, who was on the premises without business with the company. Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. St. 751; Lary v. Cleveland &c. R. Co., 78 Ind. 323, 41 Am. Rep. 572.

[39]Burling v. Illinois &c. R. Co., 85 Ill. 18; Baker v. Chicago &c. R. Co., 95 Iowa 163, 63 N. W. 667; Pittsburgh &c. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Cleveland &c. R. Co. v. Martin, 13 Ind. App. 485, 41 N. E. 1051 (where a section man, having only half an hour for dinner, on a cold day, went

§ 1790 (1252). **Who are trespassers.**—It may be stated, as a general rule, that any one who goes upon the track or premises of a railroad company, except at a public crossing or in a highway, without the invitation or license of the company, express or implied, is a trespasser.[40] An invitation to the public is implied, however, to come upon the premises of the company, at proper places to do business with it, and a license or even an invitation may be implied where the company constructs, maintains, and permits the use of a crossing not originally public under such circumstances that all persons who desire to use it may do so in the well-founded belief that it is a public crossing.[41] So,

into the company's pump house to dine); Gillshannon v. Stony Brook &c. R. Co., 10 Cush. (Mass.) 228; Mellor v. Merchants' &c. R. Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792 and note; Cowhill v. Roberts, 71 Hun 127, 24 N. Y. S. 533; Connell v. New York &c. R. Co., 213 N. Y. 352, 107 N. E. 568; Cleveland &c. Ry. Co. v. Workman, 66 Ohio St. 509, 64 N. E. 582, 587, 90 Am. St. 602 (citing text, and holding that an employe who used a "speeder" on the main track for his own business and convenience, and not in the performance of any duty, though without objection by the company, was at most a bare licensee, and that the company owed no special duty to look out for him); Mulherrin v. Delaware &c R. Co., 81 Pa. St. 366; Nashville &c. Ry. v. Lovejoy, 138 Tenn. 492, 198 S. W. 61; Texas &c. R. Co. v. Skinner, 4 Tex. Civ. App. 661, 23 S. W. 1001; Sullivan v. Waters, 14 Ir. C. L. R. 460. See also St. Louis &c. R. Co. v. Pyles, 114 Ark. 218, 169 S. W. 799; Louisville &c. R. Co. v. Jolly, 28 Ky. L. 989, 90 S. W. 977. But compare Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Ewald v. Chicago &c. R. Co., 70 Wis. 420, 36 N. W. 12; Cleveland &c. R. Co. v. Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142; Wabash R. Co. v. Erb, 36 Ind. App. 650, 73 N. E. 939; International &c. R. Co. v. Brooks, (Tex. Civ. App.), 54 S. W. 1056, 5 Am. St. 178.

[40] In Atchison &c. R. Co. v. Spaulding, 69 Kans. 431, 77 Pac. 106, 66 L. R. A. 587, and note; 105 Am. St. 175, an injunction was granted to enjoin one who made a practice of riding a bicycle along the plaintiff's track. See generally as to injunction against trespassers, note to Moore v. Halliday, 99 Am. St. 731-753.

[41] Ante, § 1786. See also Stewart v. Cincinnati &c. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539, 49 Am. & Eng. R. Cas. 456; Baltimore &c. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, and cases there cited in note; Murphy v. Boston &c. R. Co., 133 Mass. 121; Retan v. Lake Shore &c. R. Co., 94 Mich. 146, 53 N. W. 1094, 55 Am. & Eng. R. Cas. 97; Black v. Central R. Co., 85 N. J. 197, 89 Atl. 24, 51 L. R. A. (N. S.) 1215, and cases there cited in note; Spooner v. Dela-

according to many of the authorities, where the public have for a long time crossed the track of a railroad company at one particular place, with its acquiescence, a license may be implied and a duty may rest upon the company to exercise reasonable care in running its trains at such crossing, although not in a public highway.[42] But in most of the cases in which this broad statement is made, it will be found that there was something from which an invitation might be implied or a custom to give signals, or the like, which the traveler had a right to expect, and other well-considered decisions make this distinction.[43] As we have already shown, mere

ware &c. R. Co., 115 N. Y. 22, 21 N. E. 696; Nichols v. Washington &c. R. Co., 83 Va. 99, 5 S. E. 171, 32 Am. & Eng. R. Cas. 27.

[42]Owens v. Pennsylvania R. Co., 41 Fed. 187; Kelly v. Southern &c. R. Co., 28 Minn. 98, 9 N. W. 588, 6 Am. & Eng. R. Cas. 264; Barry v. New York &c. R. Co., 92 N. Y. 289; Byrne v. New York &c. R. Co., 104 N. Y. 362, 10 N. E. 539; Swift v. Staten Island &c. R. Co., 123 N. Y. 645, 25 N. E. 378; Harriman v. Pittsburg &c. R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507; Philadelphia &c. R. Co. v. Troutman, 11 W. N. C. (Pa.) 453, 6 Am. & Eng. R. Cas. 117; Taylor v. Delaware &c. R. Co., 113 Pa. St. 162, 8 Atl. 432, 28 Am. & Eng. R. Cas. 656, 57 Am. Rep. 446; Norfolk &c. R. Co. v. Carper, 88 Va. 556, 14 S. E. 328; Norfolk &c. R. Co. v. Wilson, 90 Va. 263, 18 S. E. 35; Delaney v. Milwaukee &c. R. Co., 33 Wis. 67. See also Murrell v. Missouri Pacific R. Co., 105 Mo. App. 88, 79 S. W. 505; Morgan v. Wabash &c. R. Co., 159 Mo. 262, 60 S. W. 195; Union Pac. Ry. Co. v. Connolly, 77 Nebr. 254, 109 N. W. 368; St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123. And the presence of "no trespass" signs has been held not to change this doctrine so as to make one a trespasser if they have been long and generally disregarded. Great Northern R. Co. v. Thompson, 199 Fed. 395, 47 L. R. A. (N. S.) 506; Sanders v. Southern R. Co., 90 S. Car. 331, 73 S. E. 356; International &c. R. Co. v. Brooks (Tex.), 54 S. W. 1056; Chicago &c. R. Co. v. Austin (Okla.), 163 Pac. 517, L. R. A. 1917D, 666. But see Ascher v. Harmon, 54 Ind. App. 310, 101 N. E. 515; Winnie v Lake Shore &c. R. Co., 160 Mich. 334, 125 N. W. 351; Frye v. St. Louis &c. R. Co., 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069 (a strong case); Lamb v. Southern R. Co., 86 S. Car. 106, 67 S. E. 958, 138 Am. St. 1030. License to use a path across a track is not a license to go under an empty coal car obstructing the path and the license to cross is suspended for such time as the company uses the path for standing cars. Papich v. Chicago &c. R. Co., 183 Iowa 601, 167 N. W. 686.

[43]Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112. See Atchison &c. R. Co. v. Parsons, 42 Ill. App. 93; Stewart v. Pennsyl-

sufferance or passive acquiescence in the occasional use of the track between crossings does not necessarily amount to a license and where nothing more is shown, one who so uses the track is usually a trespasser.[44] But, as will hereafter appear, some of the courts infer a license from frequent use and hold that, in any event the company should use reasonable care to discover and not to injure persons on the track at places where it may reasonably expect them to be. One court has even held that where persons have been accustomed for a long time to use a railroad track as a path, without objection from the company, they are not trespassers and the company is liable to them for injuries caused by its alleged negligence in the failure to exercise such care, notwithstanding a statute forbidding any person to use a railway track as a highway and expressly providing that it should be deemed to be a trespass in any action brought by him against the company.[45] As we have elsewhere shown, one may properly step upon a railroad track which is a part of a street without becoming a trespasser,[46] but it has been held that one who walks along be-

vania R. Co. (Ind.), 14 Am. & Eng. R. Cas. 679; Morrissey v. Eastern R. Co., 126 Mass. 377, 30 Am. Rep. 686 and note; Wright v. Boston &c. R. Co., 142 Mass. 296, 7 N. E. 866; Evans v. Atlantic &c. R. Co., 62 Mo. 49.

[44] Ante, § 1785. See also Pope v. Seaboard &c. Ry., 21 Ga. App. 251, 94 S. E. 311; Louisville &c. R. Co. v. Davis, 162 Ky. 572, 172 S. W. 966; Copp v. Maine Cent. R. Co., 100 Maine 568, 62 Atl. 735; Egan v. Montana Cent. R. Co., 24 Mont. 569, 63 Pac. 831. And the fact that the company does not own its right of way does not affect his status as a trespasser. Dorsey v. Louisville &c. R. Co., 26 Ky. L. 232, 80 S. W. 1131.

[45] Le May v. Missouri Pac. R. Co., 105 Mo. 361, 16 S. W. 1049. See also Davis v. Chicago &c. R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; Mason v. Chicago &c. R. Co., 89 Wis. 151, 61 N. W. 300; Great Northern R. Co. v. Thompson, 199 Fed. 395, 47 L. R. A. (N. S.) 506 and note. But see Missouri Pac. R. Co. v. Moseley, 57 Fed. 921, and Anderson v. Chicago &c. R. Co., 87 Wis. 195, 58 N. W. 79, 83, 23 L. R. A. 203.

[46] Ante, §§ 1443, 1444. See also as to liability for injuries to persons lawfully near tracks by objects thrown from cars. St. Louis &c. R. Co. v. Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; Jeffersonville &c. R. Co. v. Riley, 39 Ind. 568; Chicago &c. R. Co. v. O'Neil, 172 Ill. 527, 50 N. E. 216; Sullivan v. Vicksburg &c. R. Co., 39 La. Ann. 800, 4 Am. St. 239; Bradford v. Boston &c. R. Co., 160 Mass. 392, 35 N. E. 1131.

tween the rails of a track laid in an alley, but not so imbedded as to constitute part of the roadway is a trespasser.[47] Where, by mutual consent, two railway companies having adjacent and parallel tracks upon which cars are habitually left standing, permit the watchmen separately employed by each one to stand upon the tracks of each company irrespective of the one which employed him, for the purpose of examining and taking the numbers of the cars, a watchman while so engaged upon the track of the company which did not employ him is not a tresspasser thereon.[48] It has also been held that one who goes upon the track in an emergency, as to recover his hat which has been carried there by the wind,[49] who wanders upon it from a highway on a dark night,[50] is not strictly a trespasser. But in a recent case where a boy's hat blew off and he went under a car in the defendant's yard to get it, the court said that he was a trespasser or at least the defendant was not bound to keep a lookout for him.[51]

See generally Fletcher v. Baltimore & P. R. Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. ed. 411; Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. ed. 447; Louisville &c. R. Co. v. Downey, 18 Ind. App. 140, 47 N. E. 494; Goodrich v. Burlington &c. R. Co., 103 Iowa 412, 72 N. W. 653; St. Louis &c. R. Co. v. Underwood, 74 Ark. 610, 86 S. W. 804.

[47] Montgomery v. Alabama &c. R. Co., 97 Ala. 305, 12 So. 170. But compare Booth v. Union Term. R. Co., 126 Iowa 8, 101 N. W. 147; Illinois &c. R. Co. v. Mitchell, 214 Ill. 151, 73 N. E. 449. A railroad trestle is not made a highway so as to give persons a right to walk on it by reason of the fact that it crosses a navigable stream. Swanson v. Moline &c. Trac. Co., 204 Ill. App. 144.

[48] Watts v. Richmond &c. R. Co., 89 Ga. 277, 15 S. E. 365; McMarshall v. Chicago &c. R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. 445 and note. See also Louisville &c. R. Co. v. Burke (Ala.), 66 So. 885; Erie R. Co. v. Burke, 214 Fed. 247.

[49] Bernhard v. Rensselaer &c. R. Co., 1 Abb. Ct. App. 131.

[50] Baltimore &c. R. Co. v. Boteler, 38 Md. 568. For other cases where persons were held not to be trespassers see: Louisville &c. R. Co. v. Goulding, 52 Fla. 327, 42 So. 854 (quarantine guard); Croft v. Chicago &c. R. Co., 132 Iowa 687, 108 N. W. 1053, 134 Iowa 411, 109 N. W. 723 (family of railroad employe housed on right of way); Thompson v. Seaboard &c. R. Co., 81 S. Car. 333, 62 S. E. 396, 20 L. R. A. (N. S.) 426 (person on track to flag a train to prevent collision); Houston &c. R. Co. v. O'Donnell, 99 La. 636, 92 S. W. 409 (landowner repairing fence along right of way).

[51] Wagner v. Chicago &c. R. Co.,

§ 1791 (1253). **Duty to trespassers.**—The general rule is that the owner or occupier of premises owes no duty to a trespasser thereon except to do him no wilful or wanton injury.[52] A trespasser is a wrong-doer, and it is a general principle of jurisprudence that the courts will not aid a wrong-doer.[53] The fact that

124 Iowa 462, 100 N. W. 332. For other cases in which persons were held to be trespassers, see: Birmingham R. &c. Co. v. Jones, 153 Ala. 157, 45 So. 177, (walking along the track after crossing highway); St. Louis &c. R. Co. v. Lavendusky, 87 Ark. 540, 113 S. W. 204 (in railroad yard); Rutherford v. Iowa Cent. R. Co., 142 Iowa 744, 121 N. W. 703 (owner of stock driving them off); Brown v. Boston &c. R. Co., 73 N. H. 568, 64 Atl. 194 (on or near track where prohibitory notice posted).

[52] Cleveland &c. R. Co. v. Tartt, 64 Fed. 823; Kirtley v. Chicago &c. R. Co., 65 Fed. 386, 392; Pennsylvania R. Co. v. Rogers, 244 Fed. 76; Augusta R. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203; Lary v. Cleveland &c. R. Co., 78 Ind. 323, 41 Am. Rep. 572; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719; Brown v. European &c. R. Co., 58 Maine 384; Maynard v. Boston &c. R. Co., 115 Mass. 458, 15 Am. Rep. 119; Wright v. Boston &c. R. Co., 129 Mass. 440; Bresnahan v. Michigan Cent. R. Co., 49 Mich. 410; Frost v. Eastern R. Co., 64 N. H. 220, 10 Am. St. 396; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Duff v. Allegheny &c. R. Co., 91 Pa. St. 458, 36 Am. Rep. 675. See also Rosenthal v. New York &c. R. Co., 112 App. Div. 438, 98 N. Y. S. 476; Southern Ry. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283 (stating this as the general rule, but making an exception); Rossiter v. Lake Shore &c. R. Co., 52 Ind. App. 88, 96 N. E. 956; New York &c. R. Co. v. Ault, 56 Ind. App. 293, 102 N. E. 988; Dillon v. Connecticut River R. Co., 154 Mass. 478, 28 N. E. 899; Lando v. Chicago &c. R. Co., 81 Minn. 279, 83 N. W. 1089, 1090; Ward v. Southern Pac. R. Co., 25 Ore. 433, 36 Pac. 166, 23 L. R. A. 715. In the note to Union Pac. R. Co. v. Cappier, (66 Kans. 649, 12 Pac. 281), 69 L. R. A. 513, 544, where many authorities are reviewed it is said that "the rule approved by the preponderance of authority is that the duty of exercising ordinary care to avoid injury to another is due to trespassers as well as to other persons but that such duty does not arise as to trespassers until their presence or disability is discovered, and hence no duty exists to discover their presence." In White's Supp. to Thomp. Neg., § 1713, it is stated that the doctrine generally accepted in most jurisdictions is that the company is liable to a trespasser on its property under its exclusive control only for wilful or wanton injury, citing many recent cases.

[53] Kirtley v. Chicago &c. R. Co., 65 Fed. R. 386, 392.

the trespasser is a wrong-doer does not, however, justify malicious, wanton or wilful maltreatment of him, and the failure to use reasonable care to avoid injury to him after the discovery of his danger may sometimes be sufficient evidence of wilfulness or wantonness.[54] But neither negligence nor wilfulness can ordinarily be shown in this way where an adult or person apparently able to take care of himself is upon a railroad track, because the railroad employes have a right to assume, in the absence of anything to the contrary, that he will get off the track or take such other precautions as may be available to avoid injury to himself.[55] In some jurisdictions, however, it is held that these rules do not apply so strictly against children; that the owner of premises may be liable for injuries to children where he has left something naturally calculated to attract them to the place where they were injured; and that it is the duty of the engineer or other employes of a railroad company in charge of its train to keep a lookout even for trespassers upon the track. It is doubtless true that the company may owe such a duty to the passengers, but we be-

[54] Or, it may, perhaps, constitute the proximate cause of the injury and entitle the trespasser, in many jurisdictions to recover as for negligence. See, generally, Planz v. Boston &c. R. Co., 157 Mass. 377, 32 N. E. 356; Denver &c. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 107, 13 Sup. Ct. 261, 37 L. ed. 97; Haley v. Kansas City &c. R. Co., 113 Ala. 640, 21 So. 357; Isbell v. New York &c. R. Co., 27 Conn. 393, 71 Am. Dec. 78; Haden v. Sioux City &c. R. Co., 92 Iowa 226, 60 N. W. 537; Scheffler v. Minneapolis &c. R. Co., 32 Minn. 518, 21 N. W. 711; Isabel v. Hannibal &c. R. Co., 60 Mo. 475; Cowan v. Minneapolis &c. St. R. Co. (N. Dak.), 172 N. W. 322; Dubs v. Northern Pac. R. Co. (N. Dak.), 171 N. W. 888; O'Leary v. Brooks El. Co., 7 N. Dak. 554, 75 N. W. 919, 921 (citing text); Wallace v. City &c. R. Co., 26 Ore. 174, 37 Pac. 477, 25 L. R. A. 663 and note; Texas &c. R. Co. v. O'Donnell, 58 Tex. 27; Seaboard &c. R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773; Davies v. Mann, 10 Mees. & W. 546; 2 Thomp. Neg. (2nd ed.) § 1710.

[55] Smalley v. Southern R. Co., 57 S. Car. 243, 35 S. E. 489, 492, 493 (quoting text). See also Southern R. Co. v. Gullatt, 150 Ala. 318, 43 So. 577; Grayson v. St. Louis &c. R. Co., 93 Ark. 579, 125 S. W. 1013; Levy v. Houghton &c. Ry. Co., 164 Mich. 572, 129 N. W. 683; Wright v. Atlantic &c. R. Co., 110 Va. 670, 66 S. E. 848, 25 L. R. A. (N. S.) 972.

lieve the better rule to be that trespassers cannot, ordinarily at least, complain of the failure to perform it. The entire subject, however, will be more fully and specifically treated in subsequent sections.

§ 1792 (1254). **Liability for injuries to trespassers.**—There is, as we have seen, some conflict among the authorities as to the duty due a trespasser and this makes it difficult to determine the liability of the company in such cases. But when the question of the duty of the company to a trespasser is settled the question as to its liability to him is comparatively free from difficulty. If the company wilfully injures him it will be liable even though he may have been guilty of contributory negligence.[56] So, in some jurisdictions, the term "gross negligence" is still used and it is held that the company is liable where the conduct of its servants, resulting in injury to the trespasser is grossly negligent or so reckless as to evince an entire disregard of consequences or a willingness to inflict the injury, and that it is liable if they fail to use reasonable care to avoid injury to him after discovering his danger and apparent inability to take care of himself, if such care would have prevented the injury. Several of the courts even go so far as to hold the company liable in such a case where it fails to use reasonable care to discover the trespasser in time; but this we regard, in ordinary cases at least, as contrary to principle.[57]

[56] Johnson v. Chicago &c. R. Co., 116 Iowa 639, 88 N. W. 811, 812 (citing text). This is well settled as shown in subsequent sections.

[57] At least at places not frequented by the public and where there is no good reason to expect them. Louisville &c. R. Co. v. Vittitoe, 19 Ky. L. 612, 41 S. W. 269 and cases cited; Louisville &c. R. Co. v. Davis, 162 Ky. 572, 172 S. W. 966; Louisville &c. R. Co. v. Hathaway, 28 Ky. L. 628, 89 S. W. 724, 2 L. R. A. (N. S.) 498 and note, and this rule is held to apply as to children. Louisville &c. R. Co. v. Logsdin, 118 Ky. 600, 81 S. W. 657. But in Louisville &c. R. Co. v. Daniel, 82 Ky. L. 1146, 91 S. W. 691, it is said that where trespassers habitually use a railroad track with the knowledge and acquiescence of the company, their presence must be provided for by the company as a fact within its knowledge. See also Springer v. St. Louis &c. R. Co., 161 Fed. 801; Southern R. Co. v. Sanders, 145 Ky. 679, 141 S. W. 77; Palmer v. Oregon &c. R. Co., 34 Utah 466, 98 Pac. 689; Murphy v.

On the other hand it has been held in many cases that one who trespasses upon a railroad track or other dangerous place upon the company's premises is guilty of contributory negligence, and this is certainly true unless he uses care proportioned to the danger, or in other words, such reasonable care as the circumstances demand. If he does not do so, the company is not liable unless it wilfully or wantonly injures him, or at least fails to use due care after discovering his danger and inability to escape. These rules, and the modifications or exceptions sometimes made in the case of children or persons obviously unable to take care of themselves, will be fully considered and illustrated in subsequent sections.

§ 1793 (1255). Trespassers on cars.—A railroad company owes trespassers no contract duty. Indeed, as already stated, the general rule is that it owes them no duty except not to wilfully injure them, and this rule applies to those who are attempting to steal a ride or otherwise trespass upon the company's cars.[58]

Wabash Ry. Co., 228 Mo. 56, 128 S. W. 481; Holland v. Missouri Pac. Ry. Co., 210 Mo. 338, 109 S. W. 19; Epperson v. International &c. R. Co., 59 Tex. Civ. App. 66, 125 S. W. 117. See ante, § 1787, and post, § 1795 for further consideration of this question. See also St. Louis &c. R. Co. v. McLaughlin, 129 Ark. 377, 196 S. W. 460.

[58] Waterbury v. New York &c. R. Co., 17 Fed. 671; Southwestern R. Co. v. Singleton, 66 Ga. 252; Toledo &c. R. Co. v. Brooks, 81 Ill. 245, 292; Hoar v. Main Cent. R. Co., 70 Maine 65, 35 Am. Rep. 299; Planz v. Boston &c. R. Co., 157 Mass. 377, 32 N. E. 356; Brevig v. Chicago &c. R. Co., 64 Minn. 168, 66 N. W. 401; Chicago &c. R. Co. v. Smith, 46 Mich. 504, 9 N. W. 830, 41 Am. Rep. 17, 4 Am. & Eng. R. Cas. 535; Richmond &c. R. Co. v. Burnsed, 70 Miss. 437, 12 So. 958, 35 Am. St. 656; Brown v. Missouri &c. R. Co., 64 Mo. 536; Eaton v. Delaware &c. R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Duff v. Allegheny &c. R. Co., 91 Pa. St. 458, 36 Am. Rep. 675; Pennsylvania R. Co. v. Price, 96 Pa. St. 256; Morgan v. Oregon Short Line R. Co., 27 Utah 92, 74 Pac. 523. See also McNamara v. Great Northern R. Co., 61 Minn. 296, 63 N. W. 726; Bollinger v. Texas &c. R. Co., 47 La. Ann. 721, 17 So. 253, 49 Am. St. 379; Illinois Cent. R. Co. v. Meacham, 91 Tenn. 428, 19 S. W. 232; Jordan v. Grand Rapids &c. R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. 217; Pittsburgh &c. R. Co. v. Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767. See also St. Louis &c. R. Co.

They are not in a position to invoke the doctrine of apparent authority and can only hold the company liable for acts of its employes done within the scope of their actual authority, express or implied.[59] Indeed, we think the better rule is that a trespasser who is ejected from a train by a brakeman or other subordinate employe not in charge of the train must show, in order to recover from the company for injuries so inflicted that such employe possessed authority to do the act which caused the injury.[60] There are, however, authorities which hold that the ejection of trespassers is within the scope of the implied authority of a brakeman,[61] and where an employe is placed in charge of the

v. Reed, 76 Ark. 106, 88 S. W. 836; Purple v. Union Pac. R. Co. 114 Fed. 123, 57 L. R .A. 700; Arkansas &c. R. Co. v. Sain, 90 Ark. 278, 119 S. W. 659, 22 L. R. A. (N. S.) 910; Wabash R. Co. v. Kingsley, 177 Ill. 558, 52 N. E. 931, 932 (citing text). Udell v. Citizens St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. 336; Chicago &c. R. Co. v. Lacy, 78 Kans. 622, 97 Pac. 1025; Bjornquist v. Boston &c. R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. 332; Yancey v. Boston El. R. Co., 205 Mass. 162, 91 N. E. 202, 26 L. R. A. (N. S.) 1217, 137 Am. St. 431; Grimshaw v. Lake Shore &c. R. Co., 205 N. Y. 371, 98 N. E. 762. But compare Louisville &c. R. Co. v. Popp, 96 Ky. 99, 27 S. W. 992.

[59] Brevig v. Chicago &c. R. Co., 64 Minn. 168, 66 N. W. 401, 404. See also Whistler v. Cowan, 26 Ohio Cir. Ct. R. 511, affirmed in 70 Ohio St. 514, 72 N. E. 1167; Rathbone v. Oregon R. Co., 40 Ore. 225, 66 Pac. 909; Morris v. Brown, 111 N. Y. 318, 18 N. E. 722, 7 Am. St. 751.

[60] Corcoran v. Concord &c. R. Co., 56 Fed. 1014; Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480; Marion v. Chicago &c. R. Co., 59 Iowa 428, 13 N. W. 415, 44 Am. Rep. 687, 8 Am. & Eng. R. Cas. 177; Harrington v. Boston &c. R. Co., 213 Mass. 338, 100 N. E. 606, Ann. Cas. 1914A, 597, 598 (citing text); Farber v. Missouri Pac. R. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350; Pennsylvania Co. v. Toomey, 91 Pa. St. 256; Cauley v. Pittsburgh &c. R. Co., 98 Pa. St. 498; International &c. R. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. 902; Texas &c. R. Co. v. Moody (Tex. Civ. App.), 23 S. W. 41; Bess v. Chesapeake &c. R. Co., 35 W. Va. 492, 14 S. E. 234, 29 Am. St. 820. See also Illinois Cent. R. Co. v. King, 179 Ill. 91, 53 N. E. 552, 554, 70 Am. St. 93; Galaviz v. International &c. R. Co., 15 Tex. Civ. App. 61, 38 S. W. 234; Illinois Cent. R. Co. v. Latham, 72 Miss. 32, 16 So. 757.

[61] Georgia So. &c. R. Co. v. Thomas, 18 Ga. App. 511, 90 S. E. 80; Kansas City &c. R. Co. v. Kelly, 36 Kans. 655, 14 Pac. 172, 59 Am. Rep. 596 and note; O'Banion v.

train such authority may be implied.[62] In one case a boy who was trespassing upon a freight train was struck by a piece of coal thrown at him by a brakeman, and was injured in trying to get off but it was held that he could not recover from the company because the brakeman had no implied authority to eject trespassers.[63] In another case it was held that a boy who was injured in jumping from an engine upon which he was a trespasser could not recover although he was frightened off by the fireman.[64]

Missouri Pac. R. Co., 65 Kans. 352, 69 Pac. 353; Brevig v. Chicago &c. R. Co., 64 Minn. 168, 66 N. W. 401; Golden v. Northern Pac. Ry. Co., 39 Mont. 435, 104 Pac. 549, 34 L. R. A. (N. S.) 1154; Hoffman v. New York &c. R. Co., 87 N. Y. 25, 41 Am. Rep. 337 and note; Dixon v. Northern Pac. R. Co., 37 Wash. 310, 79 Pac. 943, 107 Am. St. 712. See also Smith v. Louisville &c. R. Co., 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72; Cincinnati &c. R. Co. v. Rue, 142 Ky. 694, 134 S. W. 1144, 34 L. R. A. (N. S.) 200; McKeon v. New York &c. R. Co., 183 Mass. 271, 67 N. E. 329, 97 Am. St. 437; Verlinde v. Michigan Cent. R. Co., 165 Mich. 371, 130 N. W. 317.

[62] Carter v. Railway Co., 98 Ind. 552, 49 Am. Rep. 780. Thus in Folley v. Chicago &c. R. Co., 16 Okla. 32, 84 Pac. 1090, it is held that a conductor has such implied authority and that while a 15 year old country boy, who is ignorant of the means and manner of operating and managing railroad trains, goes upon a freight train at the direction of a brakeman and without right, such person is a trespasser, and the conductor may lawfully expel such boy from the train; yet if such conductor, in the exercise of such authority, while the train is moving at a rate of speed rendering it dangerous to get off, by threats of violence and show of force causes such boy to alight from the moving train, and injury results, such acts of the conductor under such circumstances constitute gross negligence, or wanton and wilful carelessness, and the railway company will be liable for the resulting injuries. Citing Holmes v. Wakefield, et al., 12 Allen (Mass.) 580, 90 Am. Dec. 171; Ramsden v. Boston &c. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Rounds v. Delaware &c. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Hoffman v. New York &c. R. Co., 87 N. Y. 25, 41 Am. Rep. 337; Townley v. Chicago &c. R. Co., 53 Wis. 626, 11 N. W. 55; Pierce v. North Carolina R. Co., 124 N. Car. 83, 32 S. E. 399. See also Alabama &c. R. Co. v. Livingston, 84 Miss. 1, 36 So. 256; Hayes v. Southern R. Co., 141 N. Car. 195, 53 S. E. 847.

[63] Towanda Coal Co. v. Heeman, 86 Pa. St. 418. But compare Polatty v. Charleston &c. R., 67 S. Car. 391, 45 S. E. 932.

[64] Chicago &c. R. Co. v. Smith, 46 Mich. 504, 9 N. W. 830, 41 Am. Rep. 177. See also Bjornquist v.

And in still another case it was held that a boy who was playing upon a flat car, and who was injured in jumping off in obedience to an employe's order, could not recover from the company because it owed him no duty, and that his father could not recover because of his contributory negligence in permitting the boy to trespass upon the car.[65] So, one of the courts which considers that a brakeman has implied authority to eject trespassers, has recently held that where a person bribed the brakeman to let him ride in a freight car, they thereby became joint trespassers and the former could not recover from the company for an assault by the brakeman in afterwards ejecting him in an improper manner.[66] The company may be held liable, however, although the injured person be a trespasser, if its employes, while acting within the scope of their actual authority, wilfully injure him or eject him with unnecessary force and violence.[67] The fact that an em-

Boston &c. R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. 332; Albert v. Boston El. R. Co., 185 Mass. 210, 70 N. E. 52. But compare Georgia So. &c. R. Co. v. Thomas, 18 Ga. App. 511, 90 S. E. 80; Pollack v. Pennsylvania R. Co., 210 Pa. St. 631, 60 Atl. 311, 105 Am. St. 843; Gulf &c. R. Co. v. Gibson, 42 Tex. Civ. App. 306, 93 S. W. 469.

[65] Cauley v. Pittsburgh &c. R. Co., 95 Pa. St. 398. See also St. Louis &c. R. Co. v. Cochran, 77 Ark. 393, 91 S. W. 747, 40 Am. Rep. 664 and note.

[66] Brevig v. Chicago &c. R. Co., 64 Minn. 168, 66 N. W. 401.

[67] St. Louis &c. R. Co. v. Reagan, 52 Ill. App. 488; Louisville &c. R. Co. v. Dunkin, 92 Ind. 601, 15 Am. & Eng. R. Cas. 422; Carter v. Louisville &c. R. Co., 98 Ind. 552, 49 Am. Rep. 780; Benton v. Chicago &c. R. Co., 55 Iowa 496; Schultz v. Third Ave. R. Co., 89 N. Y. 242, 9 Am. & Eng. R. Cas. 412; Southern Pac. R. Co. v. Kennedy, 9 Tex. Civ. App. 232, 29 S. W. 394. See also Thompson v. Yazoo &c. R. Co., 72 Miss. 715, 17 So. 229; Chicago &c. R. Co. v. Doherty, 53 Ill. App. 282; Brill v. Eddy, 115 Mo. 596, 22 S. W. 488 (receiver held liable for act of watchman in removing boy from car); Alabama &c. R. Co. v. Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. 28 and note; Smith v. Louisville &c. R. Co., 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387. See also Houston &c. R. Co. v. Bowen, 36 Tex. Civ. App. 165, 81 S. W. 80; Folley v. Chicago &c. R. Co., 16 Okla. 32, 84 Pac. 1090; Hayes v. Southern Ry. Co., 141 N. Car. 195, 53 S. E. 847; Pollack v. Penna. R. Co., 210 Pa. St. 631, 60 Atl. 311, 105 Am. St. 843; Parulo v. Philadelphia &c. R. Co., 145 Fed. 664. But a conductor has been held not guilty of wilful or reckless conduct in ordering a boy off of a

ployé who is not in charge of the train, and has no authority in the premises, invites or permits a person to ride on the train without paying fare does not make the latter a passenger or impose upon the company any greater duty to him than it owes to an ordinary trespasser.[68] Although the youth, inexperience, or ignorance, of the person injured may sometimes be important in determining the question of contributory negligence, it cannot be considered as enlarging or extending the implied authority of the company's employés. It "cannot operate to enlarge the boundaries of the agent's authority"[69] nor "confer an authority on one who has none."[70]

moving street car. Lebov v. Consol. R. Co., 203 Mass. 380, 89 N. E. 546, 26 L. R. A. (N. S.) 265. Compare, however, Southern Pac. R. Co. v. Svendsen, 13 Ariz. 111, 108 Pac. 262; Doggett v. Chicago &c. R. Co., 134 Iowa 690, 112 N. W. 171, 13 L. R. A. (N. S.) 364; Jones v. Mobile &c. R. Co. (Ky.), 127 S. W. 144; Williams v. Louisiana R. &c. Co., 121 La. Ann. 438, 46 So. 528.

[68] Chicago &c. R. Co. v. Casey, 9 Bradw. (Ill.) 632 (invitation by engineer); Chicago &c. R. Co. v. Michie, 83 Ill. 427; Sherman v. Hannibal &c. R. Co., 72 Mo. 62, 37 Am. Rep. 423; Snyder v. Hannibal &c. R. Co., 60 Mo. 413; Flower v. Pennsylvania &c. R. Co., 69 Pa. St. 210, 8 Am. Rep. 251. See also Hall v. Missouri Pac. R. Co., 219 Mo. 553, 118 S. W. 56; Kansas City &c. R. Co. v. Williford, 115 Tenn. 108, 88 S. W. 178. This doctrine has even been extended to a case in which the conductor permitted a boy to ride upon the train, without paying fare, in violation of the rules of the company. Duff v. Allegheny &c. R. Co., 91 Pa. St 458, 36 Am. Rep. 675, 2 Am. & Eng. R. Cas. 1. See also Hot Springs &c. R. Co. v. Dial, 58 Ark. 318, 24 S. W. 500; Keating v. Michigan Cent. &c. R. Co., 97 Mich. 154, 37 Am. St. 328. But compare Waterbury v. New York &c. R. Co., 17 Fed. 671 and note; Harris v. Southern Ry. Co., 25 Ky. L. 559, 76 S. W. 151.

[69] Chicago &c. R. Co. v. Casey, 9 Bradw. (Ill.) 632, 643.

[70] Flower v. Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251; Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Snyder v. Hannibal &c. R. Co., 60 Mo. 413. See also Barney v. Hannibal &c. R. Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; Keating v. Michigan Cent. R. Co., 97 Mich. 154, 56 N. W. 346, 37 Am. St. 328. But it may be of importance upon the question of the negligence or conduct of an employé in authority in evicting him from the train at a dangerous place or the like. Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387; Louisville &c. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Kline v. Central Pac. R. Co., 37

§ 1794 (1256). **Strangers at stations.**—We shall elsewhere consider the liability of railroad companies to passengers, and those intending to become passengers for injuries received at stations. But there are others to whom a railroad company may owe a duty at its stations, although they are neither passengers nor employes. It undoubtedly owes a duty to exercise reasonable care to all who come to its stations upon its own invitation, express or implied. Thus, a railroad company is liable to one who comes to the station to meet a friend who is on the company's train, or, to use a familiar quotation, "to welcome the coming or speed the parting guest," for injuries caused him by the failure of the company to exercise reasonable care to keep the station platform in a safe condition and properly lighted.[71] So, a traveler

Cal. 400, 99 Am. Dec. 282; Lovett v. Salem &c. R. Co., 9 Allen (Mass.) 557; Drogmund v. Metropolitan St. R. Co., 122 Mo. App. 154, 98 S. W. 1091. See also Charleston &c. R. Co. v. Johnson, 1 Ga. App. 441, 57 S. E. 1064; Pollack v. Penna. R. Co., 210 Pa. St. 631, 60 Atl. 311, 105 Am. St. 843; Enright v. Pittsburgh &c. R. Co., 198 Pa. St. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. St. 795; Peterson v. South &c. R., 143 N. Car. 260, 55 S. E. 618; Texas &c. R. Co. v. Buch, 59 Tex. Civ. App. 304, 125 S. W. 316.

[71] New York &c. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954; Cherokee Packet Co. v. Hilson, 95 Tenn. 1, 31 S. W. 737; Hamilton v. Texas &c. R. Co., 64 Tex. 251, 53 Am. Rep. 756, 21 Am. & Eng. R. Cas. 336; Louisville &c. R. Co. v. Berry, 88 Ky. 222, 10 S. W. 472, 21 Am. St. 329; McKone v. Michigan &c. R. Co., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596. See also Tobin v. Portland &c. R. Co., 59 Maine 183, 8 Am. Rep. 415; Doss v. Missouri &c. R. Co., 59 Mo. 27, 21 Am. Rep. 371; Atchison &c. R. Co. v. Cogswell, 23 Okla. 181, 99 Pac. 923, 925, 20 L. R. A. (N. S.) 837, (citing text and so holding where the plaintiff had an engagement to meet the passenger for a business consultation). And to the same effect as this Oklahoma case is Klugherz v. Chicago &c. R. Co., 90 Minn. 17, 95 N. W. 586, 101 Am. St. 384. As to duty to one permitted to enter car on his own business and not as passenger see note to Peterson v. South &c. R. Co., 143 N. Car. 260, 55 S. E. 618 in 8 L. R. A. (N. S.) 1240; Montgomery &c R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72; Denver &c. R. Co. v. Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; Sullivan v. Vicksburg &c. R. Co., 39 La. Ann. 800, 2 So. 586, 4 Am. St. 239, 30 Am. & Eng. R. Cas. 168; Baltimore &c. R. Co. v. Rose, 65 Md. 485, 4 Atl. 899; Ingalls v. Adams Express Co., 44 Minn. 128, 46 N. W. 325 (police officer); Langan v. St. Louis &c. R. Co., 72

who goes to the depot for a time-table, to see when his train leaves, or whether there is any change in the schedule, is not a trespasser upon the company's walk leading to the depot and may recover for an injury received, without fault on his part, by the negligence of the company in throwing off mail bags upon such walk, where he has no knowledge of any such custom.[72] Indeed, railroad companies have been held liable in many cases for injuries to persons rightfully upon the station platform by mail bags negligently thrown from passing trains by postal clerks with the knowledge and consent of the companies.[73] But where

Mo. 392, 3 Am. & Eng. R. Cas. 355 (passenger's servant); Gulf &c. R. Co. v. Williams, 21 Tex. Civ. App. 469, 51 S. W. 653; Galveston &c. R. Co. v. Matzdorf (Tex. Civ. App.), 107 S. W. 882; Watkins v. Great Western R. Co., 46 L. J. C. P. 817. But compare Galveston &c. R. Co. v. Matzdorff, 102 Tex. 42, 112 S. W. 1036, 20 L. R. A. (N. S.) 833. Nor is such a person necessarily a trespasser because he fails to leave the platform at once and take the nearest route home. New York &c. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954; Keefe v. Boston &c. R. Co., 142 Mass. 251, 7 N. E. 874. But he may become a trespasser or bare licensee by unreasonable delay. Heinlein v. Boston &c. R. Co., 147 Mass. 136, 16 N. E. 698, 9 Am. St. 676. See also Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337.

[72] Bradford v. Boston &c. R. Co., 160 Mass. 392, 35 N. E. 1131. See also St. Louis &c. R. Co. v. Fairbairn, 48 Ark. 491, 4 S. W. 50; Hale v. Grand Trunk R. Co., 60 Vt. 605, 15 Atl. 300, 1 L. R. A. 187. So as to injuries caused in handling baggage and the like, Atchison &c. R. Co. v. Johns, 36 Kans. 769, 14 Pac. 237, 59 Am. Rep. 609; Keefe v. Boston &c. R. Co., 142 Mass. 251, 7 N. E. 874; Louisville &c. R. Co. v. Shanks, 94 Ind. 598; Tebbutt v. Bristol &c. R. Co., L. R. 6 Q. B. 75. But see where a prospective passenger was held a mere licensee in using a path to a station and the company liable only for positive negligence in operation of trains and not in placing a derail at the place. Bales v. Louisville &c. R. Co., 179 Ky. 207, 200 S. W. 471.

[73] Galloway v. Chicago &c. R. Co., 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. 468; Snow v. Fitchburg R. Co., 136 Mass. 552, 49 Am. Rep. 40 and note, 18 Am. & Eng. R. Cas. 161; Carpenter v. Boston &c. R. Co., 97 N. Y. 494, 49 Am. Rep. 540, 21 Am. & Eng. R. Cas. 331. See also Williams v. Louisville &c. R. Co., 98 Ky. 247, 32 S. W. 934, 41 S. W. 1100; Sargent v. St. Louis &c. R. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460; Pittsburgh &c. R. Co. v. Warrum, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; Carver v. Minneapolis &c. R. Co., 120 Iowa 346, 94 N. W. 862. So, where the servants of the

there is no custom to throw out mail bags at the particular platform and the company has no reason to apprehend that they will be so thrown out, it is not, it seems, liable for the act of a postal clerk in so doing,[74] and it owes no duty to a trespasser to exercise care in this regard or to keep the crane used to catch the mail pouch in safe condition.[75] The company is, of course, liable to one, who, in response to its notification to call and get goods that have been shipped to him and received at its freight depot, comes to such depot, and, while walking along a proper passage way in the exercise of due care, is injured by freight falling upon him which had been carelessly piled up by the company's servants.[76] So, where plaintiff went to the defendant's depot with a baggage check to get his daughter's trunk and was injured while there the company was held liable and the court stated that "it is the duty of a railroad company to keep the approach to its depot and platform reasonably convenient, accessible and safe for ingress and egress of passengers, and for the public rightfully and properly doing business with it."[77] It has also been held that where a lunch stand is kept at a railroad station by authority of the company, which can only be reached by going over the company's platform, the company is responsible for the condition of the platform to persons who pass over it to get lunch.[78] But the com-

company are negligent in handling baggage. Tebbutt v. Bristol &c. R. Co., L. R. 6 Q. B. 73.

[74] Muster v. Chicago &c. R. Co., 61 Wis. 325, 18 Am. & Eng. R. Cas. 113, 50 Am. Rep. 141; Walton v. New York &c. R. Co., 139 Mass. 556, 2 N. E. 101. See also Walker v. Hannibal &c. R. Co., 121 Mo. 575, 26 S. W. 360, 24 L. R. A. 363, 42 Am. St. 547, 59 Am. & Eng. R. Cas. 607; Cunningham v. Grand Trunk R. Co., 31 U. C. Q. B. 350.

[75] Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782. But see Illinois Cent. R. Co. v. Wall, 53 Ill. App. 588.

[76] Danville &c. R. Co. v. Brown, 90 Va. 340, 18 S. E. 278. See also Toledo &c. R. Co. v. Grush, 67 Ill. 262, 16 Am. Rep. 618; Pittsburgh &c. R. Co. v. Ives, 12 Ind. App. 602, 40 N. E. 923; Williams v. Louisville &c. R. Co., 98 Ky. 247, 32 S. W. 934, 41 S. W. 1100; Ward v. Maine Cent. R. Co., 96 Maine 136, 51 Atl. 947; Foss v. Chicago &c. R. Co., 33 Minn. 392, 23 N. W. 553; Moore v. Wabash R. Co., 84 Mo. 481; International &c. R. Co. v. Neira (Tex. Civ. App.), 28 S. W. 95.

[77] Christie v. Chicago &c. R. Co., 61 Minn. 161, 63 N. W. 482.

[78] Dillingham v. Teeling (Tex.),

pany owes no such duty to a hotel-keeper, who goes to its depot to solicit guests for his own sole benefit,[79] unless, perhaps, where it has invited, or at least, licensed him so to do.[80] It may, indeed, be stated as a general rule, that one who goes upon the platform at a railroad station from mere curiosity, or for the transaction of business in no way connected with the company, cannot recover for injuries received because of defects therein.[81] But where a railroad company has a contract with the United States and postal clerks on mail trains are required to receive mail on the mail car while stopping at stations it is held to be the duty of the company to use reasonable care to keep its platforms and approaches reasonably safe for persons using the same to mail letters on such train as such persons are regarded as acting under an implied invitation of the company in so doing.[82]

24 S. W. 1094. See also Clussman v. Long Island R. Co., 9 Hun (N. Y.), 618 (telegraph office kept by company).

[79] Post v. Texas &c. R. Co. (Tex.), 23 S. W. 708.

[80] See Tobin v. Portland &c. R. Co., 59 Maine 183, 8 Am. Rep. 415.

[81] St. Louis &c. R. Co. v. Fairbairn, 48 Ark. 491, 4 S. W. 50, 30 Am. & Eng R. Cas. 166; Kansas City R. Co. v. Kirksey, 48 Ark. 366, 3 S. W. 190; Burbank v. Illinois Cent. R. Co., 42 La. Ann. 1156, 8 So. 580, 11 L. R. A. 720 and note, 45 Am. & Eng. R. Cas. 593; Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; Gillis v. Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317; Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258, 47 Am. Rep. 706, 8 Am. & Eng. R. Cas. 544. See also Omaha &c. R. Co. v. Martin, 14 Nebr. 295, 15 N. W. 696, 19 Am. & Eng. R. Cas. 236; Clark v. Howard, 88 Fed. 199; Montgomery &c. R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72; Redigan v. Boston &c. R. Co., 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. 520 and note; Williams v. Kansas City R. Co., 96 Mo. 275, 9 S. W. 573; Cincinnati &c. R. Co. v. Aller, 64 Ohio St. 183, 60 N. E. 205; Dobbins v. Missouri &c. R. Co., 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. 856; Norfolk &c. R. Co. v. Wood, 99 Va. 156, 37 S. E. 846. In the first case above cited, the general rule was stated as in the text, but it was held that one who went upon the company's premises to read a notice of stock killed, which was posted there in pursuance of the statute, with the owner of missing stock, who could not read, was invited there and that the company was bound to use ordinary care to keep the platform in repair for such persons.

[82] Atchison &c. R. Co. v. Jandera, 24 Okla. 106, 104 Pac. 339, 24 L. R. A. (N. S.) 535; Hale v. Grand Trunk R. Co., 60 Vt. 605, 15 Atl. 300, 1 L. R. A. 187.

§ 1795 (1257). Injuries to trespassers upon track.—What we have already said concerning the limited duty to trespassers applies to trespassers upon a railroad track.[83] It is generally, and, we think, correctly, held that a railroad company is not bound to keep a lookout for trespassers upon the track.[84] But some au-

[83] Ante, § 1791; also Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672; Weatherly v. Nashville &c. R. Co., 166 Ala. 575, 51 So. 959; St. Louis &c. R. Co. v. Monday, 49 Ark. 257, 4 S. W. 782; St. Louis &c. R. Co. v. Bryant, 81 Ark. 368, 99 S. W. 693; Toomey v. Southern Pac. R. Co., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139 and note; Central of Ga. R. Co. v. Tapley, 145 Ga. 792, 89 S. E. 841; Thompson v. Cleveland &c. R. Co., 226 Ill. 542, 80 N. E. 1054, 9 L. R. A. (N. S.) 672; Roden v. Chicago &c. R. Co., 133 Ill. 72, 23 Am. St. 585; Mason v. Missouri &c. R. Co., 27 Kans. 83, 41 Am. Rep. 405; Tennis v. Rapid Transit R. Co., 45 Kans. 503, 25 Pac. 876; Atchison &c. R. Co. v. Todd, 54 Kans. 551, 38 Pac. 804; Louisville &c. R. Co. v. Redmons, 28 Ky. L. 1293, 91 S. W. 722; Illinois Cent. R. Co. v. Johnson, 30 Ky. L. 142, 97 S. W. 745; Copp v. Maine Cent. R. Co., 100 Maine 568, 62 Atl. 735; Morrissey v. Eastern R. Co., 126 Mass. 377, 30 Am. Rep. 686 and note; Dillon v. Connecticut River R. Co., 154 Mass. 478, 28 N. E. 899; Palon v. Great Northern R. Co., 135 Minn. 154, 160 N. W. 670; Louisville &c. R. Co. v. Williams, 69 Miss. 631, 12 So. 957; Candelaria v. Atchison &c. R. Co., 6 N. Mex. 266, 27 Pac. 497; Spicer v. Chesapeake &c. R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385 and note.

[84] Woodruff v. Northern Pac. Co., 47 Fed. 689; East Tennessee &c. R. Co. v. King, 81 Ala. 177, 2 So. 152; Memphis &c. R. Co. v. Womack, 84 Ala. 149, 4 So. 618; Glass v. Memphis &c. R. Co., 94 Ala. 581, 10 So. 215; Georgia Pac. R. Co. v. Ross, 100 Ala. 490, 14 So. 282; Whitney v. New York &c. R. Co., 87 Conn. 623, 89 Atl. 269; Illinois Cent. R. Co. v. O'Connor, 189 Ill. 559, 59 N. E. 1098 (quoting § 1790, ante); Terre Haute &c. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719, 12 Am. & Eng. R. Cas. 77; Cannon v. Cleveland &c. R. Co., 157 Ind. 682, 62 N. E. 8; Dull v. Cleveland &c. R. Co., 21 Ind. App. 571, 52 N. E. 1013; McAllister v. Burlington &c. R. Co., 64 Iowa 395, 20 N. W. 488; Burg v. Chicago &c. R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419, 60 Am. & Eng. R. Cas. 159; Thomas v. Chicago &c. R. Co., 93 Iowa 248, 61 N. W. 967; Louisville &c. R. Co. v. Davis, 162 Ky. 572, 172 S. W. 966; Louisville &c. R. Co. v. Greene, 5 Ky. L. 594, 19 Am. & Eng. R. Cas. 95; Givens v. Kentucky Cent. R. Co., 12 Ky. L. 950, 15 S. W. 1057; Baltimore &c. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; State v. Baltimore &c. R. Co., 69 Md. 494, 9 Am. St. 436 and note; Chenery v. Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22

thorities hold that it must keep a lookout for trespassers as well as others.[85] And in a number of jurisdictions the rule is modified

L. R. A. 575; Scheffler v. Minneapolis &c. R. Co., 32 Minn. 518, 21 N. W. 711; Louisville &c. R. Co. v. Williams, 69 Miss. 631, 12 So. 957; Hamilton v. Kansas City &c. Ry. Co., 250 Mo. 714, 157 S. W. 622; Egan v. Montana &c. R. Co., 24 Mont. 569, 63 Pac. 831; Ward v. Southern Pac. R. Co., 25 Ore. 433, 36 Pac. 156, 23 L. R. A. 715, 60 Am. & Eng. R. Cas. 34; Anderson v. Chicago &c. R. Co., 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203, 60 Am. & Eng. R. Cas. 86. See also Chesapeake &c. R. Co. v. Donahue, 107 Md. 119, 68 Atl. 507; Byrnes v. Boston &c. R. Co., 181 Mass. 322, 63 N. E. 897; Cleveland &c. R. Co. v. Lartt, 64 Fed. 823; Sheehan v. St. Paul &c. R. Co., 76 Fed. 201; Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Northwestern El. R. Co. v. O'Malley, 107 Ill. App. 599; Cleveland &c. R. Co. v. Cline, 111 Ill. App. 416; Yates v. Illinois Cent. R. Co., 28 Ky. L. 75, 89 S. W. 161; Smith v. Illinois Cent. R. Co., 28 Ky. L. 723, 90 S. W. 254; Illinois Cent. R. Co. v. Johnson, 30 Ky. L. 142, 97 S. W. 745; Smalley v. Southern R. Co., 57 S. Car. 243, 35 S. E. 489; Chesapeake &c. Ry. Co. v. Farrow, 106 Va. 137, 55 S. E. 569; Alabama &c. R. Co. v. Moorer, 116 Ala. 642, 22 So. 900, 901 (quoting text). In several of these jurisdictions, however, while this is the general rule it is modified as to trespassers or licensees at certain places where they are to be anticipated.

[85] Troy v. Cape Fear &c. R. Co., 99 N. Car. 298, 6 S. E. 77, 6 Am. St. 521; Clark v. Wilmington &c. R. Co., 109 N. Car. 430, 14 S. E. 43, 14 L. R. A. 749; McDonald v. International &c. R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. 803; St. Louis &c. Ry. Co. v. Watts (Tex. Civ. App.), 173 S. W. 909; Smith v. Norfolk &c. R. Co., 114 N. Car. 728, 19 S. E. 863, 923, 25 L. R. A. 286 (apparently modifying former North Carolina decisions which are extreme). But see Pickett v. Wilmington &c. R. Co., 117 N. Car. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. 611; East Tennessee &c. R. Co. v. St. John, 5 Sneed (Tenn.) 524, 73 Am. Dec. 149; Patton v. East Tennessee &c. R. Co., 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184, 48 Am. & Eng. R. Cas. 581; Railroad Co. v. Sympkins, 54 Tex. 615, 38 Am. Rep. 632 and note, 6 Am. & Eng. R. Cas. 11; Texas &c. R. Co. v. Watkins, 88 Tex. 20, 29 S. W. 232; Olivaras v. San Antonio &c. R. Co. (Tex. Civ. App.), 77 S. W. 981; Missouri &c. R. Co. v. Hanner, 34 Tex. Civ. App. 354, 78 S. W. 708; Gunn v. Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. 842. This is said to be the rule in Maryland, North Carolina, Tennessee, Texas and West Virginia. See note in 69 L. R. A. 546, et seq. And see also in Louisiana, Roberts v. Louisiana R. &c. Co., 132 La. Ann. 446, 61 So. 522, Ann. Cas. 1914D, 1207. But there are apparently conflicting au-

so far as to require the company to keep a lookout in cities and other places where persons regarded as licensees may reasonably be expected.[86] This is sometimes called the "middle ground" or

thorities in Maryland and North Carolina, and it is doubtful if this is the unqualified rule in those states. See, however, Bogan v. Carolina Cent. R. Co., 129 N. Car. 154, 39 S. E. 808, 55 L. R. A. 418.

[86] Felton v. Aubrey, 74 Fed. 359; Garner v. Trumbull, 94 Fed. 321; South &c. R. Co. v. Donovan, 84 Ala. 141, 4 So. 142; Southern R. Co. v. Smith, 163 Ala. 174, 50 So. 390; Louisville &c. R. Co. v. Ganter, 16 Ala. App. 323, 77 So. 917; Alabama &c. R. Co. v. Guest, 144 Ala. 373, 39 So. 654; St. Louis &c. R. Co. v. Hudson, 86 Ark. 183, 110 S. W. 590; Arkansas &c. R. Co. v. Graves, 96 Ark. 638, 132 S. W. 992; Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692, 694, 695 (quoting text); Louisville &c. R. Co. v. Daniel, 28 Ky. L. 1146, 91 S. W. 691; Johnson v. Louisville &c. R. Co., 29 Ky. L. 36, 91 S. W. 707; Louisville &c. R. Co. v. Miller, 134 Ky. 716, 121 S. W. 648, 135 Am. St. 433; Battishill v. Humphreys, 64 Mich. 494, 31 N. W. 894; Reilly v. Hannibal &c. R. Co., 94 Mo. 600, 7 S. W. 407; Chicago &c. R. Co. v. Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522; Cassida v. Oregon R. &c. Co., 14 Ore. 551, 13 Pac. 438; Chattanooga Station Co. v. Harper, 138 Tenn. 562, 199 S. W. 394; Palmer v. Oregon Short Line R. Co., 34 Utah 466, 98 Pac. 689; **Davis v. Chicago &c. R. Co., 58** Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; Bandekow v. Chicago &c. R. Co., 136 Wis. 341, 117 N. W. 812; Townley v. Chicago &c. R. Co., 53 Wis. 626, 11 N. W. 55; Johnson v. Lake Superior &c. Co., 86 Wis. 64, 56 N. W. 161. See also Cleveland &c. R. Co. v. Means, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375; Phipps v. Oregon R. &c. Co., 161 Fed. 376. In Williams v. Kansas City &c. R. Co., 96 Mo. 275, 9 S. W. 573, it is shown that this is as far as the rule has been modified in Missouri, although some of the cases state in general terms that the company must keep a lookout for trespassers and licensees, and is liable if it ought to have discovered the injured party in time, but negligently failed to do so. See also Hamilton v. Kansas City &c. R. Co., 250 Mo. 714, 157 S. W. 622; Hall v. Missouri Pac. R. Co., 219 Mo. 553, 118 S. W. 56; Powell v. Missouri Pac. R. Co., 59 Mo. App. 626; Gray v. Wabash R. Co. (Mo. App.), 198 S. W. 1137; Fearons v. Kansas City El. R. Co., 180 Mo. 208, 79 S. W. 394; Teakle v. San Pedro &c. R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486; Norfolk &c. R. Co. v. Carper, 88 Va. 556, 14 S. E. 328; Blankenship v. Chesapeake &c. R. Co., 94 Va. 449, 27 S. E. 20; Chesapeake &c. R. Co. v. Rodgers, 100 Va. 324, 41 S. E. 732; Whalen v. Chicago &c. R. Co., 75 Wis. 654, 44 N. W. 849. See the principal and dissenting opinions in Brown v. Boston &c. R. Co., 73 N. H. 568, 64

"intermediate doctrine," and it appears to be gaining increased favor with some of the courts. It does not seem to be as logical, definite, and practicable as the rule we have approved, but there is much to commend it.[87] Under most statutes and ordinances trespassers upon the track are not entitled to the benefit of signals required to be given at public crossings,[88] nor to the benefit

Atl. 194, on the question as to the rule where trespassers are to be expected. In Illinois Cent. R. Co. v. Murphy, 123 Ky. 787, 97 S. W. 729, the Kentucky decisions holding that no duty arises until the trespasser's peril is discovered, are collected, and it is said that, while divisible into two classes, they are all based on that one principle where his presence is neither known nor to be reasonably anticipated, but that where the presence of such a person should be anticipated as probable, the train should be operated with a lookout and under control so as to stop, if necessary, before injury is done. See also Adkins v. Big Sandy & Cumberland R. Co., 147 Ky. 30, 143 S. W. 764; Louisville &c. R. Co. v. Vaughan's Admr., 183 Ky. 829, 210 S. W. 938.

[87] In Cleveland &c. R. Co. v. Meanes, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375, many cases are reviewed and this rule is stated as follows: "Where a railroad company has permitted the public the free use of the tracks to pass along or over, and this use is open and continued for a long period of time and by a large or considerable number of people, or where the railroad runs through thickly populated portions of a city, town or village where people frequently go upon or pass over the tracks for such a length of time that the employes of the railroad company may be charged with notice, or when such notice is directly given to them, then in all such cases, although the injured person be a trespasser, still the railroad company, having reason to expect that some one may be on or near the track, must act accordingly, and keep a lookout and give timely warning in order to prevent a collision, and a failure to exercise ordinary care in keeping a lookout and in giving warning may be negligence for which even a trespasser is entitled to recover, provided he is not guilty of contributory negligence which is the proximate cause of the injury."

[88] Ante, § 1652, and authorities there cited; also Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. R. 145; Shackleford v. Louisville &c. R. Co., 84 Ky. 43, 4 Am. St. 189; Cincinnati &c. R. Co. v. Carter, 180 Ky. 765, 203 S. W. 740; Parker v. Wilmington &c. R. Co., 86 N. Car. 221; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. 602; Missouri &c. R. Co. v. Luten (Tex. Civ. App.), 203 S. W. 909; Spicer v. Chesapeake &c. R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385.

of a speed ordinance.[89] So, it has been held in some cases that one who trespasses upon the track is ipso facto guilty of negligence,[90] and there are many cases in which persons have been held guilty of contributory negligence in trespassing upon the track and then failing to exercise such care as their dangerous position and the circumstances required.[91]

§ 1796 (1257a). Presumption that person will get off track—Discovery of peril—Wilfulness.—As a general rule the company's employes may presume that one apparently able to do so will get

[89] Clemens v. Chicago &c. R. Co., 128 Iowa 394, 104 N. W. 431.

[90] Grethen v. Chicago &c. R. Co., 22 Fed. 609; Tucker v. Baltimore &c. R. Co., 59 Fed. 968; Glass v. Memphis &c. R. Co., 94 Ala. 581, 10 So. 215; Savannah &c. R. Co. v. Meadows, 95 Ala. 137, 10 So. 141; Illinois Cent. R. Co. v. Hall, 72 Ill. 222; Roden v. Chicago &c. R. Co., 133 Ill. 72, 24 N. E. 425, 23 Am. St. 585; Parker v. Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; McAllister v. Burlington &c. R. Co., 64 Iowa 395, 20 N. W. 488; Schexnaydre v. Texas &c. R. Co., 46 La. Ann. 248, 14 So. 513, 49 Am. St. 321 (deaf mute); State v. Baltimore &c. R. Co., 58 Md. 482, 15 Am. & Eng. R. Cas. 409 and note; Little Schuylkill &c. R. Co. v. Norton, 24 Pa. St. 465, 64 Am. Dec. 672 and note; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Dell v. Phillips &c. Co., 169 Pa. 549, 32 Atl. 601.

[91] Central Trust Co. v. Wabash &c. R. Co., 26 Fed. 896 and note; Missouri Pac. R. Co. v. Moseley, 57 Fed. 921; Kansas City R. Co. v. Cook, 66 Fed. 115, 28 L. R. A. 181; Kirtley v. Chicago &c. R. Co., 65 Fed. 386; Northern Pac. Ry. Co. v. Jones, 144 Fed. 47; Hutchinson v. Norfolk &c. Ry. Co., 171 Fed. 410; Frazer v. South &c. R. Co., 81 Ala. 185, 1 So. 85 and note, 60 Am. Rep. 145; Duncan v. St. Louis &c. R. Co., 152 Ala. 118, 44 So. 418; Teunenbrock v. South Pac. R. Co., 59 Cal. 269, 6 Am. & Eng. R. Cas. 8; McClaren v. Indianapolis &c. R. Co., 83 Ind. 319; Legge v. New York &c. R. Co., 197 Mass. 88, 83 N. E. 367, 23 L. R. A. (N. S.) 633; Bresnahan v. Michigan Cent. R. Co., 49 Mich. 410, 13 N. W. 797, 8 Am. & Eng. R. Cas. 147; Spaven v. Lake Shore &c. R. Co., 130 Mich. 579, 90 N. W. 325; Raiolo v. Northern Pac. R. Co., 108 Minn. 431, 122 N. W. 489; Ayers v. Wabash R. Co., 190 Mo. 228, 88 S. W. 608; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. 602; Hughes v. Galveston &c. R. Co., 67 Tex. 595, 4 S. W. 219; International &c. R. Co. v. Ploeger (Tex. Civ. App.), 96 S. W. 56; Virginia Midland R. Co. v. Barksdale, 82 Va. 330.

off the track in time.[92] But where a very young child is seen upon the track they can not safely act upon the presumption that it will get off the track or exercise the care of an adult.[93] So, even in the case of an adult the circumstances may be such that no such presumption can be indulged.[94] And, as we have elsewhere

[92] St. Louis &c. R. Co. v. Monday, 49 Ark. 257, 4 S. W. 782; Kennedy v. Denver &c. R. Co., 10 Colo. 493, 16 Pac. 210; Indianapolis &c. R. Co. v. McClaren, 62 Ind. 566; Pennsylvania Co. v. Myers, 136 Ind. 242, 36 N. E. 32; Cleveland &c. R. Co. v. Klee, 154 Ind. 430, 434, 56 N. E. 234; Louisville &c. R. Co. v. Cronback, 12 Ind. App. 66, 41 N. E. 15; Campbell v. Kansas City &c. R. Co., 55 Kans. 536, 40 Pac. 997; Nichols v Louisville &c. R. Co., 9 Ky. L. 702, 6 S. W. 339; Louisville &c. R. Co. v. Redmons, 28 Ky. L. 1293, 91 S. W. 722; Bouwmeester v. Grand Rapids &c. R. Co., 67 Mich. 87, 34 N. W. 414; Candee v. Kansas City &c. R. Co., 130 Mo. 142, 31 S. W. 1029; Omaha &c. R. Co. v. Cook, 42 Nebr. 905, 62 N. W. 235; Syme v. Richmond &c. R. Co., 113 N. Car. 558, 18 S. E. 114; Ward v. Atlantic &c. R. Co., 167 N. Car. 148, 83 S. E. 326, 329 (quoting text); Wyrick v. Southern R. Co., 172 N. Car. 549, 90 S. E. 563; ante, § 1646; Houston &c. R. Co. v. O'Donnell, 99 Tex. 636, 92 S. W. 409, note in 69 L. R. A. 550. See also Chesapeake &c. R. Co. v. Donahue, 107 Md. 119, 68 Atl. 507, 510; Pope v. Wabash R. Co., 242 Mo. 232, 146 S. W. 790, 792 (citing text); La Mountains Admx. v. Rutland R. Co. (Vt.), 106 Atl. 517.

[93] Anderson v. Great Northern R. Co., 15 Idaho 513, 99 Pac. 91, 96 (citing text); Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 9 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Payne v. Humeston &c. R. Co., 70 Iowa 584, 31 N. W. 886; Donahoe v. Wabash &c. R. Co., 83 Mo. 543, 53 Am. Rep. 594; Kenyon v. New York &c. R. Co., 5 Hun (N. Y.) 479; Spooner v. Delaware &c. R. Co., 115 N. Y. 22, 21 N. E. 696; Pennsylvania R. Co. v. Morgan, 82 Pa. St. 134; Galveston &c. R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Missouri &c. Ry. Co. v. Hammer, 34 Tex. Civ. App. 354, 78 S. W. 708; Hyde v. Union Pac. R. Co., 7 Utah 356, 26 Pac. 979; Smalley v. Rio Grande &c. R. Co., 34 Utah 423, 98 Pac. 311. But the presumption may usually be indulged where the child is apparently old enough and able to take care of himself. Missouri Pac. R. Co. v. Hansen, 48 Nebr. 232, 66 N. W. 1105 (child twelve years old); Meredith v. Richmond &c. R. Co., 108 N. Car. 616, 13 S. E. 137 (boy thirteen years old); Cleveland &c. R. Co. v. Klee, 154 Ind. 430, 434, 56 N. E. 234 (boy nine years old); Trudell v. Grand Trunk Ry. Co., 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271 (boy seven years old).

[94] Tanner v. Louisville &c. R. Co., 60 Ala. 621; St. Louis &c. R. Co. v. Scott, 102 Ark. 417, 144 S.

said, the company is liable where it wilfully injures a trespasser[95] or fails to exercise reasonable care after discovering, or, according to some of the authorities, after it ought to have discovered, his danger and inability to escape, if the exercise of such care would have prevented the injury.[96] Although there is a clear

W. 917; St. Louis &c. R. Co. v. Manly, 58 Ill. 300; Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241 and note, 16 Am. St. 334; Starett v. Chesapeake &c. R. Co., 33 Ky. L. 309, 11 S. W. 282; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Herring v. Wilmington &c. R. Co., 10 Ired. (N. Car.) 402, 51 Am. Dec. 395; Sawyer v. Roanoke &c. R. Co., 145 N. Car. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200; Brown v. North Carolina R. Co., 172 N. Car. 604, 90 S. E. 783. And it has been held that the trainmen have no right to act on such assumption until they have given a warning signal at such a distance as should enable him to hear it and get off the track. Kelley v. Ohio River R. Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. (N. S.) 898, 901 (citing text). See also International &c. R. Co. v. Smith, 62 Tex. 254; Louisville &c. R. Co. v. Tinkham, 19 Ky. L. 1784, 44 S. W. 439; Central R. &c. Co. v. Denson, 84 Ga. 774, 11 S. E. 1039; Texas &c. Ry. Co. v. Brannon, 43 Tex. Civ. App. 531, 96 S. W. 1095.

[95] Esrey v. Southern Pac. R. Co., 103 Cal. 541, 37 Pac. 500; Lake Shore &c. R. Co. v. Bodemer, 139 Ill. 596, 32 Am. St. 218, 29 N. E. 692; Palmer v. Chicago &c. R. Co., 112 Ind. 250; Dennis v. Louisville &c. R. Co., 116 Ind. 42, 1 L. R. A. 448 and note; Kansas Pac. R. Co. v. Whipple, 39 Kans. 531, 18 Pac. 730; ante, §§ 1791, 1792.

[96] Louisville &c. R. Co. v. Lohges, 6 Ind. App. 288, 33 N. E. 449; Sutzin v. Chicago &c. R. Co., 95 Iowa 304, 63 N. W. 709; Papich v. Chicago &c. Ry. Co., 183 Iowa 601, 167 N. W. 686; Wren v. Louisville &c. R. Co., 14 Ky. L. 324, 20 S. W. 215; Mobile &c. R. Co. v. Watly, 69 Miss. 145, 13 So. 825; Union Pac. R. Co. v. Mertes, 35 Nebr. 204, 52 N. W. 1099; Omaha &c. R. Co. v. Cook, 37 Nebr. 435; Atchison &c. R. Co. v. Miles (Okla.), 170 Pac. 896; Gulf &c. R. Co. v. Lankford, 9 Tex. Civ. App. 593, 29 S. W. 933; Raines v. Chesapeake &c. R. Co., 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226; 2 Thomp. Neg. (2nd ed.), § 1711; ante, §§ 1671, 1672, where the last clear chance doctrine is considered. In Long v. Pacific R. & Nav. Co., 74 Ore. 502, 144 Pac. 462, 145 Pac. 1068, as in many other cases, it is held that the last clear chance doctrine applies only as to perceived peril in the case of a trespasser. See also Louisville &c. R. Co. v. Young, 153 Ala. 232, 45 So. 238, 16 L. R. A. (N. S.) 301; Murphy v. Wabash R. Co., 228 Mo. 56, 128 S. W. 481; Neary v. Northern Pac. R. Co., 41 Mont. 480, 110 Pac. 226; Sawyer v. Roanoke &c. Lumber Co., 145 N. Car. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200;

distinction between negligence and wilfulness, yet a reckless and wanton disregard of consequences, evincing a willingness to inflict injury, may amount to wilfulness, although there is no direct proof of actual intention to inflict the injury complained of.[97] Thus, where a trespasser was seen by the engineer upon a long trestle in time to have stopped the train, and the latter did nothing to stop or slacken the speed of the train, but went on, speculating on the chances of the trespasser's reaching the end of the trestle before the train, although it must have been apparent that the trespasser could not escape, it was held that the engineer was guily of such recklessness as amounted to wilfulness, that the company was liable for running over and killing such trespasser while upon the trestle, regardless of his contributory negligence.[98]

Great Northern R. Co. v. Harman, 217 Fed. 959, L. R. A. 1915C, 843 (perceived peril). In La Mountain's Admx. v. Rutland R. Co. (Vt.), 106 Atl. 517, 519, it is said that although various forms of expression are used in the books in defining the duty of trainmen who see and appreciate the peril of a person on the track,—some saying they must use the care of a prudent man, some that they must make all reasonable use of the means at hand, and some that they must do their utmost.—"These forms of statement, rightly understood, mean the same thing. They must do everything possible with the means at hand. Nothing short of this is making a reasonable use of the means at hand; nothing short of this is using the care of a prudent man."

[97] Palmer v. Chicago &c. R. Co., 112 Ind. 250, 14 N. E. 70; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301, 30 Am. Rep. 185 and note; Lake Erie &c. R. Co. v. Brafford, 15 Ind. App. 655, 43 N. E. 882; Lake Shore &c. R. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. 218; Louisville &c. R. Co. v. Trammell, 93 Ala. 350, 9 So. 870. See also Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692 (citing text). But it involves conduct which is quasi criminal. Louisville &c. R. Co. v. Bryan, 107 Ind. 51; Parker v. Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552. See also Williams v. Central of Ga. R. Co., 146 Ala. 680, 40 So. 143; Alabama Great So. R. Co. v. Guest, 144 Ala. 373, 39 So. 654; Lando v. Chicago &c. R. Co., 81 Minn. 279, 83 N. W. 1089; Bartlett v. Wabash R. Co., 220 Ill. 163, 77 N. E. 96.

[98] Central R. &c. Co. v. Vaughan, 93 Ala. 209, 9 So. 468, 30 Am. St. 50. See also St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123; Purcell v. Chicago &c. R. Co., 109 Iowa 628, 80 N. W. 682, 77 Am. St. 557; Peirce v. Walters, 164 Ill. 560, 45 N. E. 1068; Clark

But in another case there was held to be no liability for failure to keep a lookout and for injury where a trespasser on the trestle was not seen.[99] And it has been held that trainmen are not obliged to stop the train or slow up as soon as they discover a trespassing object lying beside the track that "looks like a man," and that if he is in a safe position they are not bound to anticipate that he may move so as to place himself in peril.[1] In some other cases, however, especially where the man was helpless or the object was a young child a contrary view has been taken.[2]

v. Wilmington &c. R. Co., 109 N. Car. 430, 14 S. E. 43, 14 L. R. A. 749; Vanarsdall v. Louisville &c. R. Co., 23 Ky. L. 1666, 65 S. W. 858, 77 S. W. 1103. But compare Ullrich v. Cleveland &c. R. Co., 151 Ind. 358, 51 N. E. 95. See generally as to persons on trestles or bridges, Southern R. Co. v. Bush, 122 Ala. 470, 26 So. 168; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. 145; Chicago &c. R. Co. v. Kotoski, 199 Ill. 383, 65 N. E. 350; Chicago &c. R. Co. v. Gruss, 200 Ill. 195, 65 N. E. 693; Mason v. Missouri Pac. R. Co., 27 Kans. 83, 41 Am. Rep. 405; Lapp v. Louisville &c. R. Co., 178 Ky. 647, 199 S. W. 798; Bogan v. Carolina &c. R. Co., 129 N. Car. 154, 39 S. E. 808, 55 L. R. A. 418; Smalley v. Southern R. Co., 57 S Car. 243, 35 S. E. 489; Gunn v. Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

[99] Curd v. Cincinnati &c. R. Co., 163 Ky. 104, 173 S. W. 335. There is, however, no necessary conflict between this decision and the cases cited, or most of them, in the last preceding note.

[1] New York &c. R. Co. v. Kelly, 93 Fed. 745; Little Rock &c. R. Co. v. Haynes, 47 Ark. 497, 1 S. W. 774; Missouri Pac. R. Co. v. Prewitt, 59 Kans. 734, 54 Pac. 1067; Goodman v. Louisville &c. R. Co., 116 Ky. 900, 77 S. W. 174, 63 L. R. A. 657; Louisville &c. R. Co. v. Hathaway, 28 Ky. L. 628, 89 S. W. 724, 2 L. R. A. (N. S.) 498; Louisville &c. R. Co. v. Williams, 69 Miss. 631, 12 So. 957; Murch v. Western &c. R. Co., 78 Hun 601, 29 N. Y. S. 490; Norfolk &c. R. Co. v. Dunaway, 93 Va. 29, 24 S. E. 698. In most of these cases, however, while the nature of the object could not be clearly discerned, the trainmen did not think it was a human being, or did not think he was in peril. See also Sanders v. Texas &c. R Co. (La. Ann.), 42 So. 764; Wells v. Lusk, 188 Mo. App. 63, 173 S. W. 750; Trigg v. Water &c. Co., 215 Mo. 521, 114 S. W. 972, 20 L. R. A. (N. S.) 987; San Antonio &c. R. Co. v. McMillan, 100 Tex. 562, 102 S. W. 103.

[2] Meeks v. Southern Pac. R. Co., 56 Cal. 513, 38 Am. Rep. 67; Keyser v. Chicago &c. R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405; Isabel v. Hannibal &c. R. Co., 60 Mo. 475; East Tenn. &c. R. Co. v.

§ 1797 (1258). Injuries to persons in company's yards.—No duty rests upon a railroad company in favor of trespassers or bare licensees, who use its track as a footway, to keep its switches blocked in its private yard in order to prevent injury to such persons.[3] So, it has been held that staking cars across a highway in the railroad company's yard is not an unlawful act, nor negligence per se, and that one who travels along the right of way of a railroad company is a trespasser and cannot recover for injuries received where a highway crosses the tracks of the company in its own yard from a car which is being staked along the track on such right of way.[4] The court was of the opinion that the highway crossing was simply for the purpose of passing from one side of the railroad to the other, and that the plaintiff did not cease to be a trespasser merely because he happened to have reached the crossing at the time he was injured. In another recent case it was held that one who crosses on a railroad ferry-boat in violation of the rules of the company forbidding the carriage of passengers thereon, and, in seeking to return, again enters the company's yard, remains a trespasser in proceeding through such yard to reach a public ferry-boat after he has been

St. John, 5 Sneed (Tenn.) 525, 73 Am. Dec. 149; Hyde v. Union Pac. R. Co., 7 Utah 356, 26 Pac. 979. See also Seaboard &c. R. Co. v. Joyner, 92 Va. 334, 23 S. E. 773; Watts v. Chicago &c. R. Co., 61 Ind. App. 51, 104 N. E. 42; Campbell v. Kansas City &c. R. Co., 55 Kans. 536, 40 Pac. 997. For a discussion of the general rule as to indulging the presumption that one on or near the track will get or keep out of the way, and the limits of the right to act on such presumption, together with a review of numerous authorities, see note to Union Pac. R. Co. v. Cappier, 66 Kans. 649, 72 Pac. 281, 69 L. R. A. 513, 550-556, and note in 6 L. R. A. (N. S.) 283.

[3] International &c. R. Co. v. Lee (Tex.), 34 S. W. 160; Akers v. Chicago &c. R. Co., 58 Minn. 540, 60 N. W. 669, 60 Am. & Eng. R. Cas. 30. See also St. Louis &c. R. Co. v. Lavendusky, 87 Ark. 540, 113 S. W. 204; Fowler v. Georgia R. &c. Co., 133 Ga. 664, 66 S. E. 900; Shults v. Chicago &c. R. Co., 83 Nebr. 272, 119 N. W. 463.

[4] Kelly v. Michigan Cent. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. R. 876. Sherwood, J., dissented in this case, and the decision is certainly very close to the line. Compare Johnson v. Louisville &c. R. Co., 29 Ky. L. 36, 91 S. W. 707; Louisville &c. R. Co. v. Vaughan's Adm'r, 183 Ky. 829, 210 S. W. 938.

ordered off the railroad boat, although the company's employes direct him as to the way through the yard to the ferry landing, which way is at least as safe as any other exit.[5] Even as to employes, the company is usually under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yard, for the purpose of notifying such employes, who are familiar with the operation of the yard.[6] If one who is not an employe, without the knowledge or consent of the company, goes into its yard which is interlaced with tracks, upon which engines and cars are being switched and changed, he must use care commensurate with the peril in which he has placed himself, and the company owes him no duty except not to injure him wilfully, or by negligence after its employes see his danger and inability to escape in time to prevent such injury by the exercise of due care.[7] The switch-yard of a railroad company is

[5] Kansas City &c. R. Co. v. Cook, 66 Fed. 115, 28 L. R. A. 181. The court said: "Plaintiff was not rightfully in the yard; his being there was negligence. The railroad company owed him no duty except to avoid, after discovering his danger, any wanton or unnecessary injury being done him." See also Richmond &c. R. Co. v. Watts, 92 Ga. 88, 17 S. E. 983.

[6] Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. ed. 758; Chesapeake &c. Ry. Co. v. Shiflett's Adm'x., 118 Va. 63, 86 S. E. 860, 863 (citing text). See also Chicago &c. Ry. Co. v. Kroloff, 217 Fed. 525; Goodes v. Boston &c. R. Co., 162 Mass. 287, 38 N. E. 500; Lake Erie &c. R. Co. v. Hennessey, 38 Ind. App. 574, 78 N. E. 670. But compare Pittsburgh &c. R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128. And, on the other hand, it seems that the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so, does not apply to one who is employed in a railroad yard and whose duties make it necessary for him to frequently go upon the tracks. Jordan v. Chicago &c. R. Co., 58 Minn. 8, 59 N. W. 633, 49 Am. St. 486.

[7] Rome R. Co. v. Tolbert, 85 Ga. 447, 11 S. E. 849; Central R. &c. Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634; Missouri Pac. R. Co. v. Moseley, 57 Fed. 921; St. Louis &c. R. Co. v. Monday, 49 Ark. 257, 4 S. W. 782; Huff v. Chesapeake &c. Ry. Co., 48 W. Va. 45, 35 S. E. 866, 867 (quoting text). See also Tucker v. Baltimore &c. R. Co., 59 Fed. 968; Chicago &c. R. Co. v. Caulfield, 63 Fed. 396; Murdock v. Yazoo &c. R. Co., 77 Miss. 487, 29 So. 25; Hufft v. St. Louis &c. R. Co., 222 Mo. 286, 121 S. W. 120; Kendall v. Louisville &c. R. Co., 25 Ky. L. 793, 76 S. W. 376; Johnson v. Louisville &c. R. Co., 29 Ky. L. 36, 91 S. W. 707.

usually even a more dangerous place than the right of way where there is but a single track, and as it is likely to be in continuous use by the company in switching, storing and repairing cars, making up trains, or the like, there is, perhaps, still less reason for implying a license or invitation to strangers to use such premises than in the case of the right of way where there is but a single track.[8] In any event, what we have heretofore stated in regard to the risks taken by the licensee and the limited duty due him from the company must apply with at least equal force where the license is to use the company's private yard and tracks therein.[9] Where, however a public street crosses the tracks in a railroad yard, one who is crossing on such street is not a trespasser or bare licensee. In such a case the railroad may be liable for injuries under circumstances which would not make it liable to a trespasser. Thus, in a recent case, the company was held liable to a traveler upon a street, where it crossed the tracks, for injury by a steer, which, owing to its crippled condition, had been unloaded to be killed, and was negligently allowed to recover and run loose in the yard through which the street crossed.[10] It has

[8] "A railroad company is entitled to the exclusive use of the tracks in its switchyard, and there can be no implied license to use such tracks inconsistent with such right." Wright v. Atlantic &c. R. Co., 18 Ga. App. 439, 89 S. E. 595. And a public way is not established across a switchyard by pedestrians trespassing thereon so long that they have worn a beaten path. Malott v. Union Pac. R. Co., 99 Kans. 115, 160 Pac. 978. But compare Chicago &c. R. Co. v. Austin, 63 Okla. 169, 163 Pac. 517, L. R. A. 1917D, 666.

[9] See Clark v. Michigan Cent. R. Co., 113 Mich. 24, 71 N. W. 327, 67 Am. St. 442; Bledsoe v. Grand Trunk R. Co., 126 Mich. 312, 85 N. W. 738; Lingenfelter v. Baltimore &c. R. Co., 154 Ind. 49, 55 N. E. 1021; Illinois Cent. R. Co. v. Arnola, 78 Miss. 787, 78 So. 768, 84 Am. St. 645; Cleveland &c. R. Co. v. Ballentine, 84 Fed. 935. And see also Chicago &c. R. Co. v. Payne, 103 Ark. 226, 146 S. W. 487, 39 L. R. A. (N. S.) 217; St. Louis &c. R. Co. v. Pylis, 114 Ark. 218, 169 S. W. 799; Scharf v. Spokane &c. R. Co., 92 Wash. 561, 159 Pac. 797.

[10] Texas &c. R. Co. v. Juneman, 71 Fed. 939. See also as to failure to block guard rail in street. Goodrich v. Burlington &c. R. Co., 103 Iowa 412, 72 N. W. 653; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132, 2 Am. St. 155; Gulf &c. R. Co. v. Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. 582; Littlejohn v. Richmond &c. R. Co., 49 S. Car. 12, 26 S. E. 967.

also been held that yards about a passenger depot are a public place and that one is not a trespasser who follows a beaten path in an attempt to get on a train about to leave, although such path is some feet away from the depot.[11]

§ 1798 (1259). **Liability for injury to trespassing children—Turn-table cases.**—In actions of injuries to children, as in other cases, there can be no recovery unless the defendant has been guilty of a breach of duty.[12] We presume that no court would deny this fundamental doctrine, but, as suggested in a recent case, it is sometimes lost sight of and "in dealing with cases which involve injuries to children courts and juries have sometimes strangely confounded legal obligations with sentiments independent of law."[13] There is sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that, although the age of the child may be important in determining the question of contributory negligence or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees not invited or enticed by it than it is to keep them safe for adults.[14] On the

[11] Willis v. Vicksburg &c. R. Co., 115 La. Ann. 53, 38 So. 892.

[12] 2 Thomp. Neg. (2nd ed.), § 1805 et seq; St. Louis &c. R. Co. v. Davis (Tex. Civ. App.), 110 S. W. 939 (quoting text). See also Highland Ave. &c. R. Co. v. Robbins, 124 Ala. 113, 27 So. 422, 82 Am. St. 153; Walsh v. Pittsburg Ry. Co., 221 Pa. St. 463, 70 Atl. 826, 32 L. R. A. (N. S.) 559; Grand Trunk Ry. Co. v. Flagg, 156 Fed. 359; Chesapeake &c. Ry. Co. v. Hawkins, 174 Fed. 597, 26 L. R. A. (N. S.) 309.

[13] Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65.

[14] Nashville &c. R. Co. v. Harris, 142 Ala. 249, 37 So. 794, 110 Am. St. 29; Southern Ry. Co. v. Forrister, 158 Ala. 477, 48 So. 69, 71 (citing text); Nolan v. New York &c. R. Co., 53 Conn. 461, 4 Atl. 106; Chicago &c. R. Co. v. McLaughlin, 47 Ill. 265; Gavin v. Chicago, 97 Ill. 66, 37 Am. Rep. 99; Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65; Central Branch &c. R. Co. v. Henigh, 23 Kans. 347, 33 Am. Rep. 167; Atchison &c. R. Co. v. Flinn, 24 Kans. 627; McDermott v. Kentucky Cent. R. Co., 93 Ky. 408, 20 S. W. 380; Fredericks v. Ill. Cent. R. Co., 46 La. Ann. 1180, 15 So.

other hand while it may be contributory negligence for a child to play upon the track or any other dangerous place, yet if he has

413; Bannon v. Baltimore &c. R. Co., 24 Md. 108; Morrissey v. Eastern R. Co., 126 Mass. 377, 30 Am. Rep. 686 and note; McEachen v. Boston &c. R. Co., 150 Mass. 515, 23 N. E. 231; Emerson v. Peteler, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337; Sherman v. Hannibal &c. R. Co., 72 Mo. 62, 37 Am. Rep. 423; Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74, 3 Am. St. 557; Clark v. Manchester, 62 N. H. 577; Frost v. Eastern R. Co., 64 N. H. 220, 9 Atl. 790, 10 Am. St. 396; McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555, Cauley v. Pittsburgh &c. R. Co., 95 Pa. St. 398, 40 Am. Rep. 664 and note; Gillespie v. McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258, 47 Am. Rep. 706; Pennsylvania Co. v. McMullen, 132 Pa. St. 107, 19 Atl. 27; Walsh v. Pittsburgh Rys. Co., 221 Pa. St. 463, 70 Atl. 826, 32 L. R. A. (N. S.) 559, and cases there reviewed in note; Klix v. Nieman, 68 Wis. 271, 32 N. W. 223, 60 Am. Rep. 854. See also Trudell v. Grand Trunk R. Co., 126 Mich. 73, 85 N. W. 250, 253, 53 L. R. A. 271, 273 (quoting text); Alabama &c. R. Co. v. Moorer, 116 Ala. 642, 22 So. 900, 901 (quoting text); Jefferson v. Birmingham &c. Co., 116 Ala. 294, 22 So. 546, 548, 38 L. R. A. 458, 67 Am. St. 116 (quoting text); Savannah &c. R. Co. v. Waller, 97 Ga. 164, 25 S. E. 823, 34 L. R. A. 459; Thomas v. Chicago &c. R. Co., 114 Iowa 164, 86 N. W. 259; McDermott v. Kentucky &c. R. Co., 93 Ky. 408, 20 S. W. 380; Hasting v. Southern R. Co., 143 Fed. 260, 264 (citing text). But see Harriman v. Pittsburg &c. R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434; Callahan v. Eel River &c. R. Co., 92 Cal. 89, 28 Pac. 104; Birge v. Gardner, 19 Conn. 507, 50 Am. Dec. 261; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 10 N. E. 70, 58 Am. Rep. 387; Chicago &c. R. Co. v. Bockoven, 53 Kans. 279, 36 Pac. 322; Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119; Westerfield v. Lewis, 43 La. Ann. 63, 9 So. 52; Powers v. Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; Mackey v. Vicksburg, 64 Miss. 777, 2 So. 178; Featherstone v. Kansas &c. R. Co., 174 Mo. App. 664, 161 S. W. 284; note to Newman v. Phillipsburgh &c. R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842; Pittsburgh &c. R. Co. v. Shields (Ohio), 31 Cent. L. J. 168 and note; Mason v. Southern R. Co., 58 S. Car. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. 826; Lynch v. Nurdin, 1 Q. B. 29; 2 Thomp. Neg. (2nd ed.) § 1805 et seq. The text is quoted in Flippen Prather Realty Co. v. Mather (Tex. Civ. App.), 207 S. W. 121, 124, but the case was held to come within the rule of the turntable cases.

a right to be there, as, for instance in a public highway, where it crosses the track, it has been held that he cannot be treated as a trespasser.[15] So, if the company invites, allures or entices a child into a place of danger and negligently injures such child while there it may be held liable, in the absence of contributory negligence, for such injury. Some of the authorities have applied this rule in favor of children when they would not have applied it to adults and have held railroad companies liable where that which allured them was not near any public place in which they had a right to be and where they necessarily became intruders or trespassers before they could reach it. This is particularly true of some of the turn-table cases. In an early case the Supreme Court of the United States held that, "while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts," and that when it leaves a turn-table unlocked and unguarded in an exposed place where children are likely to be attracted by it, this may be considered as a constructive invitation to them and the company held liable for their injury.[16] This decision has been followed in many other cases,[17] in some of which the doc-

[15] Krenzer v. Pittsburgh &c. R. Co., 151 Ind. 587, 68 Am. St. 252, 43 N. E. 649, 52 N. E. 220; Louisville &c. R. Co. v. Sears, 11 Ind. App. 654, 38 N. E. 837; Huerzeler v. Central &c. R. Co., 139 N. Y. 490, 34 N. E. 1101; McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep. 668. See also Livingston v. Wabash R. Co., 170 Mo. 452, 71 S. W. 136.

[16] Railroad Co. v. Stout, 17 Wall. (U. S.) 657, 21 L. ed. 745.

[17] Barrett v. Southern Pac. R. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. 186; Ferguson v. Columbus &c. R. Co., 77 Ga. 102; Lewis v. Cleveland &c. R. Co., 42 Ind. App. 337, 84 N. E. 23; Kansas Cent. R. Co. v. Fitzsimmons, 22 Kans. 686, 31 Am. Rep. 203; Brown v. Chesapeake &c. R. Co., 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717; Keefe v. Milwaukee &c. R. Co., 21 Minn. 297, 18 Am. Rep. 393; O'Malley v. St. Paul &c. R. Co., 43 Minn. 289, 45 N. W. 440; Nagel v. Missouri Pac. R. Co., 75 Mo. 653, 42 Am. Rep. 418; Berry v. St. Louis &c. R. Co., 214 Mo. 593, 114 S. W. 27; Atchison &c. R. Co. v. Bailey, 11 Nebr. 332; Bridger v. Ashville &c. R. Co., 27 S. Car. 456, 3 S. E. 860, 13 Am. St. 653; Fort Worth &c.

trine therein announced was stretched to its utmost limits in its application to the facts. But some of the ablest courts of the land, in recent decisions, have refused to follow it,[18] and in this we be-

R. Co. v. Robertson (Tex.), 16 S. W. 1093, 14 L. R. A. 781 and note; Evanisch v. Gulf &c. R. Co., 57 Tex. 123; Ilwaco R. Co. v. Hedrick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. 169. See also Union Pacific R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434; Chesko v. Delaware &c. Co., 218 Fed. 804 (machine shop with open door six feet from sidewalk); Chicago &c. R. Co. v. Fox, 38 Ind. App. 268, 70 N. E. 81; Edgington v. Burlington &c. R. Co., 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561, citing and reviewing the authorities; East Tenn. &c. R. Co. v. Cargille, 105 Tenn. 628, 59 S. W. 141; Chicago &c. R. Co. v. Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920. While the court in the Stout Case, supra, stated the rule as to the duty to trespassers too broadly, without even limiting it to children, what was directly decided was that it was for the jury to determine whether the turn-table was a dangerous machine and the company negligent under the particular circumstances of the case. Some of the other cases have assumed that a turntable is exceptionally dangerous and attractive in itself, and in this, it seems, while professedly relying on that case, have gone to a still greater extreme. See for review of authorities on turntable cases note to Walker's Adm'r v. Potomac &c. R. Co., 105 Va. 1226, 53 S. E. 113, 4 L. R. A. (N. S.) 80.

[18] Daniels v. New York &c. R. Co., 154 Mass. 349, 28 N. E. 283, 33 Cent. L. Jour. 322, 13 L. R. A. 248, 26 Am. St. 253; Ryan v. Towar, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. 481; Reid v. Harmon, 161 Mich. 51, 125 N. W. 761; Delaware &c. R. Co. v. Reich, 61 N. J. L. 635, 40 Atl. 682, 41 L. R. A. 837, 68 Am. St. 727; Frost v. Eastern R. Co., 64 N. H. 220, 9 Atl. 790, 10 Am. St. 396; Walsh v. Fitchburg R. Co., 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 725, 45 Am. St. 615; Thompson v. Baltimore &c. R. Co., 218 Pa. St. 444, 67 Atl. 768, 19 L. R. A. (N. S.) 1162, 120 Am. St. 897, and cases there cited in note; Paolino v. McKendall, 24 R. I. 432, 53 Atl. 268, 60 L. R. A. 133, 96 Am. St. 736; Walker v. Potomac &c. R. Co., 105 Va. 226, 53 S. E. 113 (reviewing authorities); Uthermohlen v. Bogg's Run Co., 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. 884; Conrad v. Baltimore &c. R. Co., 64 W. Va. 176, 61 S. E. 44, 16 L. R. A. (N. S.) 1129. See also Lake Shore &c. R. Co. v. Clark, 41 Ill. App. 343; Holbrook v. Aldrich, 168 Mass. 16, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. 394; Berg v. Duluth &c. R. Co., 111 Minn. 305, 126 N. W. 1093; Wheeling &c. R. Co. v. Harvey, 77 Ohio St. 235, 83 N. E. 66, 122 Am. St. 503, 19 L. R. A. (N. S.) 1136. In Bates v. Nashville &c. R. Co.,

lieve they are justified by reason, if not by the weight of authority. And even if a railroad company should be held liable, as in some of the cases, where it leaves a turn-table unguarded and unfastened in an exposed place near a highway or a place where the public have a right to go and children frequently do go, it does not follow, it seems to us, that it would be liable where the turn-table is far from such a place in an isolated position upon the company's grounds, and we believe that, in such a case, the court might so hold as a matter of law.[19]

§ 1799 (1260). Injury to trespassing children—Attractive nuisance—Illustrative and conflicting cases.—The importance of this subject renders desirable a statement of what has been held in some of the conflicting authorities. On the one hand it has been

90 Tenn. 36, 15 S. W. 1069, 25 Am. St. 665, and Kolsti v. Minneapolis &c. R. Co., 32 Minn. 133, 19 N. W. 655, it was held proper to instruct the jury that the company was not required to so fasten or secure the turn-table that boys could not displace such fastening and put the table in motion. But compare Callahan v. Eel River &c. R. Co., 92 Cal. 89, 28 Pac. 104. The authorities on both sides are reviewed in the note to Walkers' Adm'r. v. Potomac &c. R. Co., 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, and Cahill v. E. B. &c. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094.

[19] See St. Louis &c. R. Co. v. Bell, 81 Ill. 76, 25 Am. Rep. 269; Hanna v. Iowa Cent. R. Co., 129 Ill. App. 134; Walker's Adm'r. v. Potomac &c. R. Co., 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80; Kaumeier v. City Elect. R. Co., 116 Mich. 306, 74 N. W. 481, 40 L. R. A. 385, 387 (citing text); Houck v. Chicago &c. R. Co., 116 Mo. App. 559, 92 S. W. 738. Certainly this must be true where the child could not have been attracted by it until after he became a trespasser. See Chicago &c. R. Co. v. Bockoven, 53 Kans. 279, 36 Pac. 322, 333; Chambers v. Milner Coal & R. Co., 143 Ala. 255, 39 So. 170, 171 (citing this section). In several jurisdictions, while the doctrine of the turn-table cases is followed, it is limited in its application. See Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. 597; Dobbins v. Missouri &c. R. Co., 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. 856; Savannah &c. R. Co. v. Beavers, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314; Witte v. Stifel, 126 Mo. 295, 28 S. W. 891, 47 Am. St. 668; Houck v. Chicago &c. R. Co., 116 Mo. App. 559, 92 S. W. 738, 741; Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. 106.

held, in accordance with what we regard as the true rule, that cars are not "dangerous machines" and attractive to children, within the meaning of the rule adopted in some of the turn-table cases, and that a railroad company owes no duty to a child trespassing in its yards to see that he does not jump on its cars, or to fence its freight yard, [20] nor to keep its cars in good repair, or the doors shut,[21] nor to guard them so that such a child cannot be injured by loosening the brakes.[22] And the turn-table doctrine is not applicable to moving trains.[23] So, even where a railroad company kept old cars and coal dumps in its yard, which was

[20] Barney v. Hannibal &c. R. Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847. See also Rushenburg v. St. Louis &c. R. Co., 109 Mo. 112, 19 S. W. 216; Nixon v. Montana &c. R. Co., 50 Mont. 95, 145 Pac. 81; Bishop v. Union R. Co., 14 R. I. 314, 51 Am. Rep. 386; Catlett v. St. Louis &c. R. Co., 57 Ark. 461, 21 S. W. 1062, 54 Am. & Eng. R. Cas. 113; Louisville &c. R. Co. v. Hurt, 11 Ky. L. 825, 13 S. W. 275; Chicago &c. R. Co. v. Stumps, 69 Ill. 409. But see as to effect of failure to fence, generally: Keyser v. Chicago &c. R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405; Schmidt v. Milwaukee &c. R. Co., 23 Wis. 186; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434, and note to 31 Am. & Eng. R. Cas. 423; note to Bottoms v. Seaboard &c. R. Co., 114 N. Car. 699, 19 S. E 730, 25 L. R. A. 784.

[21] McEacheon v. Boston &c. R. Co., 150 Mass. 515, 23 N. E. 231; Curley v. Missouri Pac. R. Co., 98 Mo. 13, 10 S. W. 593.

[22] Central Branch &c. R. Co. v. Henigh, 23 Kans. 347, 33 Am. Rep. 167; Haesley v. Winona &c. R. Co., 46 Minn. 233, 48 N. W. 1023, 24 Am. St. 220. See also Gay v. Essex &c. R. Co., 159 Mass. 238, 34 N. E. 258, 21 L. R. A. 448, 38 Am. St. 415; Compton v. Missouri Pac. R. Co., 147 Mo. App. 414, 126 S. W. 84; Louisville &c. R. Co. v. Ray, 124 Tenn. 16, 134 S. W. 858, Ann. Cas. 1912D, 910. Nor is the company liable under the turn-table or "attractive nuisance" doctrine for leaving a flat car unbraked and unlocked on a side track where trespassing children move it and are thereby injured. Buddy v. Union Terminal R. Co., 276 Mo. 276, 207 S. W. 821, 825 (citing text). But compare Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094.

[23] Catlett v. St. Louis &c. Ry. Co., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. 254; Underwood v. Western &c. R. Co., 105 Ga. 48, 31 S. E. 123; Wilson v. Atchison R. Co., 66 Kans. 183, 71 Pac. 282; Nixon v. Montana &c. R. Co., 50 Mont. 95, 145 Pac. 8. Compare also Smalley v. Rio Grande &c. R. Co., 34 Utah 423, 98 Pac. 311.

enclosed by a fence from which trespassers had knocked off planks, leaving it open in places, and children were accustomed to go into the yard to play, notwithstanding they were frequently warned and driven out by the employes of the company, it was held that the company had done nothing to invite children there and was not liable for injury to a boy while riding on a coal dump pushed by his companions.[24] In another case it appeared that section men had left a hand-car, when they quit work, at the foot of an embankment, four or five feet below the level of the track, and not near any public place; that some boys had found it and placed it upon the track, when the boy who was injured was attracted to it by seeing them run it on the track, and that he thereupon joined in the sport and was injured by jumping or falling off while it was descending a grade at a high rate of speed. It was held that the company was not negligent in leaving the hand-car unlocked beside the track, and was not liable for such injuries.[25] So, it has been held in many cases that a railroad company is not obliged to keep a lookout for trespassing children upon its track, under ordinary circumstances, or move its cars with reference to them until their presence in danger is discovered.[26] On the other hand, it has been held that

[24] O'Connor v. Illinois Cent. R. Co., 44 La. Ann. 339, 10 So. 678. See also Southern R. Co. v. Benefield, 172 Ala. 588, 55 So. 252; Central R. &c. Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634. But compare Cleveland &c. R. Co. v. Means, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375, and cases there cited. Even if an invitation for children to play about tracks and pick up coal may be implied from long acquiescence, this does not constitute even a license to a six year old boy to go under a standing coal car to cross the track. Papich v. Chicago &. R. Co., 183 Iowa 601, 167 N. W. 686.

[25] Robinson v. Oregon &c. R. Co., 7 Utah 493, 27 Pac. 689, 13 L. R. A. 765 and note.

[26] Woodruff v. Northern Pacific R. Co., 47 Fed. 689; Central &c. R. Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634 and note; Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672; Masser v. Chicago &c. R. Co., 68 Iowa 602, 27 N. W. 776; Wagner v. Chicago &c. R. Co., 122 Iowa 360, 98 N. W. 141; Givens v. Kentucky Cent. R. Co. (Ky.), 15 S. W. 1057; McDermott v. Kentucky Cent. R. Co., 93 Ky. 408, 20 S. W. 380; Morrissey v. Eastern &c. R. Co., 126 Mass. 377, 30 Am. Rep. 686 and note; Wright v. Boston &c. R. Co., 142

where a railroad company allows cars to stand with open doors on a side-track near its depot and close to a public street, where, as it knows, children are in the habit of going to play, it is negligence for it to back other cars against those standing upon the switch, for the purpose of coupling without any notice and without seeking to ascertain whether children were in the cars.[27] So, it has been held that a railroad company is liable for an injury to a boy caused by the explosion of a torpedo which had been left upon the track by its employes at a place where children were in the habit of going with the knowledge and acquiescence of the company and was picked up by another boy who was with him.[28] In another case it was held that where a railroad company

Mass. 296, 7 N. E. 866; Trudell v. Grand Trunk R. Co., 126 Mich. 73, 85 N. W. 250, 253, 53 L. R. A. 271, 273 (citing text); Hepfel v. St. Paul &c. R. Co., 49 Minn. 263, 51 N. W. 1049; Louisville &c. R. Co. v. Williams, 69 Miss. 631, 12 So. 957; Williams v. Kansas City &c. R. Co., 96 Mo. 275, 9 S. W. 573; Chrystal v. Troy &c. R. Co., 105 N. Y. 164, 11 N. E. 380; Pennsylvania R. Co. v. McMullen, 132 Pa. 107, 19 Atl. 27, 19 Am. St. 591; Mitchell v. Philadelphia &c. R. Co., 132 Pa. St. 226, 19 Atl. 28. See also Horn v. Chicago &c. R. Co., 124 Iowa 281, 99 N. W. 1068; ante, § 1798, notes 11, 12. Even where the company has knowledge of frequent use by many people in the daytime, it is held that this does not require the company to look out for them at night. Louisville &c. R. Co. v. Bay's Adm'r., 142 Ky. 400, 134 S. W. 450; Dahmer v. Northern Pac. R. Co., 48 Mont. 152, 136 Pac. 1059, 142 Pac. 209. But compare Lange v. Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989.

[27] Louisville &c. R. Co. v. Popp, 96 Ky. 99, 27 S. W. 992, 10 Lewis Am. Rep. & Corp. 280. See also Davis v. St. Louis &c. Ry. Co. (Tex. Civ. App.), 92 S. W. 831; Cleveland &c. R. Co. v. Means, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 775; Black v. Michigan Cent. R. Co., 146 Mich. 568, 109 N. W. 1052; Lange v. Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989. But it is held that the company is not required to look under its cars. Udell v. Citizens St. R. Co., 152 Ind. 507, 512, 52 N. E. 799; Jordan v. Grand Rapids &c. R. Co., 162 Ind. 464, 70 N. E. 524; Hammers v. Colorado &c. R. Co., 128 La. 648, 55 So. 4, 34 L. R. A. (N. S.) 685.

[28] Harriman v. Pittsburg &c. R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507; Pittsburgh &c. R. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. 840, 31 Cent. L. J. 168. And to the same effect is Mills v. Central &c. R. Co., 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098, 1100 (quoting text). Compare also Illinois Cent. R. Co.

had built a stock-yard some distance from the nearest public place and a child was injured while swinging on a defective gate within the inclosure the company could not be held liable, although it knew that children were in the habit of playing in the vicinity, if such child first climbed over the outer fence or gate therein to get within the inclosure and upon the inside gate, but that it might be liable if the outside gate was negligently left open and the child entered in that way, or if the company had knowledge that children frequently climbed over the outer gate and swung upon the defective gate and took no measure to keep them away or prevent injury to them.[29] There are also cases to which we have referred in a former section, in which it is held that railroad companies must keep a lookout for children upon their tracks, although trespassers or bare licensees, wherever they may reasonably be expected; but most of the courts which have adopted this rule apply it in favor of adults as well as children.

§ 1800 (1261). **Contributory negligence of children.**—The general rule is well settled that children are only required to exercise such care for their own safety as may reasonably be expected in view of their age and condition,[30] or, in other words, a child

v. Schultz, 87 Miss. 321, 39 So. 1005; Loughlin v. Pennsylvania R. Co., 240 Pa. St. 174, 87 Atl. 294. But see Carter v. Columbia &c. R. Co., 19 S. Car. 20, 45 Am. Rep. 754; McShane v. Toronto &c. R. Co., 31 Ont. 185; Obertoni v. Boston &c. R., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422. The Harriman Case is also distinguished in Cleveland &c. R. Co. v. Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142. See also for other cases holding there is no liability, St. Louis &c. R. Co. v. Williams, 98 Ark. 72, 135 S. W. 804, 33 L. R. A. (N. S.) 94; Louisville &c. R. Co. v. Hart, 24 Ky. L. 1123, 70 S. W. 830; Holmes v. Delaware &c. R. Co., 128 App. Div. 24, 112 N. Y. S. 421. And compare Jacobs v. New York &c. R. Co., 212 Mass. 96, 98 N. E. 688, 40 L. R. A. (N. S.) 41.

[29] Chicago &c. R. Co. v. Bockoven, 53 Kans. 279, 36 Pac. 322. See also Chicago &c. R. Co. v. Fox, 38 Ind. App. 268, 70 N. E. 81; Cleveland &c. R. Co. v. Means, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375, and authorities there cited.

[30] Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401, 21 L. ed. 114; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38

must exercise such care as other children of the same age are accustomed to exercise under similar circumstances,[31] unless there is evidence that he is of more or less than average intelligence or the like. This simply means that he, like every one else, must exercise ordinary or reasonable care under the circumstances. The question is usually one for the jury to determine,[32] but the child may be so young that the court may

L. ed. 434, 60 Am. & Eng. R. Cas. 1; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. 242; Edgington v. Burlington &c. R. Co., 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561; Fishburn v. Burlington &c. R. Co., 127 Iowa 483, 103 N. W. 481; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534; Plumley v. Birge, 124 Mass. 57, 26 Am. Rep. 645; note to Slattery v. O'Connell, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653; Young v. Small, 188 Mass. 4, 73 N. E. 1019; Baker v. Flint &c. R. Co., 68 Mich. 90, 35 N. W. 836; Ridenhour v. Kansas City &c. R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Chicago &c. R. Co. v. Grablin, 38 Nebr. 90, 56 N. W. 796, 57 N. W. 522, 60 Am. & Eng. R. Cas. 133, 138; Byrne v. New York &c. R. Co., 83 N. Y. 620; Christensen v. Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746; 1 Thomp. Neg. (2nd ed.), § 292 et seq. See also to the same general effect Garrison v. St. Louis &c. R. Co., 92 Ark. 437, 123 S. W. 657; Indianapolis Tract. &c. Co. v. Croly, 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091; Kelly v. Benas, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903 and note.

[31] Goldstein v. People's R. Co., 5 Pen. (Del.) 306, 60 Atl. 975; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. 242; Wolfe v. Pierce, 24 Ind. App. 680, 57 N. E. 555; Murray v. Richmond &c. R. Co., 93 N. Car. 92; Collins v. South Boston &c. R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466, 3 L. R. A. 385, 15 Am. St. 596; Cincinnati St. R. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688; Haynes v. Raleigh &c. Co., 114 N. Car. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. 786; Townley v. Chicago &c. R. Co., 53 Wis. 626, 11 N. W. 55. See also numerous authorities cited in note in 49 Am. St. 409 et seq. But see Western &c. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320; Gulf &c. R. Co. v. McWhirter, 77 Tex. 356, 14 S. W. 26, 19 Am. St. 755.

[32] Chicago &c. R. Co. v. Becker, 84 Ill. 483; Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. 114; Louisville &c. R. Co. v. Sears, 11 Ind. App. 654, 38 N. E. 837; Collins v. South Boston &c. R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; Lange v. Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989; Dowling v. New

say that he was non sui juris and incapable of contributory negligence or so old and intelligent that he was guilty of contributory negligence as a matter of law, where it is clear that he did not exercise such care as should reasonably be expected of children of the same age and intelligence under the circumstances. There is no absolutely fixed period below which children are non sui juris and at which they at once become sui juris. Thus, it has been held that children of various ages, from one to seven years, were non sui juris,[33] and this is probably the

York &c. R. Co., 90 N. Y. 670; Houston &c. R. Co. v. Simpson, 60 Tex. 103. Stone v. Dry Dock &c. R. Co., 115 N. Y. 104, 21 N. E. 712 (with which compare, however, Tucker v. New York &c. R. Co., 124 N. Y. 308, 26 N. E. 916), 21 Am. St. 670; Schierhold v. North Beach &c. R. Co., 40 Cal. 447; Note to Slattery v. O'Connell, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653; Zwack v. New York &c. R. Co., 160 N. Y. 362, 54 N. E. 785; Strawbridge v. Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St. 670; Edwards v. Chicago &c. R. Co., 21 S. Dak. 504, 110 N. W. 832; Davis v. St. Louis &c. R. Co. (Tex. Civ. App.), 92 S. W. 831. See also Cahill v. E. B. &c. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094 and notes; Hammond &c. R. Co. v. Blockie, 40 Ind. App. 497, 82 N. E. 541; Doggett v. Chicago &c. R. Co., 134 Iowa 690, 112 N. W. 171, 13 L. R. A. (N. S.) 364, as to when children are to be deemed sui juris and as to the question usually being for the jury.

[33] Central Trust Co. v. Wabash &c. R. Co., 31 Fed. 246; Chicago City R. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76 and note (citing cases, but not deciding the question); Chicago City R. Co. v. Tuohy, 196 Ill. 510, 63 N. E. 997, 58 L. R. A. 270 (at least prima facie incapable of such conduct as will constitute contributory negligence); Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723; Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Barnes v. Shreveport &c. R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. 400 and note reviewing the authorities; Keyser v. Chicago &c. R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405; Duggan v. Boston &c. R. Co., 74 N. H. 250, 66 Atl. 829; Carleo v. Delaware &c. R. Co., 77 N. J. L. 607, 72 Atl. 89; Mangam v. Brooklyn R. Co., 38 N. Y. 455, 98 Am. Dec. 66 and note; Bottoms v. Seaboard &c. R. Co., 114 N. Car. 699, 19 S. E. 730, 25 L. R. A. 784 and note, 41 Am. St. 799; Freer v. Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 663 and note; Texas &c. R. Co. v. Fletcher, 6 Tex. Civ. App. 738, 26 S. W. 446; Norfolk &c. R. Co. v. Ormsby, 27 Gratt. (Va.) 455; Schmidt v. Milwaukee &c. R. Co., 23 Wis. 186, 99 Am. Dec. 158; 1 Thomp. Neg. (2nd ed.) § 310.

general rule, but in other cases children less than seven years old have been held sui juris, and even capable of being adjudged guilty of contributory negligence as matter of law for not exercising such care as might reasonably be expected of children of that age.[34] And in the case of children older than seven years of age the question is nearly always held to be one for the jury. In supposed analogy to the rule of the criminal law, however, it has been held in some jurisdictions that a child between seven and fourteen years of age is presumptively incapable of exercising judgment and discretion and that after he has attained that age the contrary presumption prevails, although the presumption may be rebutted in either case.[35] But, as a matter of fact, a child of ordinary intelligence and capacity, between seven and fourteen years of age, is, as every one knows, capable of exercising some judgment and care, and no child on arriving at the age of fourteen makes a sudden leap from darkness into light, from mental incapacity to judgment and discretion, from inability to exercise any discretion or care to ability to exercise distinction and care.[36] We think, therefore, that there is no

[34] Hayes v. Norcross, 162 Mass. 546, 39 N. E. 282; Wright v. Boston R. Co., 142 Mass. 296, 7 N. E. 866; Serano v. New York &c. R. Co., 114 App. Div. 684, 99 N. Y. S. 1103; Cleveland &c. R. Co. v. Tartt, 64 Fed. 830. The New Jersey statute, declaring that any person injured while walking, standing, or playing on a railroad shall be deemed to have contributed to the injury, applies to a boy less than seven years old who had been playing marbles near a railroad siding and was injured when the car from under which he was trying to get a marble was moved. Erie R. Co. v. Hilt, 247 U. S. 97, 38 Sup. Ct. 435, 62 L. ed. 1003.

[35] Lovell v. DeBardelaben &c. Co., 90 Ala. 13, 7 So. 756; Birmingham R. &c. Co. v. Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. 25; Pratt &c. Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. 751; Rhodes v. Georgia &c. R. Co. 84 Ga. 320, 10 S. E. 922, 20 Am. St. 362; Trumbo v. City St. Car Co., 89 Va. 780, 17 S. E. 124; Nagle v. Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413, explained in Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910, 13 L. R. A. 374 and note, 27 Am. St. 633. And when under seven there is more reason for holding that they are non sui juris but not that they at that age at once become sui juris.

[36] See authorities cited in note 32, supra, also, Hepfel v. St. Paul &c. R. Co., 49 Minn. 263, 51 N. W. 1049; Holmes v. Atlantic Ave. R.

foundation for any such presumption, and that the better rule is that it is usually for the jury to determine, without regard to any such arbitrary presumption, whether the particular child has exercised such care, if any, under the circumstances, as might reasonably be expected of a child of his age and capacity, and that a child under fourteen years of age may be declared guilty of contributory negligence by the court, as a matter of law, where the facts are undisputed and no other inference could reasonably be drawn by ordinary and reasonable men. While most of the courts, we think, would admit the correctness of this rule, yet they differ when they come to apply it to the facts. We shall refer briefly to some of the cases in which the question arose as to whether very young children were guilty of negligence as matter of law, selecting, as far as possible, those in which the children were trespassers or bare licensees. In one case a boy between ten and eleven years old, who had been warned against playing on a turn-table, was held guilty of contributory negligence as a matter of law, although he did not fully understand the danger,[37] and in another case a boy between seven and eight years old was held guilty of contributory negligence as matter of law in going to sleep on the track.[38] So, a boy eleven

Co., 16 N. Y. S. 743; Bridger v. Asheville &c. R. Co., 27 S. Car. 456, 3 S. E. 860, 13 Am. St. 653; Central R. &c. Co. v. Golden, 93 Ga. 510, 21 S. E. 68; Paducah &c. R. Co. v. Hoehl, 12 Bush. (Ky.) 41. See also note in 49 Am. St. 410, 411, where numerous authorities are cited; Rohloff v. Fair Haven &c. R. Co., 76 Conn. 689, 58 Atl. 5.

[37] Twist v. Winona &c. R. Co., 39 Minn. 164, 39 N. W. 402, 12 Am. St. 626. So where the boy was thirteen years old. Merryman v. Chicago &c. R. Co., 85 Iowa 634, 52 N. W. 545. But see Union Pac. R. Co. v. Dunden, 37 Kans. 1, 14 Pac. 501.

[38] Krenzer v. Pittsburgh &c. R. Co., 151 Ind. 587, 43 N. E. 649, 68 Am. St. 252. See also Raden v. Georgia R. Co., 78 Ga. 47; Downey v. Baton Rouge &c. R. Co., 122 La. Ann. 481, 47 So. 837; Mollica v. Michigan Cent. R. Co., 170 Mich. 96, 135 N. W. 927. So a little girl seven and a half years old was held guilty of contributory negligence where she stood on a track, without taking any precautions, and was run over by a train which was in plain view for a long distance. Dull v. Cleveland &c. R. Co., 21 Ind. App. 571, 52 N. E. 1013. See also Holian v. Boston El. R. Co., 194 Mass. 74, 80 N. E. 1, 11 L.

years old was held guilty of contributory negligence in trespassing upon the track without paying attention.[39] And in many other cases children of from seven to twelve years of age have been held guilty of contributory negligence in crossing in front of a rapidly moving train,[40] in climbing over or crawling under cars,[41] and in crossing without paying any attention when they must have seen the approaching train if they had looked.[42] So, where a boy sixteen years old deliberately stood on a railroad track with his back to an engine which was twenty feet away and which he knew was liable to move at any moment, he was held negligent as matter of law.[43] On the other hand, there are

R. A. (N. S.) 166; Trudell v. Grand Trunk R. Co., 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271.

[39] Masser v. Chicago &c. R. Co., 68 Iowa 602, 27 N. W. 776. See also Central R. Co. v. Brinson, 70 Ga. 207; Houston &c. R. Co. v. Smith, 77 Tex. 179, 13 S. W. 972. That very young children may be trespassers, see Baltimore &c. R. Co. v. Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. 252; Dull v. Cleveland &c. R. Co., 21 Ind. App. 571, 52 N. E. 1013; Chesapeake &c. R. Co. v. Price's Admr., 179 Ky. 532, 200 S. W. 927. But see note in 49 Am. St. 406 et seq.

[40] Motel v. Sixth Ave. R. Co., 99 N. Y. 632; Wendell v. New York &c. R. Co., 91 N. Y. 420; Manahan v. Steinway &c. R. Co., 125 N. Y. 760, 26 N. E. 736; Payne v. Chicago &c. R. Co., 129 Mo. 405, 31 S. W. 885; Chicago &c. R. Co. v. Laughlin, 74 Kans. 567, 87 Pac. 749 (boy 13 years old).

[41] Studer v. Southern Pac. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. 39; Gay v. Essex &c. R. Co., 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448, 38 Am. St. 415; Wallace v. New York &c. R. Co., 165 Mass. 236, 42 N. E. 1125; Powers v. Chicago &c. R. Co., 57 Minn. 322, 59 N. W. 307; Oregon &c. Co. v. Egley, 2 Wash. 409, 26 Pac. 973, 26 Am. St. 860; Ante, § 1665. See Ecliff v. Wabash &c. R. Co., 64 Mich. 196, 31 N. W. 180; Ostertag v. Pacific R. Co., 64 Mo. 421; Central R. &c. Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634; Lewis v. Baltimore &c. R. Co., 38 Md. 588, 17 Am. Rep. 521; Fitzgerald v. Chicago &c. R. Co., 114 Ill. App. 118.

[42] Tucker v. New York &c. R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. 670; Sheets v. Connolly St. R. Co., 54 N. J. L. 518, 24 Atl. 483; Shirk v. Wabash R. Co., 14 Ind. App. 126, 42 N. E. 656. See also Marden v. Boston &c. R. Co., 159 Mass. 393, 34 N. E. 404; Given v. Kentucky Cent. R. Co., 12 Ky. L. 950, 15 S. W. 1057; Fezler v. Wilmar &c. R. Co., 85 Minn. 252, 88 N. W. 746; Anderson v. Central R. Co., 68 N. J. L. 269, 53 Atl. 391.

[43] Lofdahl v. Minneapolis &c. R. Co., 88 Wis. 421, 60 N. W. 795. See

many cases in which, under somewhat similar circumstances, it was held that the children could not be said to have been negligent as matter of law, although they would undoubtedly have been so adjudged if they had been adults, and in some instances it seems to us, from the facts stated, that they did not exercise any care whatever, or, at least, that they did not exercise such care as might reasonably be expected of children of their age and capacity.[44]

§ 1801 (1262). **Imputable negligence.**—In some jurisdictions the rule prevails that in actions by or on behalf of children who are non sui juris the contributory negligence of their parents, custodians or others who stand in loco parentis is imputed to them.[45] This rule, however, has met with well-merited criti-

also Benedict v. Minneapolis &c. R. Co., 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639.

[44]McGuire v. Chicago &c. R. Co., 37 Fed. 54; Kansas Central R. Co. v. Fitzsimmons, 22 Kans. 686, 31 Am. R. 203, and note; Dealey v. Mullen, 149 Mass. 432, 21 N. E. 763; Powers v. Harlow, 53 Mich. 507, 19 N. W. 507, 51 Am. Rep. 154; Wright v. Detroit &c. R. Co., 77 Mich. 123, 43 N. W. 765; Mackey v. Vicksburg, 64 Miss. 777, 2 So. 178; Tobin v. Missouri Pac. R. Co. (Mo.), 18 S. W. 996; Wyatt v. Citizens' R. Co., 55 Mo. 485; Eswin v. St. Louis &c. R. Co., 96 Mo. 290, 9 S. W. 577; Omaha &c. R. Co. v. Morgan, 40 Nebr. 604, 59 N. W. 81; Barry v. New York &c. R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Stone v. Dry Dock &c. R. Co., 115 N. Y. 104, 21 N. E. 712; Huerzeler v. Central &c. R. Co., 139 N. Y. 490, 34 N. E. 1101; Lake Erie &c. R. Co. v. Mackey, 53 Ohio St. 370, 41 N. E. 980, 29 L. R. A. 757; Rauch v. Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747. See Taylor v. Delaware &c. R. Co., 113 Pa. St. 162, 8 Atl. 43, 57 Am. Rep. 446; Houston &c. R. Co. v. Boozer, 70 Tex. 530, 8 S. W. 119, 8 Am. St. 615; Avey v. Galveston &c. R. Co., 81 Tex. 243, 16 S. W. 1015, 26 Am. St. 809. The general subject is discussed and numerous authorities on both sides are reviewed in the note to Barnes v. Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. 406 et seq. See also where the question as to children not far from seven years of age was held for the jury. Mullin v. St. Louis &c. R. Co., 196 Mo. 572, 94 S. W. 288 (six years old); Grealish v. Brooklyn &c. R. Co., 130 App. Div. 238, 114 N. Y. App. 582, (eight and one-half years old); Simkoff v. Lehigh Valley R. Co., 190 N. Y. 256, 83 N. E. 15 (seven years old).

[45]Meeks v. Southern Pac. R. Co., 52 Cal. 602; Kyne v. Wilmington &c. R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Ohio &c. R. Co. v. Stratton, 78 Ill. 88. Toledo &c. R. Co. v. Grable, 88 Ill. 441 (but later cases render it doubtful if this doctrine now prevails

cism,[46] and is denied in most jurisdictions.[47] So, even where it

in Illinois); Pittsburgh &c. R. Co. v. Vining, 27 Ind. 513, 92 Am. Dec. 269; Lafayette &c. R. Co. v. Huffman, 28 Ind. 287, 92 Am. Dec. 318; Hathaway v. Toledo &c. R. Co., 46 Ind. 25; Smith v. Atchison &c. R. Co., 25 Kans. 738; Louisville &c. R. Co. v. Murphy, 9 Bush (Ky.) 522; Brown v. European &c. R. Co., 58 Maine 384; Wright v. Malden &c. Co., 4 Allen (Mass.) 283; Lovett v. Salem &c. R. Co., 9 Allen (Mass.) 557; Holly v. Boston &c. Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Carey v. Smith, 152 Mass. 294, 25 N. E. 734, 23 Am. St. 842; Fitzgerald v. St. Paul &c. R. Co., 29 Minn. 336, 43 Am. Rep. 212; Hartfield v. Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, and note; Paige v. New York &c. R. Co., 111 App. Div. 828, 98 N. Y. S. 183; Mangam v. Brooklyn &c. R. Co., 38 N. Y. 455, 98 Am. Dec. 66, and note. But see Louisville &c. R. Co. v. Sears, 11 Ind. App. 654, 38 N. E. 837; Cleveland &c. R. Co. v. Keely, 138 Ind. 600, 37 N. E. 406; Evansville v. Senhenn, 151 Ind. 52, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728, 68 Am. St. 218, showing that this is not now the rule in Indiana in an action by the child; Wail v. Dry Dock &c. R. Co., 119 N. Y. 147, 23 N. E. 487; Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. 186; McGeary v. Eastern R. Co., 135 Mass. 363. See also Waite v. Northeastern R., El. Bl. & El. 719; St. Louis &c. R. Co. v. Underwood, 194 Fed. 363, (showing in what states adopted and in what states denied).

[46] 1 Thomp. Neg. (2d ed.) § 292, et seq.

[47] Berry v. Lake Erie R. Co., 70 Fed. 679; Pratt &c. Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. 751; Southern R. Co. v. Forrister, 158 Ala. 477, 48 So. 69; St. Louis &c. R. Co. v. Rexroad, 59 Ark. 180, 26 S. W. 1037; Miles v. St. Louis &c. R. Co., 90 Ark. 485, 119 S. W. 837; Daley v. Norwich &c. R. Co., 26 Conn. 591, 68 Am. Dec. 413; Conger v. Baltimore &c. R. Co., 31 App. D. C. 139; Atlantic &c. R. Co. v. Crosby, 53 Fla. 400, 43 So. 318; Ferguson v. Columbus &c. R. Co., 77 Ga. 102; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. 145; Chicago City R. Co. v. Wilcox (Ill.), 24 N. E. 419, 8 L. R. A. 494, and note (reversed on rehearing, 27 N. E. 899, 138 Ill. 370, 21 L. R. A. 77); Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583; Louisville &c. R. Co. v. Gobin, 52 Ill. App. 565; Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 57 N. E. 88, 41 L. R. A. 728, 68 Am. St. 218; Wymore v. Mahaska County, 78 Iowa 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. 449 and note; Ives v. Welden, 114 Iowa 476, 87 N. W. 408, 54 L. R. A. 854, 89 Am. St. 379; Shippy v. Au Sable, 85 Mich. 280, 48 N. W. 584; Love v. Detroit &c. R. Co., 170 Mich. 1, 135 N. W. 963; Mattson v. Minnesota &c. R. Co., 95 Minn. 477, 104 N. W. 443, 111 Am. St. 483; Westbrook v. Mobile &c. R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. 587 and note; Winters v. Kansas City &c. R. Co., 99 Mo. 509, 12 S. W. 652, 17 Am. St. 591, 6 L. R. A. 536; Berry v. St. Louis &c. R. Co., 214 Mo. 593, 114 S. W. 27;

obtains, it will not prevent a recovery if the child exercised such reasonable and ordinary case as an adult would have exercised under the same circumstances.[48] Where, however, the action is brought by the parent for his own benefit it is justly held that he can not recover if the child was non sui juris and the parent was guilty of contributory negligence in permitting it to go into a dangerous place where it was injured by reason of its failure to exercise ordinary care,[49] or if the child although sui juris, was

Flaherty v. Butte Elec. R. Co., 40 Mont. 454, 107 Pac. 416, 135 Am. St. 630; Huff v. Ames, 16 Nebr. 139, 19 N. W. 623, 49 Am. Rep. 716; Bisaillon v. Blood, 64 N. H. 565, 15 Atl. 147; Cleveland &c. R. Co. v. Manson, 30 Ohio St. 451; Newman v. Phillipsburg &c. R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842; Bottoms v. Seaboard &c. R. Co., 114 N. Car. 699, 19 S. E. 730, 25 L. R. A. 784, 41 Am. St. 799; Kay v. Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Galveston &c. R. Co. v. Moore, 59 Tex. 64, 46 Am. Rep. 265; Allen v. Texas &c. R. Co. (Tex. Civ. App.), 27 S. W. 943; Northern Tex. Trac. Co. v. Roye, 38 Tex. Civ. App. 601, 86 S. W. 621; Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67; Norfolk &c. R. Co. v. Ormsby, 27 Gratt. (Va.) 455; Norfolk &c. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. 718.

[48]Chicago City R. Co. v. Robinson, 127 Ill. 1, 18 N. E. 772, 4 L. R. A. 126; Wiswell v. Doyle, 160 Mass. 42, 35 N. E. 107, 39 Am. St. 451; O'Brien v. McGlinchy, 68 Maine 552, 556.

[49]Pratt &c. R. Co. v. Brawley, 83 Ala. 371, 3 Am. St. 751, 3 So. 555; St. Louis &c. R. Co. v. Cochran, 77 Ark. 398, 91 S. W. 747; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. 145 (negligence of custodian imputed to father but not to mother); Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 N. E. 246; Evansville &c. R. Co. v. Wolf, 59 Ind. 89; Schlenks v. Central &c. R. Co., 15 Ky. L. 409, 23 S. W. 589; Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52; Westbrook v. Mobile &c. R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. 587; Senn v. Southern R. Co., 124 Mo. 621, 28 S. W. 66; Tucker v. Draper, 62 Nebr. 66, 86 N. W. 917, 54 L. R. A. 321; Foley v. New York &c. R. Co., 78 Hun 248, 28 N. Y. S. 816; Bellefontaine &c. R. Co. v. Snyder, 18 Ohio St. 399, 24 Ohio St. 670; Glassey v. Hestonville &c. R. Co., 57 Pa. St. 172; Smith v. Hestonville &c. R. Co., 92 Pa. St. 450, 37 Am. Rep. 705; Westerberg v. Kinzua &c. R. Co., 142 Pa. St. 471, 21 Atl. 878, 24 Am. St. 510; Pollack v. Pennsylvania R. Co., 210 Pa. St. 634, 60 Atl. 312, 105 Am. St. 846, and note; Bamberger v. Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163; Williams v. Texas &c. R. Co., 60 Tex. 205. See also Gress v. Philadelphia &c. R. Co., 228 Pa. St. 482, 77 Atl. 810, 32 L. R. A. (N. S.) 409, and note, 21 Ann. Cas. 142; Kuchler v. Milwaukee Elec. &c. Co., 157 Wis. 107, 146 N. W. 1133.

injured by reason of its failure to exercise such care as might reasonably be expected of one of its age and capacity.[50] But a parent is not necessarily negligent in permitting a child to go with a custodian apparently capable of taking care of it to a place where there is a concealed danger unknown to both,[51] and it has been held that the fact that the child escaped through a door momentarily left open and ran into a place of danger does not necessarily show negligence on the part of the parents,[52] and that domestic exigencies,[53] or even poverty,[54] may sometimes excuse the parents from the exercise of such watchfulness as might otherwise be required of them.

[50]Chicago &c. R. Co. v. Harney, 28 Ind. 28, 92 Am. Dec. 282; Burke v. Broadway &c. R. Co., 34 How. Pr. (N. Y.) 239; Fitzgerald v. St. Paul &c. R. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212.

[51]Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434. See also Chicago City R. Co. v. McKeon, 143 Ill. App. 598; Huerzeler v. Central Cross Town R. Co., 139 N. Y. 490, 34 N. E. 1101. But see where the custodian was young and inexperienced, Gress v. Philadelphia &c. R. Co., 228 Pa. St. 482, 77 Atl. 810, 32 L. R. A. (N. S.) 409. And compare also Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 44 Am. St. 145; Bellefontaine R. Co. v. Snyder, 24 Ohio St. 670.

[52]Weissner v. St. Paul &c. R. Co., 47 Minn. 468, 50 N. W. 606; Pittsburgh &c. R. Co. v. Pearson, 72 Pa. St. 169; Houston City R. Co. v. Dillon, 3 Tex. Civ. App. 303, 22 S. W. 1066; Farris v. Cass Ave. R. Co., 80 Mo. 325; Morgan v. Illinois &c. R. Co., 5 Dill. (U. S.) 96. See also Jacksonville Elec. Co. v. Adams, 50 Fla. 429, 39 So. 183; Perryman v. Chicago &c. R. Co., 242 Ill. 269, 89 N. E. 980; Saxton v. Pittsburg Rys. Co., 219 Pa. St. 492, 68 Atl. 1022.

[53]Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723; Slattery v. O'Connell, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653, and note; McMahon v. Northern Cent. R. Co., 39 Md. 438; Atchison &c. R. Co. v. Calvert, 52 Kans. 547, 34 Pac. 976; Elgin &c. R. Co. v. Raymond, 47 Ill. App. 242.

[54]Walters v. Chicago &c. R. Co., 41 Iowa 71; O'Flaherty v. Union R. Co., 45 Mo. 70, 100 Am. Dec. 343; Isabela v. Hannibal &c. R. Co., 60 Mo. 475; Pittsburg &c. R. Co. v. Pearson, 72 Pa. St. 169; Philadelphia &c. R. Co. v. Long, 75 Pa. St. 257; Compty v. C. H. Starke Dredge &c. Co., 129 Wis. 622, 109 N. W. 650, 9 L. R. A. (N. S.) 652. But this holding is questionable. See Illinois &c. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. 242; Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Cumming v. Brooklyn City R. Co., 104 N. Y. 669, 10 N. E. 855. Compare Mean v. Callison, 28 Okla. 737, 116 Pac. 195.

§ 1802 (1263). Liability for injury to persons on adjacent highway.—Railroad companies should so construct and maintain their premises which abut upon highways, and their tracks which run along or across highways, that they shall not cause injury to travelers who are lawfully and properly using such highways, and if the company is negligent in this respect it will be liable to a traveler, who, while exercising due care on his part, is injured by such negligence.[55] Thus, where a traveler, while walking upon a highway under a bridge upon which a railroad crossed the highway, was injured by a brick which fell from one of the abutments, the company was held liable.[56] So, where a bolt upon an elevated railroad company's track broke and fell, with an iron plate, upon a traveler who was driving upon the highway under the structure, it was held that the company was liable, in the absence of proof of proper inspection.[57] In another case, the plaintiff was injured by cross-ties which fell from a moving gondola car upon him while he was walking along a pathway outside of the railroad right of way, and it was held that the mere fact that the ties fell from the car and injured

[55]Beatty v. Central Iowa R. Co., 58 Iowa 242, 12 N. W. 332; Titcomb v. Fitchburg R. Co., 12 Allen (Mass.) 254; Conlon v. Eastern R. Co., 135 Mass. 195; North Penn. R. Co. v. Robinson, 44 Pa. St. 175; Goldthorpe v. Hardman, 13 Mees. & W. 377; Robbins v. Jones, 15 Com. B. (N. S.) 221. See also notes to Lepnick v. Gaddis, 72 Miss. 200, 16 So. 213, 26 L. R. A. 686; Baltimore &c. R. Co. v. Breinig, 25 Md. 378, 90 Am. Dec. 49, et seq.; Sweeny v. Old Colony R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Illinois Cent. R. Co. v. Schultz, 87 Miss. 321, 39 So. 1005; Fletcher v. Baltimore & P. R. Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. ed. 411; Elliott Roads and Streets (3d ed.), § 1017. Ante, §§ 1575, 1577 This rule was properly applied in a recent case where live coals fell from an elevated railway on a traveler in the street below. Woodall v. Boston El. R. Co., 192 Mass. 308, 78 N. E. 446. See also Walsh v. Boston El. R. Co., 192 Mass. 423, 78 N. E. 451; Hillman v. Boston El. R. Co., 207 Mass. 478, 93 N. E. 653, 32 L. R. A. (N. S.) 198.

[56]Kearney v. London &c. R. Co., L. R. 5 Q. B. 411. See also Pennsylvania &c. R. Co. v. Graham, 63 Pa. St. 290, 3 Am. Rep. 549; Cooke v. Boston &c. R. Co., 133 Mass. 185; Dickie v. Boston &c. R. Co., 131 Mass. 516.

[57]Volkmar v. Manhattan &c. R. Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. 678. See also Lowery v. Manhattan &c. R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12.

him was, under the doctrine of res ipsa loquitur, prima facie evidence of negligence on the part of the railroad company.[58] So, where cars are derailed by the negligence of the company and run into an adjacent building, causing damage to person and property, the company is liable in the absence of contributory negligence.[59] And there are several recent cases in which railroad companies have been held liable where a traveler on a highway was injured by an article thrown or falling from a passing car.[60] So, in another recent case the company was held liable where an employe of one, in whose sand yard a private track was laid, was injured by derailment of a car, caused by sand accumulating on the track, notwithstanding his employer had agreed to keep the track clear.[61] But it has been held that a

[58]Howser v. Cumberland &c. R. Co., 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. 332. See also Chicago &c. R. Co. v. O'Neil, 172 Ill. 527, 50 N. E. 216; Kansas Pac. R. Co v. Ward, 4 Colo. 30; Chesapeake &c. R. Co. v. Davis, 119 Ky. 641, 60 S. W. 14. Several of the courts have shown a tendency to unduly extend this doctrine, it seems to us, under the lead of Judge Thompson, and it is, perhaps, doubtful if the case just cited does not do so. See the article on "Res Ipsa Loquitur," by Judge Thompson, in 10 Cent. L. Jour. 261; Bryne v. Boadle, 2 Hurl. & C. 722; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Hogan v. Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403. The res ipsa loquitur doctrine has been applied in other recent cases where persons being in a proper place were injured by objects flying or falling from a passing engine and tender or train. St. Louis &c. R. Co. v. Armbrust, 121 Ark. 351, 181 S. W. 131, Ann. Cas. 1917D, 537, and cases there reviewed.

[59]Walsh v. Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873; Lane v. Illinois Cent. R. Co., 43 La. Ann. 833, 9 So. 560; Lake Erie &c. R. Co. v. Lowder, 7 Ind. 537, 34 N. E. 447, But see Ewing v. Pittsburgh &c. R. Co., 147 Pa. St. 40, 23 Atl. 340, 14 L. R. A. 666, and note, 30 Am. St. 709, and note.

[60]Northern Ala. R. Co. v. Counts, 166 Ala. 550, 51 So. 938 (projection from car negligently operated); Chicago &c. R. Co. v. Pritchard, 168 Ind. 398, 79 N. E. 508, 9 L. R. A. (N. S.) 857; Willis v. Maysville &c. R. Co., 29 Ky. L. 178, 92 S. W. 604 (piece of ice kicked by brakeman from platform of passing car); Clifford v. New York &c. R. Co., 111 App. Div. 809, 97 N. Y. S. 594; (bundle of newspapers thrown from car). See also Pittsburgh &c. R. Co. v. Warrum, 42 Ind. App. 179, 84 N. E. 356; Pittsburgh &c. R. Co. v. Hoffman, 57 Ind. App. 431, 107 N. E. 315; Geddings v. Atlantic Coast Line R. Co., 91 S. Car. 477, 75 S. E. 284.

[61]Glappa v. Detroit &c. R. Co., 179 Mich. 76, 146 N. W. 134.

railroad company owes no duty with respect to the speed of its trains to one who is casually near its track in the country where there is no road or pathway, and, although some of its cars leave the track, owing to the high rate of speed, and injure such person, the company is not liable, at least, unless, for some reason, the injury might have been anticipated.[62] If, however, the company has invited or induced the public to use a footway over and along one side of its bridge and separated from it by a fence from its track, it is liable to one who is injured while using such footway without contributory negligence, by reason of its failure to exercise ordinary care.[63] In the case just cited the company failed to give any signal and the engine struck a man who was upon the track at the crossing and knocked some tools which he was carrying over the fence and against the plaintiff, who was upon the footway. It was held that he was entitled to recover from the company for the injury thus caused. But in another recent case it was held that where the defendant negligently ran its locomotive through a street at a dangerous rate of speed and struck a person whose body was thus hurled against the plaintiff while the latter was standing on the defendant's station platform, such injury to the plaintiff was not the natural and probable consequence of the defendant's negligence and the plaintiff could not recover therefor.[64]

[62] Holland v. Sparks, 92 Ga. 753, 18 S. E. 990. See also Dillon v. Connecticut &c. R. Co., 154 Mass. 478, 28 N. E. 899; Carr v. Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874, not liable to a trespasser struck by coal falling from a tender. Thomas v. Cincinnati &c. R. Co., 32 Ky. L. 67, 105 S. W. 379. Compare also St. Louis &c. R. Co. v. Lavendusky, 87 Ark. 540, 113 S. W. 204; Covington &c. R. Co. v. Mulvey, 135 Ky. 223, 122 S. W. 129, 26 L. R. A. (N. S.) 204; O'Brien v. Union Freight R. Co., 209 Mass. 449, 95 N. E. 861 (not liable to licensee). The engineer of a train on a track parallel to a highway is not bound to discover the peril of a traveler from a runaway horse, but only to use ordinary care to prevent injury after the peril is discovered. Louisville &c. R. Co. v. Stanaford, 172 Ky. 511, 189 S. W. 427.

[63] Hamill v. Pennsylvania R. Co., 56 N. J. L. 370, 24 L. R. A. 531, 60 Am. & Eng. R. Cas. 124. See also Kentucky &c. Bridge Co. v. Montgomery, 24 Ky. L. Rep. 167, 67 S. W. 1008, 57 L. R. A. 781.

[64] Evansville &c. R. Co. v. Welch, 25 Ind. App. 308, 58 N. E. 88, 81 Am. St. 102.

§ 1803 (1264). Liability for frightening horses—Operation of trains.—A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere sight of its trains or the noises necessarily incident to the running of trains and the operation of the road.[65] Thus, there can be no recovery where the horse is frightened by a statutory signal properly given.[66] So, on the other hand the failure to give a statutory signal will not render the company liable if it is not the proximate cause of the injury,[67] and, according to what we regard as the better rule, the company owes no duty to one who is not upon the highway near the crossing to give the statutory signals, and it is not, therefore, liable to one whose horse,

[65]Hahn v. Southern Pac. R. Co., 51 Cal. 605; Burton v. Philadelphia &c. R. Co., 4 Harr. (Del.) 252; Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 S. E. 374; Peru &c. R. Co. v. Hasket, 10 Ind. 409, 71 Am. Dec. 335; Baltimore &c. R. Co. v. Thomas, 60 Ind. 107; Ohio &c. R. Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 64; Louisville &c. R. Co. v. Schmidt, 134 Ind. 16, 33 N. E. 774; Marion &c R. Co. v. Dubois, 23 Ind. App. 342, 55 N. E. 266; Ochiltree v. Chicago &c. R. Co., 93 Iowa 628, 62 N. W. 7, 11; Whitney v. Maine Cent. R. Co., 69 Maine 208; Flint v. Norwich &c. R. Co., 110 Mass. 222; Favor v. Boston &c. R. Co., 114 Mass. 350, 19 Am. Rep. 364; Lamb v. Old Colony R. Co., 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449; Heininger v. Great Northern &c. R. Co., 59 Minn. 458, 61 N. W. 558; Estler v. Delaware &c. R. Co., 91 N. J. L. 421, 103 Atl. 989; Yingst v. Lebanon &c. St. R. Co., 167 Pa. St. 438, 31 Atl. 687; Gulf &c. R. Co. v. Hord, 39 Tex. Civ. App. 319, 87 S. W. 848; Dewey v. Chicago &c. R. Co., 99 Wis. 455, 75 N. W. 74, 75 (citing text).

[66]Barron v. Chicago &c. R. Co., 89 Wis. 79, 61 N. W. 303; Phillips v. New York &c. R. Co., 84 Hun 412, 32 N. Y. S. 299. See also Atchison &c. R. Co. v. Walkenshaw, 71 Kans. 742, 81 Pac. 463; Lyons v. Chicago &c. R. Co., 28 S. Dak. 31, 132 N. W. 679, 35 L. R. A. (N. S.) 1219 (so where whistle was for private crossing and not required by statute).

[67]Leavitt v. Terre Haute &c. R. Co., 5 Ind. App. 513, 32 N. E. 866; Pennsylvania Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188. So, where a car is left in a highway in violation of statute, the violation of the statute must be a proximate cause of the frightening of the horses and resulting injury in order to render the company liable. Cleveland &c. Co. v. Wynant, 114 Ind. 525, 532, 17 N. E. 118, 5 Am. St. 644. See also McDonald v. International &c. R. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. 803, and note; also Gilson v. Delaware &c. Co., 65 Vt. 213, 26 Atl. 70, 36 Am. St. 802, and note. And see to the effect that the question of proximate cause is for the jury. Miller v. Engle, 185 Mo. App. 558, 172 S. W. 631.

while upon a parallel highway which does not cross the track or in a field, is frightened and runs away because the statutory signals were not given for the crossing of a neighboring highway and the owner thus failed to hear and prepare for the approach of the train.[68] But much necessarily depends upon the language and purpose of the particular statute in question, and the authorities upon the subject are not all in accord.[69] If the failure to give the statutory signals is the proximate cause of the injury, one to whom that duty is due, and who is himself free from contributory negligence, may, of course, recover from the company under ordinary circumstances.[70] So, on the other hand, there

[68]Louisville &c. R. Co. v. Lee, 47 Ill. App. 384; St. Louis &c. R. Co. v. Payne, 29 Kans. 166; Williams v. Chicago &c. R. Co., 135 Ill. 491, 26 N. E. 661, 11 L. R. A. 352, 25 Am. St. 397; East Tenn. &c. R. Co. v. Feathers, 10 Lea (Tenn.) 103. To same effect, see Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84; Pike v. Chicago &c. R. Co., 39 Fed. 754; Nashville &c. R. Co. v. Hembree, 85 Ala. 481, 5 So. 173; Holmes v. Central &c. Co., 37 Ga. 593; Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 S. E. 374; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. 145; Blanchard v. Lake Shore &c. R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. 630; Favor v. Boston &c. R. Co., 114 Mass. 350, 19 Am. Rep. 364; Melton v. St. Louis &c. R. Co., 99 Mo. App. 282, 73 S. W. 231; Everett v. Great Northern R. Co., 100 Minn. 309, 111 N. W. 281, 283 (quoting text); Hall v. Brown, 54 N. H. 495; Elwood v. New York &c. R. Co., 4 Hun (N. Y.) 808; O'Donnell v. Providence &c. R. Co., 6 R. I. 211.

[69]Chicago &c. R. Co. v. Metcalf, 44 Nebr. 848, 63 N. W. 51, 28 L. R. A. 824; Wakefield v. Connecticut &c. R. Co., 37 Vt. 330, 86 Am. Dec. 711; Norton v. Eastern R. Co., 113 Mass. 366; Harty v. Central R. Co., 42 N. Y. 468, 7 N. W. 9, 9 N. W. 116; Hart v. Chicago &c. R. Co., 56 Iowa 166, 41 Am. Rep. 93; Lonergan v. Illinois Cent. R. Co., 87 Iowa 755, 759, 49 N. W. 852, 53 N. W. 236, 17 L. R. A. 254, and note. See Ransom v. Chicago &c. R. Co., 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718. We have already considered that question, and many authorities on both sides are reviewed in the notes in 33 L. R. A. (N. S.) 123, 31 L. R. A. (N. S.) 667, and 14 L. R. A. (N. S.) 998.

[70]Cosgrove v. New York &c. Co., 87 N. Y. 88, 41 Am. Rep. 355, 6 Am. & Eng. R. Cas. 35; Ransom v. Chicago &c. R. Co., 62 Wis. 178, 22 N. W. 147, 51 Am. Rep. 718; Rosenberger v. Grand Trunk R. Co., 8 Ont. App. 482, 15 Am. & Eng. R. Cas. 448; Grand Trunk R. Co. v. Rosenberger, 9 Can. S. C. 311, 19 Am. & Eng. R. Cas. 8. See also Warn v. Chicago &c. R. Co., 149 Iowa 450, 126 N. W. 1104, 31 L. R. A. (N. S.) 667, and cases there cited in note; Rupard v.

are, perhaps, exceptional cases in which the company may be held liable for injuries caused by giving the statutory signals, as, for instance, where the engineer sees that the horse is already frightened and its driver in danger, and that no one else is near who could be affected by the failure to give the signal.[71] In order to render the company liable, however, for injuries caused by giving statutory signals, it must be a very clear case of negligence or wilfulness, for an engineer cannot be expected, upon the spur of the moment, to survey the surroundings and determine with absolute accuracy whether he shall give the signals in compliance with the statute and thus, perhaps, add to the fright of horses and probability of injury to them and their driver, or disobey the letter of the statute with the possibility of a fine for so doing, and injury or death to his passengers and those who may be about to cross the track. Although a railroad company is not liable, under ordinary circumstances, for the fright of horses caused by the operation of its road in the usual manner, it is liable for frightening horses and causing injury by unnecessary and excessive whistling or letting off steam under such circumstances as to constitute negligence or wilfulness.[72]

Chesapeake &c. R. Co., 88 Ky. 280, 11 S. W. 70, 7 L. R. A. 316, and note; Miller v. Engle, 185 Mo. App. 558, 172 S. W. 631; (so as to violation of ordinance).

[71] See Louisville &c. R. Co. v. Stanger, 7 Ind. App. 179; Louisville &c. R. Co. v. Smith, 107 Ky. 178, 53 S. W. 269; Houston &c. R. Co. v. Blan (Tex. Civ. App.), 62 S. W. 552, 553 (citing text). See also note to Effinger v. Ft. Wayne &c. Trac. Co., 175 Ind. 175, 93 N. E. 855, in 33 L. R. A. (N. S.) 123; Louisville &c. R. Co. v. Johnson, 155 Ky. 155, 159 S. W. 685, 47 L. R. A. (N. S.) 918.

[72] Northern Pac. R. Co. v. Sullivan, 53 Fed. 219; Texas &c. R. Co. v. Scoville, 62 Fed. 730, 27 L. R. A. 179, and note (wilfulness); Weil v. St. Louis &c. R. Co., 64 Ark. 535, 43 S. W. 967, 968 (citing text); Toledo &c. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489 (wilfulness); Chicago &c. R. Co. v. Dunn, 52 Ill. 451; Chicago &c. R. Co. v. Steckman, 125 Ill. App. 299, affirmed in 224 Ill. 500, 79 N. E. 602; Chicago &c. R. Co. v. Dickson, 88 Ill. 431; Neer v. Pryor, 201 Ill. App. 79; Billman v. Indianapolis &c. R. Co., 76 Ind. 166, 40 Am. Rep. 230, 6 Am. & Eng. R. Cas. 41; Louisville &c. R. Co. v. Schmidt, 81 Ind. 264, 8 Am. & Eng. R. Cas. 248; Indianapolis &c. R. Co v. Boettcher, 131 Ind. 82, 28 N. E. 551; Rodgers v. Baltimore &c. R. Co., 150 Ind. 397, 49 N. E. 453, 455 (citing text); Chicago &c. R. Co. v. Cummings, 24 Ind. App. 192, 53 N. E. 1026, 1028 (citing text); Louisville

Such act must be a proximate cause of the injury, however, and, where negligence alone is relied upon, the injured party must be free from contributory negligence. The mere sounding of a whistle, or the like, even at a place of extraordinary danger where horses are likely to be present, is not necessarily actionable negligence per se.[73]

§ 1804. Frightening horses—Objects left on or near highway. —The company may also be liable where it negligently leaves

&c. R. Co. v. Street, 139 Ky. 186, 129 S. W. 570; Louisville &c. R. Co. v. Mercer, 178 Ky. 473, 199 S. W. 30; Hill v. Portland &c. R. Co., 55 Maine 438, 92 Am. Dec. 601; Borst v. Lake Shore &c. R. Co., 66 N. Y. 639; Dunn v. Wilmington &c. R. Co., 124 N. Car. 252, 32 S. E. 711, (citing text); Talliaferro v. Atchison &c. Ry. Co., 61 Okla. 27, 160 Pac. 69; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259, 98 Am. Dec. 346; Cobb v. Columbia &c. R. Co., 37 S. Car. 194, 15 S. E. 878 (wilfulness); Nashville &c. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296 (wilfulness); Gulf &c. R. Co. v. Spence (Tex. Civ. App.), 32 S. W. 329; Manchester &c. R. Co. v. Fullarton, 14 Com. B. N. S. 54, 108 Eng. Com. L. 54; Stott v. Grand Trunk R. Co., 24 U. C. C. P. 347. See also Shiver v. Tift, 143 Ga. 791, 185 S. E. 1031, L. R. A. 1918A, 622; Jones v. Spokane &c. Ry. Co., 69 Wash. 12, 124 Pac. 142 (company held liable where its bridge over a highway let smoke and steam through). But compare Kelsey v. New York &c. R. Co., 181 Mass. 64, 63 N. E. 8. Where an electric car running along the highway at the usual rate of speed threw up water and made a loud roaring and hissing noise frightening a horse the company was held liable. Ayars v. Camden &c. R. Co., 63 N. J. L. 416, 43 Atl. 678. As to whether the car should be stopped or speed slackened, see Terre Haute Elec. R. Co. v. Yant, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. 376; Effinger v. Ft. Wayne &c. Co., 175 Ind. 175, 93 N. E. 855, 33 L. R. A. (N. S.) 123, and note; Steimer v. Philadelphia Trac. Co., 134 Pa. St. 199; Doster v. Charlotte St. R. Co., 117 N. Car. 651, 23 S. E. 449, 34 L. R. A. 481, and note; and compare Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436, 49 N. E. 843; Muncie St. R. Co. v. Maynard, 5 Ind. App. 372, 32 N. E. 343; Ward v. Maine Cent. R. Co., 96 Maine 136, 51 Atl. 947.

[73]Cincinnati &c. R. Co. v. Gaines, 104 Ind. 526, 4 N. E. 34, 5. N. E. 746, 54 Am. Rep. 334; Billman v. Indianapolis &c. R. Co., 76 Ind. 166, 40 Am. Rep. 230; Culp v. Atchison &c. R. Co., 17 Kans. 475; Philadelphia &c. R. Co. v. Stinger, 78 Pa. St. 219. The text is also cited to this effect in Baltimore &c. R. Co. v. Rodgers, 150 Ind. 397, 49 N. E. 453, 455. See also 2 Thomp. Neg. (2d ed.) § 1910; Lyons v. Chicago &c. R. Co., 28 S. Dak 31, 132 N. W. 679, 35 L. R. A. (N. S.) 1219.

hand-cars or other obstructions upon a highway,[74] or negligently leaves a derrick projecting over a highway in such a manner as would naturally frighten horses of ordinary gentleness.[75] And this doctrine was applied and the company was held liable where a mail crane was erected by the company beside a highway so that when a mail bag was strung up it was calculated to frighten horses of ordinary gentleness and did frighten the plaintiff's horse and thereby injured him, although the bag was actually placed in position by government employes.[76] But it has been held that it is not liable where horses are frightened at a car in the highway unless horses of ordinary gentleness would naturally be frightened thereby.[77] And it has also been held that there can

[74] Ohio &c. R. Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 64; Southern Ind. R. Co. v. Norman, 165 Ind. 126, 74 N. E. 896, 897 (citing text); Myers v. Richmond &c. R. Co., 87 N. Car. 345, 8 Am. & Eng. R. Cas. 293; Bussian v. Milwaukee &c. R. Co., 56 Wis. 325, 14 N. W. 452, 10 Am. & Eng. R. Cas. 716; Vars v. Grand Trunk R. Co., 23 U. C. C. P. 143; Elliott Roads and Streets, 831. See also Grimes v. Louisville &c. R. Co., 3 Ind. App. 573, 30 N. E. 200; Louisville &c. R. Co. v. Armstrong, 32 Ky. L. 252, 105 S. W. 473; Settlemeyer v. Southern R. Co., 91 S. Car. 147, 74 S. E. 137; Ft. Worth &c. R. Co. v. Morris, 45 Tex. Civ. App. 596, 101 S. W. 1038. Company may be found liable where steam is negligently blown off from an engine standing partly on a crossing so as to frighten the horse of a traveler who had started to cross. Weller v. Lehigh &c. R. Co., 225 Pa. St. 110, 73 Atl. 1024, 24 L. R. A. (N. S.) 1202, and other cases there cited in note.

[75] Jones v. Housatonic R. Co., 107 Mass. 261.

[76] Cleghorn v. Western R. Co., 134 Ala. 601, 33 So. 10, 60 L. R. A. 269; Western R. Co. v. Cleghorn, 143 Ala. 392, 39 So. 133.

[77] Gilbert v. Flint &c. R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592. See also Kyne v. Wilmington &c. R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Cleveland &c. R. Co. v. Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. 644; Elliott Roads and Streets, 794; 2 Thomp. Neg. (2nd ed.) § 1915; Piollett v. Summers, 106 Pa. St. 95, 51 Am. Rep. 496; Texas &c. R. Co. v. McManus, 15 Tex. Civ. App. 122, 38 S. W. 241; Norfolk &c. R. Co. v. Gee, 104 Va. 806, 52 S. E. 572, 3 L. R. A. (N. S.) 111. In the cases last above cited the object was near but not in the highway, and where it is left in the highway in violation of a statute or ordinances many courts hold that this is negligence per se. Central R. Co. v. Curtis, 87 Ga. 416, 13 S. E. 757; Denver &c. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pac. 261; McCoy v. Philadelphia &c. R. Co., 5 Houst. (Del.) 599; Pittsburgh &c. R. Co. v. Kitley, 118 Ind.

be no recovery where the complaint alleges and proceeds upon the theory that the horses were frightened at the car and the evidence shows that they were frightened at a noise in the car.[78]

§ 1805 (1265). Liability to strangers for wilful acts of employes.—We shall elsewhere consider the question as to the liability of a railroad company for the wilful acts of its employes affecting passengers. We shall here treat of the liability to others than passengers. The general rule is that a master is liable for the wilful acts of his servants if done in obedience to the master's order or within the scope of their employment or line of their duty, but not otherwise.[79] The master may also render

152, 20 N. E. 727; Peterson v. Chicago &c. R. Co., 64 Mich. 621, 31 N. W. 548. As to the evidence in such cases, contrast Cleveland &c. R. Co. v. Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. 644; Cleveland &c. R. Co. v. Wynant, 134 Ind. 681, 34 N. E. 569; Bloor v. Delafield, 69 Wis. 273, 34 N. W. 115, 18 Am. & Eng. Corp. Cas. 289; Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396, with Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55, and Crocker v. McGregor, 76 Maine 282, 49 Am. Rep. 611.

[78] Cleveland &c. R. Co. v. Wynant, 100 Ind. 160, 165, 166. For cases holding object calculated to frighten horses and company negligent see Baltimore &c. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. 503; Hanson v. Chicago &c. R. Co., 94 Iowa 409, 62 N. W. 788; Texas Midland R. Co. v. Cardwell (Tex. Civ. App.), 67 S. W. 157; Sherman &c. R. Co. v. Bridges, 16 Tex. Civ. App. 64, 40 S. W. 536; Atchison &c. R. Co. v. Morrow, 4 Kans. App. 199, 45 Pac. 956. For cases holding object not calculated to frighten horses or company not negligent see Harrington v. Chicago &c. R. Co., 53 Ill. App. 344; Gilbert v. Flint &c. R. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. R. 592; Hohman v. New York &c. R. Co., 184 N. Y. 591, 77 N. E. 1189; Webster v. Chicago &c. R. Co., 158 Fed. 769.

[79] White's Supp. to Thomp. Neg., § 556; note to Davis v. Houghtellin, 33 Nebr. 582, 50 N. W. 765, 14 L. R. A. 737; note to Gilliam v. South &c. R. Co., 70 Ala. 268, 15 Am. & Eng. R. Cas. 138; note to Barrett v. Minneapolis &c. R. Co., 106 Minn. 51, 117 N. W. 1047, 18 L. R. A. (N. S.) 416; "Assaults by Servants," 38 Cent. L. J. 447; note Pittsburgh &c. R. Co. v. Shields, 31 Cent. L. J. 168; "Master's Liability for Wilful or Malicious Acts of Servants," 2 Am. L. Reg. & Rev. (1894) 120. See also Moran v. Rockland &c. R. Co., 99 Maine 127, 58 Atl. 676; Bowen v. Illinois Cent. R. Co., 136 Fed. 306, 312, 70 L. R. A. 915 (quoting text); Parnlo v. Philadelphia &c. R. Co., 145 Fed. 664. The narrower doctrine supposed to

himself liable by ratifying the act.[80] Railroad companies have been held liable for the act of their engineers in wantonly and wilfully frightening horses by blowing the whistle or letting off steam,[81] for an assault by an employe left in charge of a ticket office growing out of a controversy over his failure to give the plaintiff the proper change,[82] for an assault by an employe in charge of a train upon one who got upon the platform of a baggage car in violation of the rules of the company, [83] for an assault

have been announced in McManus v. Cricket, 1 East 106, which was followed in many of the earlier cases, is now repudiated in most jurisdictions. Limpus v. London General Omnibus Co., 1 H. & C. 526, and Green v. London &c. Co., 7 C. B. (N. S.) 290, are leading cases. "In an action against a railroad company to recover for the death of a boy killed by a detective while stealing a ride on a freight train, if the evidence shows that he acted maliciously or in the pursuit of some purpose of his own, the defendant railroad company, in whose employ he was, is not bound by his act; but, if while acting within the general scope of his employment, he disregards his master's orders or exceeds his powers, the master will be responsible for his conduct." Sharp v. Erie R. Co., 184 N. Y. 100, 76 N. E. 923. In Mississippi Cent. R. Co. v. Williams, 112 Miss. 238, 72 So. 925 the company was held not liable to one on the right of way struck by wood which a fireman threw from the tender opposite his home, contrary to rules of the company. But compare Fletcher v. Baltimore & P. R. Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. ed. 411.

[80] International &c. R. Co. v. Miller, 9 Tex. Civ. App. 104, 28 S. W. 233; Bass v. Chicago &c. R. Co., 39 Wis. 636; Gasway v. Atlanta &c. R. Co., 58 Ga. 216. See also Tokolewski v. Plankinton &c. Co., 143 Wis. 52, 126 N. W. 554. As to whether retaining servant with knowledge is ratification see Everingham v. Chicago &c. R. Co., 148 Iowa 662, 127 N. W. 1009, Ann. Cas. 1912C, 848; and note reviewing and distinguishing apparently conflicting cases on both sides.

[81] Ante, §§ 1803, 1804.

[82] Fick v. Chicago &c. R. Co., 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878, and note. See also McKernan v. Manhattan R. Co., 22 J. & S. (N. Y.) 354; Gassenheimer v. Western R. Co., 175 Ala. 319, 57 So. 718; Christian v. Columbus &c. R. Co., 79 Ga. 460, 7 S. E. 216, 90 Ga. 124, 15 S. E. 701; Bledsoe v. West, 186 Mo. App. 460, 171 S. W. 622; Daniel v. Petersburg R. Co., 117 N. Car. 592, 23 S. E. 327; post, § 1842.

[83] Rounds v. Delaware &c. R. Co., 64 N. Y. 129, 21 Am. Rep. 597. See also Stewart v. Brooklyn &c. R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Western &c. R. Co. v. Turner, 72 Ga. 292, 53 Am. Rep. 842; Penas v. Chicago &c. R. Co., 112 Minn.

by a gate-keeper upon one who had a proper ticket and was attempting to pass through the gate at a station to take passage upon a train,[84] for the shooting of a trespasser upon a bridge by a watchman whose duty it was to guard the same,[85] and for the act of a street-car driver in purposely running into a carriage.[86] So, where an employe of a railroad company in peaceable possession of a line of road was shot and injured by employes of another company while attempting to take possession and drive away the servants of the former company, for which purpose the latter company had armed such employes, it was held that the defendant company was liable to him.[87] If an employe steps aside from the line of his duty and commits an independent tort on his own account and outside of the scope of his employment the master is not liable therefor.[88] Thus a

203, 127 N. W. 926, 140 Am. St. 470. But see Louisville &c. R. Co. v. Douglass, 69 Miss. 723, 11 So. 933, 30 Am. St. 582.

[84] Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219. The plaintiff, however, was held to be a passenger and the liability of the company was placed upon the ground of a violation of the duty to a passenger.

[85] Hachl v. Wabash R. Co., 119 Mo. 325, 24 S. W. 737. See also St. Louis &c. R. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. 105; St. Louis &c. R. Co. v. Mitchell, 100 Ark. 314, 140 S. W. 136; Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146; Southern R. Co. v. James, 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257. But compare Golden v. Newbroad, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257; Georgia R. Co. v. Wood, 94 Ga. 124, 21 S. E. 288, 47 Am. St. 146; Candiff v. Louisville &c. R. Co., 42 La. Ann. 477, 7 So. 601; Chicago &c. R. Co. v. Smith, 10 Kans. App. 162, 63 Pac. 294; Turley v. Boston &c. R. Co., 70 N. H. 348, 47 Atl. 261.

[86] Cohen v. Dry Dock R. Co., 69 N. Y. 170; Mott v. Consumers' Ice Co., 73 N. Y. 543.

[87] Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146.

[88] Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. 223; Evansville &c. R. Co. v. Baum, 26 Ind. 70; Everingham v. Chicago &c. R. Co., 148 Iowa 662, 127 N. W. 1009, Ann. Cas. 1912C, 848; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. 512; Candiff v. Louisville &c. R. Co., 42 La. Ann. 477, 7 So. 601; Campbell v. Northern Pac. R. Co., 51 Minn. 488, 53 N. W. 768; Alabama &c. R. Co. v. McAfee, 71 Miss. 70, 14 So. 260; Alabama &c. R. Co. v. Harris, 71 Miss. 74, 14 So. 263; Round's v. Delaware &c. R. Co., 64 N. Y. 129, 21

railroad company is not liable for injuries inflicted by an employe in a purely personal quarrel with one between whom and the corporation there is no connection or privity,[89] nor for an assault by a trainman on one who had been a passenger but had left the train and ceased to be a passenger at the time of the assault.[90] So, where a conductor stops his train, pursues a boy to his father's house, with a pistol in his hand, seizes him and carries him off on the train, such an act is not within the scope of the conductor's employment and the company is not liable therefor.[91] It has also been held that a railroad company is not liable for injuries received by a stranger whom its engineer

Am. Rep. 597; Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. 793, and note; Hower v. Ulrich, 156 Pa. St. 410, 27 Atl. 37. See also Waaler v. Great Northern R. Co., 18 S. Dak. 420, 100 N. W. 1097, 70 L. R. A. 731, and note; with which, however, compare Jackson v. American Tel. Co., 139 N. Car. 347, 51 S. E. 1015, 70 L. R. A. 738; Barmore v. Vicksburg &c. R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627.

[89] Cofield v. McCabe, 58 Minn. 218, 59 N. W. 1005. See also Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Campbell v. Northern Pac. Railroad Co., 51 Minn. 488, 53 N. W. 768; St. Louis &c. Ry. Co. v. Wyatt, 84 Ark. 193, 105 S. W. 72; Illinois Cent. R. Co. v. Ross, 31 Ill. App. 170; Wood v. Detroit &c. R. Co., 52 Mich. 402, 18 N. W. 124, 50 Am. Rep. 259; Pittsburgh &c. R. Co. v. Donahue, 70 Pa. St. 119. Compare also Smith v. Memphis &c. Co. (Tenn.), 1 S. W. 104 (an extreme case). It has also been held that a railroad company is not liable for an injury received where a fireman from mere wantonness placed a torpedo on the track. Chicago &c. R. Co. v. Epperson, 26 Ill. App. 72. See also Jones v. Grand Trunk R. Co., 45 Up. Can. (Q. B.) 193; Carter v. Columbia &c. R. Co., 19 S. Car. 20, 45 Am. Rep. 754. But compare Harriman v. Pittsburgh &c. R. Co., 45 Ohio St. 11, 4 Am. St. 507.

[90] Central R. Co. v. Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. 425; Eads v. Metropolitan &c. R. Co., 43 Mo. App. 536; Berryman v. Pennsylvania R. Co., 228 Pa. St. 621, 77 Atl. 1011, 30 L. R. A. (N. S.) 1049; McGilvray v. West End St. R. Co., 164 Mass. 122, 41 N. E. 116; Crocker v. New London &c. R. Co., 24 Conn. 249. But see Peeples v. Brunswick &c. R. Co., 60 Ga. 281; Savannah &c. R. Co. v. Bryan, 86 Ga. 312, 12 S. E. 307, 22 Am. St. 464; Wise v. Covington &c. R. Co., 13 Ky. L. 110.

[91] Gilliam v. South &c. R. Co., 70 Ala. 268, 15 Am. & Eng. R. Cas. 138. But see Girvin v. New York Cent. R. Co., 166 N. Y. 289, 59 N. E. 921; Chicago &c. R. Co. v. Kerr, 74 Nebr. 1, 104 N. W. 49.

has, by threats of personal violence, compelled to uncouple cars,[92] nor for injuries caused by hot water turned by the engineer and fireman in sport upon one whom they had invited to ride upon the engine,[93] nor for an assault upon one who was wrongfully riding upon a freight train by invitation of the conductor, in the absence of anything to show that the assailant was acting within the scope of his employment.[94]

§ 1806. Liability for wrongful arrest or the like.—There is conflict among authorities as to when, if at all, a railroad company is liable for a wrongful arrest or the like made or instigated by its employes. On the one hand it has been held that the company is not liable for a false arrest instigated by a ticket agent

[92] New Orleans &c. R. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356. See also Louisville &c. R. Co. v. Douglass, 69 Miss. 723, 11 So. 933, 30 Am. St. 582; Flower v. Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251.

[93] International &c. R. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517. See also Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. 223; Evers v. Krouse, 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592. But see Terre Haute &c. R. Co. v. Jackson, 81 Ind. 19, as to liability in case of passenger; also see Enting v. Chicago &c. R. Co., 116 Wis. 13, 92 N. W. 358, 60 L. R. A. 158, 96 Am. St. 936; Alsever v. Minneapolis &c. R. Co., 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748, (in which the company was held liable to strangers); Gulf &c. R. Co. v. Dickey (Tex. Civ. App.), 173 S. W. 967. But compare Berry v. Boston &c. R. Co., 188 Mass. 536, 74 N. E. 933; Soderlund v. Chicago &c. R. Co., 102 Minn. 240, 113 N. W. 449, 13 L. R. A. (N. S.) 1193. Compare also Galveston &c. R. Co. v. Currie, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, with Black v. Rock Island &c. R. Co., 125 La. Ann. 101, 51 So. 82, 26 L. R. A. (N. S.) 166.

[94] Smith v. Louisville &c. R. Co., 124 Ind. 394, 24 N. E. 753. It did not appear in what capacity the assailant worked for the company. It was simply alleged that he was a servant of the company. A somewhat similar case, where a passenger was assaulted by some one carrying a lantern and wearing a badge and lettered cap, but not shown to have been a servant of the company, is Sachrowitz v. Atchison &c. R. Co., 37 Kans. 212. But see Louisville &c. R. Co. v. Kendall, 138 Ind. 313, 36 N. E. 415. In Parulo v. Philadelphia &c. R. Co., 145 Fed. 664, a somewhat similar case, it was left to the jury to determine whether the plaintiff was assaulted by an employe of the company.

after the act for which the arrest was made had been fully consummated, as, for instance, where he causes the arrest of one suspected of having attempted to rob the till under his charge, after the attempt had ceased,[95] or causes the arrest of one suspected of passing a counterfeit bill after having accepted the same.[96] On the other hand, it has been held that the company is liable for the conduct of a ticket agent who immediately charges a woman who has purchased a ticket from him with giving him counterfeit money, and, upon her refusal to make it good, places his hand upon her shoulder, calls her a counterfeiter and prostitute, and orders her to remain until he calls a policeman to arrest and search her.[97] So, it has been held in some jurisdictions that the company is liable for the act of its conductor in wrongfully arresting or causing the arrest of a passenger as disorderly or a trespasser who refuses to pay fare,[98] while in others it has been

[95] Allen v. London &c. R. Co., L. R. 6 Q. B. 65. See also Porter v. Chicago &c. R. Co., 41 Iowa 358; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448.

[96] Mulligan v. New York &c. R. Co., 129 N. Y. 506, 29 N. E. 592, 14 L. R. A. 791, 26 Am. St. 539; Lafitte v. New Orleans &c. R. Co., 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337. See also Abrahams v. Deakin, L. R. (1891), 1 Q. B. 516; Galveston &c. R. Co. v. Donahoe, 56 Tex. 162; Daniels v. Atlantic Coast Line R. Co., 136 N. Car. 517, 48 S. E. 816, 67 L. R. A. 455, and cases cited.

[97] Palmeri v. Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. 632. So the company has been held liable for the act of its baggage master, in charge of a waiting room, in assisting in the wrongful arrest of a passenger. Texas &c. R. Co. v. Dean, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943. See also Norfolk &c. Ry. Co. v. Perdue, 117 Va. 111, 83 S. E. 1058.

[98] Krulevitz v. Eastern R. Co., 143 Mass. 228, 9 N. E. 613; Lafitte v. New Orleans &c. R. Co., 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337; Winneger v. Central &c. R. Co., 85 Ky. 547, 4 S. W. 237; Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. 827; Moore v. Metropolitan R. Co., L. R. 8 Q. B. 36. See also Wheeler &c. Co. v. Boyse, 36 Kans. 350, 12 Pac. 362, 59 Am. Rep. 571 (liability for false imprisonment); Lynch v. Metropolitan &c. R. Co., 90 N. Y. 77, 43 Am. Rep. 141 (same); Corbett v. Twenty-third St. R. Co., 42 Hun (N. Y.) 587 (same); Duggan v. Baltimore &c. R. Co., 159 Pa. St. 248, 28 Atl. 182, 186, 39 Am. St. 672; Texas &c. R. Co. v. Williams, 62 Fed. 440. See also Johnston v. Chicago &c. R. Co., 130 Wis. 492, 110 N. W. 424 (arrest of one for throwing missiles

held that there is no liability in such cases.[99] The company is liable for a wrongful assault or arrest made or caused by a detective employed by it in the course of such employment, even though he has also been given police powers by the public authorities at its request.[1] But it has been held that a corporation is not liable for a false arrest ordered by its superintendent for an alleged assault upon himself while in charge of its prop-

at train within scope of watchman's employment).

[99] See Cunningham v. Seattle &c. Co., 3 Wash. 471, 28 Pac. 745; Edwards v. London &c. R. Co., L. R. 5 C. P. 445; Poulton v. London &c. R. Co., L. R. 2 Q. B. 534. It would seem that this is within the scope of the conductor's duties, and if so, the company would be liable if the arrest was wrongful. Compare Sullivan v. Old Colony R. Co., 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513.

[1] Harris v. Louisville &c. R. Co., 35 Fed. 116; St. Louis &c. R. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. 105; Union Depot R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Evansville &c. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; Pennsylvania Co. v. Weddle, 100 Ind. 138; Dickson v. Waldron, 135 Ind. 507, 35 N. E. 1, 24 L. R. A. 483, 41 Am. St. 440; Robards v. P. Bannon &c. Co., 130 Ky. 380, 113 S. W. 429, 132 Am. St. 395, 18 L. R. A. (N. S.) 923, and other cases there cited in opinion and notes; King v. Illinois Cent. R. Co., 69 Miss. 245, 10 So. 42; Eichengreen v. Louisville &c. R. Co., 96 Tenn. 229, 34 S. W. 219, 31 L. R. A. 702, 54 Am. St. 833; Edwards v. Midland R. Co., L. R. 6 Q. B. D. 287. But see Wells v. Washington Market Co., 19 Wash. Law R. 52; Hershey v. O'Neill, 36 Fed. 168; Tolchester &c. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846; Baltimore &c. R. Co. v. Strube, 111 Md. 119, 73 Atl. 697; Rand v. Butte Elec. R. Co., 40 Mont. 398, 107 Pac. 87; Jardine v. Cornell, 50 N. J. L. 485; Fitzpatrick v. New York &c. R. Co., 15 N. Y. Week Dig. 506; Texas &c. R. Co. v. Parsons, 102 Tex. 157, 113 S. W. 914, 132 Am. St. 857. As shown in these last cases, the rule must be carefully applied, and the corporation is not liable for the act of the police officer as such and not as a servant of the company. See also Walker v. Southeastern R. Co., 23 L. T. R. (C. P.) 14; Philadelphia &c. R. Co. v. Stumpo, 112 Md. 571, 77 Atl. 266; Berryman v. Pennsylvania R. Co., 228 Pa. St. 621, 77 Atl. 1011, 30 L. R. A. (N. S.) 1049. And it has been held that the presumption is that a police officer in arresting a disorderly person is acting in his official capacity and not as agent for the company although it pays him. Foster v. Grand Rapids &c. R. Co., 140 Mich. 689, 104 N. W. 380. But it was held liable if the arrest was made at the request of the conductor for failure to pay fare.

erty.[2] In very many instances the question whether the employe or servant was acting within the scope of his authority in such a sense as to make the employer liable for his torts is one of fact, but there are cases where the question is one of law.[3]

§ 1807 (1265a). Care in the operation of handcars towards trespassers.—It has been held that the rule of law in regard to persons in charge of a locomotive, when a trespasser is seen walking along on a bridge, is not strictly applied to persons in charge of a handcar. Thus, one operating a handcar across a trestle or bridge has the right to assume that persons crossing ahead of him will step off the track and permit him to pass, particularly where it appears that others have done so and that there is sufficient room. He owes no duty towards such trespassers until he discovers by their behavior and conduct that they can not or do not intend to leave the track, and such conduct or behavior must manifest itself positively. It will not be inferred from the mere act of remaining on the track.[4]

§ 1808 (1265b). Care towards persons lawfully at work on the track.—The law does not require persons at work on the track to maintain a constant lookout for approaching trains and at the same time pursue their labor, but it does require of the operatives of trains the exercise of an active vigilance to avoid injuring such persons and that they should give reasonable danger signals

[2] Tolchester &c. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846. See also Stevens v. Midland &c. R. Co., 10 Exch. 352. Most of the decisions upon the general subject are cited in the opinions and notes to the cases referred to in the note to Texas &c. R. Co. v. Dean, 70 L. R. A. 943. See also Cobb v. Simon, 124 Wis. 467, 102 N. W. 891; Johnston v. Chicago &c. R. Co., 130 Wis. 492, 110 N. W. 424, 426 (citing text).

[3] Ante, § 247; post, §§ 1820, 1842; Elliott's Gen. Pr. § 426; Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480, 43 N. E. 1. Held a question of fact in Sharp v. Erie R. Co., 184 N. Y. 100, 76 N. E. 923. So in Girvin v. New York Cent. &c. R. Co., 166 N. Y. 289, 59 N. E. 921, and in many other cases already cited.

[4] Wright v. Southern Railway Co., 132 N. C. 327, 43 S. E. 845. Compare also McEwen v. Central of Ga. R. Co., 127 Ga. 246, 56 S. E. 289; Texas &c. R. Co. v. Meyers, 58 Tex. Civ. App. 403, 125 S. W. 49.

to attract the attention of men so employed so as to enable them to get out of the way before it is too late.[5] Whether a railroad company has been negligent in the matter of giving such signals is usually a question of fact for the jury.[6] Persons at work around railroad yards are usually presumed to know the methods of work employed in such yards—as for example, that cars are frequently bumped together with great force—and they are required to anticipate this danger and protect themselves therefrom.[7] Contributory negligence defeating a recovery for injuries was ascribed in one case to the act of an experienced clerk employed in a railroad yard to take car numbers, in standing with one foot between the rails of a parallel track while engaged in this work without looking or listening for approaching trains on this track.[8]

§ 1809 (1265c). Persons engaged in loading and unloading cars.—Shippers and consignees of freight on railroad premises for

[5] Louisville &c. R. Co. v. Williams, 198 Ala. 425, 73 So. 548 (quoting text); O'Leary v. Chicago &c. R. Co. (Iowa), 103 N. W. 362; Degitz v. Missouri &c. Ry. Co., 97 Kans. 654, 156 Pac. 743, 746 (citing text); Louisville &c. R. Co. v. Johnson's Admx., 161 Ky. 824, 171 S. W. 847; Baltimore &c. R. Co. v. State, 33 Md. 542; Goodfellow v. Boston &c. R. Co., 106 Mass. 461; McWilliams v. Detroit Mills Co., 31 Mich. 274; Haley v. New York &c. R. Co., 7 Hun (N. Y.) 84; Stinson v. New York &c. R. Co., 32 N. Y. 333; Barton v. New York &c. R. Co., 1 N. Y. S. Ct. (T. & C.) 297, affirmed in 56 N. Y. 660. But there is usually no such duty due an employe who is himself charged with looking out for the movement of engines and cars. Cincinnati &c. R. Co. v. Swann, 160 Ky. 458, 169 S. W. 886; Armstrong v. Denver &c. R. Co. (Mo. App.), 203 S. W. 246; Chesapeake &c. R. Co. v. Shiflett's Admx., 118 Va. 63, 86 S. E. 860, 863. Compare, however, St. Louis &c. R. Co. v. Puckett, 88 Ark. 204, 114 S. W. 224; Hoffard v. Illinois Cent. R. Co., 138 Iowa 543, 110 N. W. 446; West Kentucky Coal Co. v. Davis, 138 Ky. 667, 128 S. W. 1074; Young v. St. Louis &c. Ry. Co., 227 Mo. 307, 127 S. W. 19.

[6] Galveston &c. R. Co. v. Levy, 35 Tex. Civ. App. 107, 79 S. W. 879.

[7] Rock Island &c. R. Co. v. Dormady, 103 Ill. App. 127; O'Day v. Chicago &c. R. Co., 97 Ill. App. 632.

[8] Wilson v. Illinois Cent. R. Co., 210 Ill. 603, 71 N. E. 398, affirming 109 Ill. App. 542. See also Louisville &c. R. Co. v. Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119; Cincinnati &c. R. Co. v. Helm, 149 Ky. 340, 148 S. W. 25.

the purpose of loading and unloading cars are properly there and are not trespassers, or bare licensees, and the railroad company is bound to use reasonable care to avoid injuring them while so engaged.[9] If such persons while so engaged, and without negligence on their own part other than that inattention to their own safety which an absorption in the duties in which they are engaged naturally produces, are hurt by the negligence of the railway company, they have an action for damages.[10] It is a duty of switch crews with knowledge,[11] or the means of knowledge that

[9] Chicago &c. R. Co. v. Goebel, 119 Ill. 515; Bachant v. Boston &c. R. Co., 187 Mass. 392, 73 N. E. 642; Ladd v. New York &c. R. Co., 193 Mass. 359, 79 N. E. 742, 9 L. R. A. (N. S.) 874, and cases cited; Ward v. Maine Central R. Co., 96 Maine 136, 51 Atl. 947; Weatherford &c. R. Co. v. Duncan, 88 Tex. 611, 32 S. W. 878; Missouri &c. R. Co. v. Holman, 15 Tex. Civ. App. 16; St. Louis &c. R. Co. v. Fenlaw (Tex. Civ. App.), 36 S. W. 295; International &c. R. Co. v. Hall (Tex. Civ. App.), 25 S. W. 52; Gulf &c. R. Co. v. Wittnebert, 101 Tex. 368, 108 S. W. 150, 14 L. R. A. (N. S.) 1227, 130 Am. St. 858, and cases cited in notes. See also Louisville &c. R. Co. v. Morgan, 165 Ala. 418, 51 So. 827; Santa Fe &c. R. Co. v. Ford, 10 Ariz. 201, 85 Pac. 1072; Starr v. Southern R. Co., 4 Ga. App. 436, 61 S. E. 735; St. Louis &c. R. Co. v. Ridge, 20 Ind. App. 547, 49 N. E. 828; Baltimore &c. R. Co. v. Frennepohl, 44 Ind. App. 105, 87 N. E. 1059; Union &c. R. Co. v. Harwood, 31 Kans. 388; Linker v. Union Pac. R. Co., 82 Kans. 580, 109 Pac. 678; Chesapeake &c. R. Co. v. Wiley, 28 Ky. L. 770, 90 S. W. 557; Foss v. Chicago &c. R. Co., 33 Minn. 392; Eckert v. Great Northern R. Co., 104 Minn. 435, 116 N. W. 1024; Gessly v. Missouri Pac. R. Co., 32 Mo. App. 413; Ackley v. West Jersey &c. R. Co., 76 N. J. L. 741, 71 Atl. 273; St. Louis &c. R. Co. v. Colo., 49 Okla. 1, 149 Pac. 872, L. R. A. 1915F, 868 and note; Nashville &c. R. Co. v. Wade, 127 Tenn. 154, 153 S. W. 1120, Ann. Cas. 1914B, 1020.

[10] Texas &c. R. Co. v. Pennell, 2 Tex. Civ. App. 127, 21 S. W. 273. The statement in the first two sentences of this section was approved, and an instruction in practically the same words was held proper, in St. Louis &c. R. Co. v. Cole, 49 Okla. 1, 149 Pac. 872, L. R. A. 1915F, 866, 876.

[11] Chicago &c. R. Co. v. Shaw, 116 Fed. 621; Elgen &c. R. Co. v. Thomas, 115 Ill. App. 508, affirmed in 215 Ill. 158, 74 N. E. 109; Pratt v. New York &c. R. Co., 187 Mass. 5, 72 N. E. 328; Fisher v. New York Dock Co., 91 App. Div. 526, 87 N. Y. S. 117; St. Louis &c. R. Co. v. Kennemore (Tex. Civ. App.), 81 S. W. 802; Copley v. Union Pacific R. Co., 26 Utah 361, 73 Pac. 517. See also Morrill v. Detroit &c. R. Co., 159 Mich. 478, 124 N. W. 520;

persons are loading or unloading cars, to warn them of an intention to switch cars over a track on which their car is placed.[12] These persons do not assume the risk of injuries from this cause.[13] The persons actually at work must be notified; it is not sufficient to notify their employers.[14] Furthermore the railroad company owes to persons engaged in this work the duty to furnish cars in such repair that they may be used with reasonable safety.[15] But the railroad company is not an insurer of the safety of persons so engaged.[16] And the person engaged in this work will not be allowed to recover for injuries towards which his own negligence has contributed.[17] Thus, for example, a recovery was

Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194, 112 N. W. 915.

[12] Central of Georgia R. Co. v. Duffy, 116 Ga. 346, 42 S. E. 510; Linker v. Union Pac. R. Co., 82 Kans. 580, 109 Pac. 678, (quoting text); St. Louis &c. R. Co. v. Cole, 49 Okla. 1, 149 Pac. 872, L. R. A. 1915F, 866. That it is the duty of the trainmen to acquaint themselves with the dangerous position of such person before moving the train. See also Chesapeake &c. R. Co. v. Wiley, 28 Ky. L. 770, 90 S. W. 557. And compare Missouri &c. R. Co. v. Duncan, 104 Ark. 409, 148 S. W. 647.

[13] Kansas Southern R. Co. v. Moles, 121 Fed. 351; Lake Erie &c. R. Co. v. Gaughan, 26 Ind. App. 1, 58 N. E. 1072; Louisville &c. R. Co. v. Smith, 27 Ky. L. 257, 84 S. W. 755; St. Louis &c. R. Co. v. Kennemore, 81 S. W. 802; O'Leary v. Erie R. Co., 169 N. Y. 289, 62 N. E. 346.

[14] Central of Georgia R. Co. v. Duffy, 116 So. 346, 42 S. E. 510. Compare Louisville &c. R. Co. v. Hay, 145 Ky. 655, 141 S. W. 64.

[15] Pennsylvania R. Co. v. Hummel, 167 Fed. 89; Chicago &c. R. Co. v. Hale, 176 Fed. 71; Cincinnati &c. R. Co. v. Vaught, 78 S. W. 859, 25 Ky. L. R. 1766; Hale v. New York &c. R. Co., 190 Mass. 84, 76 N. E. 656; Sheltram v. Michigan Central R. Co., 128 Mich. 669, 87 N. W. 893; Sykes v. St. Louis &c. R. Co., 88 Mo. App. 193. Tateman v. Chicago &c. R. Co., 96 Mo. App. 448, 70 S. W. 514. See also Chicago &c. R. Co. v. Lewis, 103 Ark. 99, 145 S. W. 898; Risque v. Chesapeake &c. R. Co., 104 Va. 476, 51 S. E. 730.

[16] Missouri &c. R. Co. v. Duncan, 104 Ark. 409, 148 S. W. 647; Losey v. Atchison &c. R. Co., 84 Kans. 224, 114 Pac. 198; Chesapeake &c. R. Co. v. Plummer, 143 Ky. 97, 136 S. W. 159; Eaton v. New York &c. R. Co., 195 N. Y. 267, 88 N. E. 378; Houston &c. R. Co. v. Gerald (Tex. Civ. App.), 128 S. W. 166; Idaho &c. R. Co. v. Wall, 184 Fed. 677.

[17] St. Louis &c. R. Co. v. Clements, 93 Ark. 15, 123 S. W. 783; Louisville &c. R. Co. v. Smith, 27 Ky. L. 257, 84 S. W. 755; Louisville

denied to one engaged in unloading cars who crawled under a car to repair a leak and was injured by a car bumping against his car and it appeared that such person was well acquainted with the danger of thus placing himself without having someone at the side of the car to warn him of this form of danger.[18]

§ 1810 (1265d). **Injuries to employes of independent contractors.**—A person employed by one who has entered into a contract with a railroad company to do work upon the road is neither a servant of the railroad company nor a trespasser upon its tracks, and if free from contributory negligence, is entitled to recover for injuries inflicted upon him by the negligence of the servants of the railroad company.[19] But the duty to use reasonable care in this relation is a reciprocal duty, and the servant of a contractor can not recover for injuries, the result of an accident to which his own negligence has contributed,[20] as for example, where the servant of an ice company employed to ice cars ventured upon the roof of the car to be iced, at a time when it was slippery with sleet—in this case it was held that he assumed the danger of an obvious risk.[21] And an employe of a contractor

&c. R. Co. v. Farris, 30 Ky. L. 1193, 100 S. W. 870; Texas &c. R. Co. v. Brooks (Tex. Civ. App.), 118 S. W. 744; LaMountain's Adm'x. v. Rutland R. Co. (Vt.), 106 Atl. 517.

[18] Chicago &c. R. Co. v. Pettit, 209 Ill. 452, 70 N. E. 591. See also Colorado &c. R. Co. v. Sonne, 34 Colo. 206, 83 Pac. 383; Pearlstein v. New York &c. R. Co., 192 Mass. 20, 77 N. E. 1024.

[19] Pittsburgh &c. R. Co. v. Cozatt, 39 Ind. App. 682, 79 N. E. 534; St. Louis &c. R. Co. v. Ridge, 20 Ind. App. 547, 49 N. E. 828; Kentucky &c. Bridge Co. v. Sydnor, 119 Ky. 18, 82 S. W. 989, 26 Ky. L. 951, 68 L. R. A. 183; Pittsburgh &c. R. Co. v. Schaub, 136 Ky. 652, 124 S. W. 885, 136 Am. St. 273; Conrad v. New York &c. R. Co., 137 App. Div. 373, 121 N. Y. S. 774; Kesterson v. Southern R. Co., 146 N. Car. 276, 59 S. E. 871; Galveston &c. R. Co. v. Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939; Hickey v. Rio Grande &c. R. Co., 29 Utah 392, 82 Pac. 29. So held also where a railroad company has an arrangement with another to use its yard for interchange of traffic. Louisville &c. R. Co. v. Burke, 11 Ala. App. 496, 66 So. 885. See also Georgia Ry. Co. v. Martin, 138 Ala. 531, 36 So. 426, ante, § 1790 n. 46. And compare also Duncan v. St. Louis &c. R. Co., 152 Ala. 118, 44 So. 418.

[20] Johnson v. Minneapolis &c. R. Co., 140 Mich. 292, 103 N. W. 594.

[21] Baker v. Louisville &c. R. Co.,

engaged to perform a particular work may become a trespasser by venturing on the railroad premises away from the place of his employment, as for example, where a painter of a freight depot, without any invitation from the railroad company left the place where he was at work and while attempting to cross between the parts of a broken train, was injured by their sudden coming together.[22]

§ 1811 (1265e). Care required of deaf, blind and other defective persons.—Persons of defective sight and hearing are bound to exercise that degree of care for their safety on railroad tracks, that ordinarily prudent persons, likewise afflicted, would exercise under the circumstances.[23] Persons lacking either of these senses

106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474.

[22]Furey v. New York &c. R. Co., 67 N. J. L. 270, 51 Atl. 505. See also Birmingham &c. R. Co. v. Jones, 153 Ala. 157, 45 So. 177. But see Pittsburg &c. R. Co. v. Cozatt, 39 Ind. App. 682, 79 N. E. 534. In this case an employe of an independent contractor repairing a depot, left the place of his work and went to the depot platform to procure a lifting jack. There was no agreement between the railroad and the independent contractor or the employe who should furnish the necessary appliances. The employe could have, by going across the street, obtained a jack from a private individual; but he undertook to use the jack belonging to the railroad. It was held that the employe was not a trespasser on the railroad property while procuring the jack, and the railroad company could not defeat an action for injuries occasioned by its employes moving a car and injuring him, on the theory that it owed him no duty. And compare also Cleveland &c. R. Co. v. Lynn, 177 Ind. 311, 98 N. E. 67.

[23]Kennedy v. Denver &c. R. Co., 10 Colo. 493, 16 Pac. 210; Florida &c. R. Co. v. Williams, 37 Fla. 406, 20 So. 558; Toledo &c. R. Co. v. Hamett, 115 Ill. App. 268; Mobile &c. R. Co. v. Stroud, 64 Miss. 784; Maloy v. Wabash &c. R. Co., 84 Mo. 270; Fusili v. Missouri &c. R. Co., 45 Mo. App. 535; Hamlin v. Columbia &c. R. Co., 37 Wash. 448, 79 Pac. 991. See also Snow v. Indianapolis &c. R. Co., 47 Ind. App. 189, 93 N. E. 1089; Dufree v. Wabash R. Co., 155 Iowa 544, 136 N. W. 695; Smith v. Cincinnati &c. R. Co., 146 Ky. 568, 142 S. W. 1047; Mitchell v. Seaboard &c. R. Co., 153 N. Car. 116, 68 S. E. 1059. But compare Keith v. Worcester &c. R. Co., 196 Mass. 478, 82 N. E. 680, 14 L. R. A. (N. S.) 648. There is no license to sleep on tracks, and one who sits down on a track and goes to sleep is a trespasser even though at a place where he might cross it without being a trespasser. Cornett's Adm'r v. Louisville &c. R. Co., 181 Ky. 132, 203 S. W. 1054.

are usually required to exercise greater caution in the use of their remaining faculties.[24] It may be said generally that where those in charge of the train, not knowing that a trespasser is deaf, sound the signals which they ought to give a person possessing the sense of hearing, in ample time to allow him to quit the track in safety, and upon seeing that he does not quit the track, they do what they reasonably can to stop the train to prevent death or injury, then the railroad company will not be liable and the catastrophe will be charged to the contributory negligence of the injured person. The engineer has a right to presume, in the absence of knowledge that a trespasser on the track is deaf, that he will quit the track in time to avoid injuries; and the railroad company will not be answerable for damages caused because its engineer acted on this presumption until the contrary became apparent.[25] But if the engineer knows the person on the track ahead of him is deaf and can not hear the signal and he nevertheless negligently or wilfully runs him down, the company will be liable.[26] Contributory negligence can not be charged to insane persons any more than to children of tender years. But if an adult idiot is allowed to make a pathway of a railroad track, and in so doing is run over by a train and injured, the railroad company will not be charged with negligence merely because the railroad company did not stop the train in time to avoid the injury where it is not shown that the engineer knew that the trespasser was of infirm mind.[27]

[24] 1 Thomp. Neg. (2d ed.), sec. 336-338; Ft. Worth &c. R. Co. v. Wyatt, 35 Tex. Civ. App. 119, 79 S. W. 349, and cases cited in last preceding note. But this simply means ordinary or reasonable care under the circumstances.

[25] Schexnaydre v. Texas &c. R. Co., 46 La. Ann. 248, 14 So. 513; Houston &c. R. Co. v. O'Donnell, 99 Tex. 636, 92 S. W. 409. Nor where an old man, where an engine was within twelve feet of him, suddenly left a place of safety and attempted to cross the track. Guthrie v. Chicago &c. R. Co. (Mo.), 204 S. W. 185.

[26] International &c. R. Co. v. Smith, 62 Tex. 252.

[27] Daily v. Richmond &c. R. Co., 106 N. Car. 301, 11 S. E. 320. See as to what is not contributory negligence where one is mentally unsound or suddenly stricken. Seattle Elec. Co. v. Hovden, 190 Fed. 7; Epperson v. International &c. R. Co., 59 Tex. Civ. App. 66, 125 S. W. 117.

§ 1812 (1265f). Persons injured while drunk and asleep on railroad track.—The cases generally hold that an intoxicated man who seats himself on a railroad track and there sinks into a drunken stupor is guilty of contributory negligence as a matter of law.[28] The railroad company rests under no special duty to maintain a special lookout for these persons; it discharges its full duty when its employes exercise reasonable care to avoid injuring him, after discovering his position.[29] The law does not make it a duty of the railroad company to equip cars with lights similar to locomotive lights to enable the trainmen on backing cars to discern the presence of drunken trespassers on the track.[30] In a recent case where an intoxicated person was ejected from a signal tower by the operator, and while wandering along a track was struck by a train, it was held that neither the ejection of the trespasser from the tower nor the operator's failure to warn train crews about to pass of the likelihood of encountering such trespasser was negligence.[31]

[28] Jones v. New Orleans &c. R. Co., 122 La. Ann. 354, 47 So. 679; Ayers v. Wabash R. Co., 190 Mo. 228, 88 S. W. 608. See also Southern R. Co. v. Sanders, 145 Ky. 679, 141 S. W. 77, and see generally as to its bearing on the question of contributory negligence; Winfrey v. Missouri Pac. R. Co., 194 Fed. 808; Keeshan v. Elgin &c. Trac. Co., 229 Ill. 533, 82 N. E. 360; Pittsburg &c. R. Co. v. O'Conner, 171 Ind. 686, 85 N. E. 969; Hughes v. Chicago &c. R. Co., 150 Iowa 232, 129 N. W. 956.

[29] New York &c. R. Co. v. Kelly, 93 Fed. 745; Columbus &c. R. Co. v. Wood, 86 Ala. 164, 5 So. 463; Murch v. Western &c. R. Co., 78 Hun 601, 29 N. Y. S. 490; Felder v. Louisville &c. R. Co., 2 McMull. (S. C.) 403; Richardson v. Wilmington R. Co., 8 Rich. L. (S. C.) 120; Smith v. Fordyce (Texas), 18 S. W. 663; Missouri &c. R. Co. v. Brown, 75 Tex. 267, 12 S. W. 1117, 18 S. W. 670; Sullivan v. St. Louis &c. R. Co. (Tex. Civ. App.), 36 S. W. 1020. See also Tyer v. Gulf &c. Ry. Co., 143 La. 177, 78 So. 438; Watts v. Chicago &c. R. Co., 61 Ind. App. 51, 104 N. E. 42. The fact that he was intoxicated does not, however, prevent recovery where the company could have prevented the injury by the exercise of reasonable care after discovery of his peril. Owens v. Kansas City &c. Ry. Co., 95 Mo. 169, 8 S. W. 350.

[30] Gilliam v. Texas &c. R. Co., 114 La. 272, 38 So. 166. See also and compare Wise v. Cleveland &c. R. Co. (Ind. App.), 103 N. E. 866.

[31] Southern R. Co. v. Back, 103 Va. 778, 50 S. E. 257. And intoxication known to the company is material in determining the liability of the company. Rollestone v. Cassirer, 3 Ga. App. 161, 59 S. E. 442. As elsewhere shown the intoxicated person is not

§ 1813 (1265g). Injuries in making "running" or "flying" switches.—The practice of making running or flying switches is inherently dangerous and is so considered and condemned by the courts in numerous decisions.[32] Some courts have not hesitated to hold railroad companies liable for injuries to trespassers on the track thus inflicted on the ground of negligence. The case of this negligence, it is said, seems specially plain where the cars are sent in swift motion, with no one at the brakes, upon switch tracks commonly used by persons for foot-paths and crossings without objection from the company, though not at a public crossing.[33] It would seem a duty owed by the railroad company, even to licensees or trespassers, where they are to be expected, to station lookouts in such positions on the moving cars that they can watch the tracks ahead of them and warn persons thereon of their danger.[34] The Kentucky court of ap-

an outlaw and must not be wilfully injured, nor, in general, injured when injury could have been prevented by reasonable care after discovering the danger, or in some cases, even before actual discovery.

[32]Lacey v. Louisville &c. R. Co., 152 Fed. 134; Illinois &c. R. Co. v. Baches, 55 Ill. 379; Chicago &c. R. Co. v. Dignan, 56 Ill. 487; Illinois &c R. Co. v. Hammer, 72 Ill. 347, 85 Ill. 526; Murphy v. Chicago &c. R. Co., 45 Iowa 661; Southern Ry. Co. v. Caplinger, 151 Ky. 749, 152 S. W. 947, 49 L. R. A. (N. S.) 660; Nelson v. Chicago &c. R. Co., 84 Nebr. 595, 121 N. W. 1128; Haley v. New York &c. R. Co., 7 Hun (N. Y.), 84; Sutton v. New York &c. R. Co., 66 N. Y. 243; Meneo v. Central R. Co., 84 N. Y. S. 448; McCarty v. New York &c. R. Co., 73 App. Div. 34, 76 N. Y. S. 321; Wilson v. Atlantic &c. R. Co., 142 N. Car. 333, 55 S. E. 257; Farris v. Southern R. Co., 151 N. Car. 487, 66 S. E. 457, 50 L. R. A. (N. S.) 1115; Kay v. Pennsylvania R. Co., 65 Pa. St. 269. See also Johnson v. Seaboard &c. Ry. Co., 163 N. Car. 431, 79 S. E. 690, Ann. Cas. 1915B, 598; Meroney v. Louisville &c. R Co., 165 N. Car. 611, 81 S. E. 1019; and note in L. R. A. 1916C, 1034, et seq.

[33]St. Louis &c. R. Co. v. Crosnoe, 72 Tex. 79, 10 S. W. 342; Gulf &c. R. Co. v. Coleman, 51 Tex. Civ. App. 415, 112 S. W. 690; Meneo v. Central R. Co., 84 N. Y. S. 448; McCarty v. New York &c. R. Co., 73 App. Div. 34, 76 N. Y. S. 321.

[34]Patton v. East Tennessee &c. R. Co., 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184. See also Mizzell v. Southern R. Co., 132 Ala. 504, 31 So. 86; Little Rock &c. R. Co. v. Pankhurst, 36 Ark. 371; Wade v. Louisville &c. R. Co., 54 Fla. 277, 45 So. 472; Florida &c. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. 149; Wilhelm v. Missouri &c. R. Co., 252 Okla. 317, 152 Pac. 1088, L. R. A. 1916C, 1029, and cases there cited in opinion and note.

peals on this subject has said: "Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief, even to a technical trespasser. Such conduct is regarded as utterly at war with the principles of humanity, and as smacking of savagery. That the party hurt was a mere trespasser, and, otherwise than in this legal aspect, perfectly innocent and harmless, does not excuse the person that injured him by means manifestly injurious to human life and safety. By being technically a trespasser he does not forfeit all right of protection. This fact is made manifest in various ways; for instance, although, ordinarily, the conductor in running his train is not bound to look out for trespassers, yet he is bound, if he discovers him in time, to use all means at his command to protect him."[35] It has been held that to detach cars from a locomotive, and put it out of the power of the trainmen to stop or control them, starting them down a grade to a point where a person is on the track with his back towards the train, where it is the duty of the company to look out even for trespassers and to allow the cars so detached to continue a speed in excess of that limited by a municipal ordinance,—is such gross negligence as will render the company liable to the person thereby injured, although he was on the track as a trespasser, and was guilty of contributory negligence.[36] But, as elsewhere shown, it is questionable whether this doctrine ordinarily extends to trespassers, and even in other cases much may depend on the circumstances, and the question of negligence in kicking cars or making a flying switch as well as in running a train backward when cars are not detached is often for the jury.[37]

[35]Conley v. Cincinnati &c. R. Co., 89 Ky. 402, 11 Ky. L. 602, 12 S. W. 764. But see Martin v. Georgia R. &c. Co., 95 Ga. 361, 22 S. E. 626; Illinois &c. R. Co. v. Beard, 49 Ill. App. 232; Chesapeake &c. R. Co. v. Farrow, 106 Va. 137, 55 S. E. 569.

[36]Georgia &c. R. Co. v. O'Shields, 93 Ala. 29, 8 So. 248. See also International &c. R. Co. v. Brooks (Tex. Civ. App.), 54 S. W. 1056.

[37]Lake Erie &c . R. Co. v. Hennessey, 177 Ind. 64, 70, 97 N. E. 331, and cases there cited; Louisville &c. R. Co. v. Bays, 142 Ky. 400, 134 S. W. 450, 34 L. R. A. (N. S.) 678; Bouchillon v. Charleston &c. R. Co., 90 S. Car. 42, 72 S. E. 634, Ann.

§ 1814 (1265h). Persons injured while attempting rescues.—The attempt to save the life of one who is in peril on a railroad track is regarded by the courts as an act of such merit that contributory negligence is not ordinarily charged to the person injured or killed in the attempt, unless he has acted under circumstances of great rashness.[38] He is not regarded as a trespasser under the rules and if he is injured through the negligence of the railroad company he may recover.[39] On this question the supreme court of Ohio has said: "There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasions; the uncertainty as to the proper move to be made, the promptness required, and the liability to mistake as to what is best to be done suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doc-

Cas. 1913D, 1; Melton v. Chesapeake &c. R. Co., 64 W. Va. 168, 61 S. E. 39; Ferguson v. Wisconsin Cent. R. Co., 63 Wis. 145, 23 N. W. 123; ante, § 1657.

[38] Peirce v. Walters, 164 Ill. 560, 45 N. E. 1068, affirming 63 Ill. App. 562; Condiff v. Kansas City &c. R. Co., 45 Kans. 256, 25 Pac. 562; Becker v. Louisville &c. R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. L. 1893, 53 L. R. A. 267; Peyton v. Texas &c. R. Co., 41 La. Ann. 861, 6 So. 690; Linnehan v. Sampson, 126 Mass. 506; Dixon v. New York &c. R. Co., 207 Mass. 126, 92 N. E. 1030; Donahoe v. Wabash &c. R. Co., 83 Mo. 543, 560; Eckert v. Long Island R. Co., 43 N. Y. 502; Miller v. Union R. Co., 191 N. Y. 77, 83 N. E. 583; Norris v. Atlantic &c. R. Co., 152 N. Car. 505, 67 S. E. 1017, 27 L. R. A. (N. S.) 1069, and authorities there cited in opinion and note; Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172; Wilson v. New York &c. R. Co., 29 R. I. 146, 69 Atl. 364; San Antonio &c. R. Co. v. Gray, 95 Tex. 424, 67 S. W. 763.

[39] San Antonio &c. R. Co. v. Gray, 95 Tex. 424, 67 S. W. 763.

trine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence per se, is neither supported by principle nor authority."[40] A person injured while attempting to make a rescue is not generally regarded as necessarily guilty of contributory negligence, though he was wrongfully on the track when he discovered the other person's peril.[41] On the question of negligence of the railroad company there is a holding that the fact that those in charge of the train saw the peril of the rescuer in time to avoid killing him, may be proved by circumstantial evidence.[42] The rule does not fully apply, if at all, where peril is encountered in attempting to rescue chattels. Indeed, if a person puts himself in a position of danger in front of an approaching train in order to rescue property from injury or destruction, he is generally regarded as guilty of contributory negligence as a matter of law, and there can be no recovery of damages for personal injury or death.[43] But in some jurisdictions this is not regarded as negligence per se unless the risk was such that a reasonably prudent man would not have under-

[40] Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172. But compare Railway Co. v. Lynch, 69 Ohio St. 123, 68 N. E. 703, 63 L. R. A. 504, 100 Am. St. 658.

[41] San Antonio &c. R. Co. v. Gray, 95 Tex. 424, 67 S. W. 763. But see Cleveland &c. R. Co. v. Tartt, 64 Fed. 823, where a recovery by the father injured while attempting to save the life of his son, was refused on the ground that the father brought the son into the situation of peril by his own voluntary act. And in other cases where the party sought to be rescued placed himself in peril without fault of the company the rescuer has been denied recovery unless the company was negligent as to him after he began his effort to rescue the person in danger. Linz v. McDonald (Tex. Civ. App.), 133 S. W. 535; Scates v. Rapid Transit Co. (Tex. Civ. App.), 171 S. W. 503. Compare also Evansville &c. Ry. Co. v. Hiatt, 17 Ind. 102; Donahoe v. Ry. Co., 83 Mo. 560, 53 Am. Rep. 594; Railway Co. v. Ridley, 114 Tenn. 727, 86 S. W. 606; Wright v. Atlantic Coast Line R. Co., 110 Va. 670, 66 S. E. 848, 25 L. R. A. (N. S.) 972.

[42] San Antonio &c. R. Co. v. Gray, 95 Tex. 424, 67 S. W. 763.

[43] Morris v. Lake Shore &c. R. Co., 148 N. Y. 182, 42 N. E. 579; Baltimore &c. R. Co. v. Driskell, 101 Ill. App. 137.

taken it under the circumstances, and the question is usually for the jury.[44]

§ 1815 (1265i). **Whether railroad company required to care for trespasser after injury.**—It is the general rule that a railroad company not negligent in injuring a trespasser can not be made liable on the ground that its servants were negligent in caring for him after the accident. The railroad company is under no legal obligation to take charge of the wounded man, however strong the moral obligation may be.[45] If, however, the railroad company is liable to the injured person on the ground of negligence, then, according to some of the same authorities, the failure of the trainmen to take charge of the wounded man may be considered by the jury as aggravating the damages.[46] And, as

[44] Thompson v. Seaboard &c. Ry. Co., 81 S. Car. 333, 62 S. E. 396, 20 L. R. A. (N. S.) 426. See also Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819.

[45] Griswold v. Boston &c. R. Co., 183 Mass. 434, 67 N. E. 354; Union Pacific R. Co. v. Cappier, 66 Kans. 649, 72 Pac. 281, 69 L. R. A. 518. But see Northern &c. R. Co. v. State, 29 Md. 420. In this case it appeared that the body of a person, who had been run down by an express train at night, was brought to a station near at hand, and was by the stationmaster placed upon some rubbish in a warehouse, on the supposition that life was extinct, without examination by a physician, although the propriety of such examination was suggested to the company's agents. In the morning it appeared that the injured man had revived during the night, and dragged himself a considerable distance along the floor, where he was found dead, with his body yet warm, in a stooping posture, pressing his hand upon his leg, to stop the flow of blood from an artery which had been cut. There was no evidence of any serious injury to his brain, and he undoubtedly bled to death from lack of attendance. The court held that, even though the accident was caused by the negligence of the deceased, it was proper to submit to the jury whether his death did not result from subsequent neglect of the defendant's servants. The court said: "It is the settled policy of the law to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers."

[46] Union Pacific v. Cappier, 66 Kans. 649, 72 Pac. 281, 69 L. R. A. 518; Whitesides v. Southern R. Co., 128 N. C. 229, 38 S. E. 879.

already shown in another connection, railroad companies have been held liable for medical attendance procured in the emergency by the highest employe on the ground, and sometimes for improper treatment where the company undertook to furnish surgical treatment, even to persons it had injured who were not employes. As to injured employes it has been expressly held that an employer may be liable for failure to use reasonable care or diligence to furnish an employe with surgical aid, when he is so badly injured in such employment that he can not get it himself, even though the injury was not caused by any fault of the employer.[47]

[47] Hunicke v. Meramec &c. Co., 262 Mo. 560, 172 S. W. 43, L. R. A. 1915C, 789. See also Tippecanoe L. & T. Co. v. Cleveland &c. R. Co., 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739; Cincinnati &c. R. Co. v. Marrs, 119 Ky. 954, 85 S. W. 188, 70 L. R. A. 291, 115 Am. St. 289; Depue v. Flateau, 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 485; Weinsburg v. St. Louis &c. Co., 135 Mo. App. 553, 116 S. W. 461. But compare Denver &c. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222; Pittsburgh &c. R. Co. v. Sullivan, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. 313; Voorhees v. New York &c. R. Co., 129 App. Div. 780, 114 N. Y. S. 242, affirmed in 198 N. Y. 558, 92 N. E. 1105; Van Valkenburg v. Northern Nav. Co., 30 Ont. L. R. 142.

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